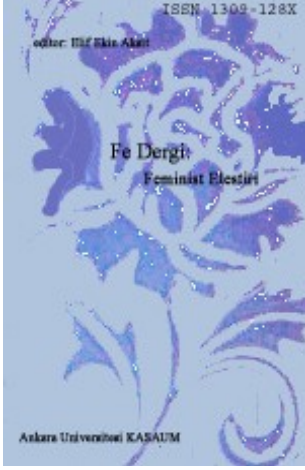


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**What is happening to women in transitional justice?  
Analysing the crime of rape and its reconciliation in the  
ICTR**

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## What is happening to women in transitional justice? Analysing the crime of rape and its reconciliation in the ICTR<sup>1</sup>

Bilge Şahin\*

*International law is dominated by the reproduction of gendered structures originating in the masculine nature of law. In respect of rape in armed conflicts the prescribed roles of men and women and the respective experiences they make severely limit substantial reconciliation. In armed conflicts, men are considered decision-makers and fighters whereas women are regularly regarded as victims. Hence, their respective roles and experiences in post-conflict societies have constrained effective legal efforts.*

*I will exemplify this by examining the masculine nature of the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR). I propose that the ICTR case law illustrates the lack luster reconciliation efforts of the international community in response to rape crimes in armed conflicts and reproduces gender norms. By analyzing what happens to women in transitional justice mechanisms, I will address the question of whether rape survivors can find reconciliation.*

*Keywords: Gender, transitional justice, Rwanda, reconciliation, rape.*

### **Geçiş dönemi adalet mekanizmasında kadınlara ne oluyor? Tecavüz suçu ve Ruanda için Uluslararası Ceza Mahkemesi'nde ele alınışının incelenmesi**

*Uluslararası Hukuk'a, hukukun eril doğası içinde meydana gelen toplumsal cinsiyet yapılarının yeniden üretilmesi hakim olmaktadır. Tecavüz suçu göz önünde bulundurulduğunda, silahlı çatışmalarda erkeklere ve kadınlara tanınmış sınırlı rol ve deneyimler, çatışma sonrası uzlaşmayı sınırlandırmaktadır. Silahlı çatışmalarda, erkekler karar verenler ve savaşanlar iken kadınlar kurbanlar olarak görülmektedir. Bu nedenle, savaş sonrası toplumlarda bu kısıtlı rol ve deneyimler hukuken etkili olabilmeyi engellemektedir.*

*Bu çalışma söz konusu hukuki yapıyı Ruanda için Uluslararası Ceza Mahkemesi'nin eril doğasını inceleyerek açıklamaya çalışacaktır. Çalışma, Mahkeme'nin silahlı çatışmalarda gerçekleşen tecavüz suçları için uzlaşma sağlama çabasından uzak olduğunu ve toplumsal cinsiyet normlarını yeniden ürettiğini göstermeye çalışacaktır. Kadınlara geçiş dönemi adalet mekanizmalarında neler olduğu analiz edilerek, tecavüz kurbanlarının adalet bulup bulmadığı sorusuna yanıt bulunmaya çalışılacaktır.*

*Anahtar Kelimeler: Toplumsal Cinsiyet, Geçiş Dönemi Adalet Mekanizması, Ruanda, Uzlaşma, Tecavüz.*

### **Introduction**

Recently, rape and other crimes of sexual violence during armed conflicts have become a visible and much debated issue in international law. Despite the growing attention, there is no comprehensive account has yet emerged which includes both men and women. In other words, there is a limited approach to the roles that men and women have and the experiences they make in armed conflicts. While men are still considered as decision-makers and fighters, women are seen as victims. This limited approach does not only affect experiences during armed conflicts but also men's and women's situations in post-conflict societies. Finding justice, peace, and reconciliation are directly affected by the way international law draws its limitations according to gender paradigms.

Put another way, masculine nature of law is defining the roles of the gender and instead of supplying equal rights to everyone, legitimizing the roles of women and men leads to the reproduction of gendered structure. Masculine nature of law deals with rape and other crimes of sexual violence through these gendered structures and reflects its approach to the conflicts and prosecution process as well.

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This essay puts into question the limitations of the international legal structure and its masculine nature surrounding transitional justice and analyses a specific transitional justice process to see how the crime of rape is prosecuted. Furthermore, it will be examined how justice mechanisms deal with survivors. The International Criminal Tribunal for Rwanda (ICTR) serves as a case study for this essay, because of its significant role for the transitional justice process in the country. The ICTR is one of the most important developments for the prosecution of rape and other crimes of sexual violence. It can also be considered as one of the first steps taken to tackle this issue. Yet, while the ICTR is a step forward with regards to the prosecution of the crime of rape, it maintains an old understanding of sex/gender and women.

Two questions will be addressed in this essay. Firstly, I will examine the question of how women are dealt with in a transitional justice mechanisms. Secondly, I will look specifically into the Rwandan case study and address the question of whether rape survivors of the genocide have found reconciliation.

First part outlines the theoretical and historical background of the crime of rape. Feminist legal theory is chosen to support the analyses of this essay. This will be ensued by an analysis of the ICTR in the second part. Three cases have been chosen to exemplify the theoretical issues at hand. Finally, the consequences of the ICTR proceedings will be scrutinized to understand the results for rape survivors.

## **Theoretical and Historical Background of the Crime of Rape**

### ***Analysing Crime of Rape through the Feminist Legal Theory***

Feminist legal theory, which is a way to expose dominant male narratives in law, focuses on and criticizes the role of the legal system in creating and perpetuating an unequal position for women. For feminist legal theory, the structure of the international legal order reflects a male perspective and ensures its continued dominance.<sup>2</sup> In other words, feminist legal theory is making the criticism of masculine nature of law and showing the reproduction of gender norms within the law.

As a rational paradigm, law seemingly establishes equality, but in fact, it disregards differences and thereby justifies disadvantages. Women are endowed with theoretical legal equality; however, due to material constraints of their lives, they are frequently unable to take advantage of it.<sup>3</sup> The right to sexual equality may solve this inequality for individual women but will leave the position of women generally unchanged.<sup>4</sup> Feminist legal theory defines equality through the terms of domination and subordination. Sexuality thereby becomes an area for both power and victimization of women.<sup>5</sup>

Gendered structure, has been preserved by law, is a power system. It has a central set of distinctions between people, and how they access resources, rights, responsibilities, and authority.<sup>6</sup> Gender not only covers differentiation but also domination, oppression, and discrimination.<sup>7</sup> The crime of rape, therefore, becomes a gender-oriented violence which is the manifestation of power and control.<sup>8</sup> As Goldstein puts it astutely, “rape is a crime of domination [...] the rapist’s sexuality is not at the centre of his act [...] rape is not driven by sexual desire.”<sup>9</sup>

The object of the offence has popularly been seen as the property of male rather than the female sexual autonomy. While the male body remains as the normal body, the female body marks the cultural associations not as an independent subject but a controlled one. Bodies are actively materialised through practices established by cultural discourses such as law. Those practices have not only given meaning to bodies but have also shaped the powers and capacities associated with them.<sup>10</sup>

The legal subject is defined through their capacity to control one’s behaviour and has the power to master the will. Feminist legal theorists assume that the criminal legal subject is marked as masculinity and the nature of law is masculine. The argument depends on an assertion of the power of a number of binary oppositions marked by hierarchies where the feminine has been associated with the less valued members of each pair. These binaries are, for instance, reason and emotion, self and other, individual and community, mind and body, strong and weak, rational and irrational, active and passive.<sup>11</sup> There is a simple division of roles between sexes: men are the perpetrators/heroes who are defending the nation and the vulnerable ones – women and children. Women, on the other hand, are victims. While women are related to the notion of peace (passivity), men are associated with war (aggression). Even if men become victims, they are accepted as heroes. As Moser

and Clark state, “stereotypical essentializing of women as victims and men as perpetrators of political violence and armed conflict assumes universal, simplified definitions of such phenomena.”<sup>12</sup>

However, this point that has not been noticed, even by several feminist theorists, is that gender does not constitute a monolithic picture of unified categories of sexes. Instead, as the intersectionalist approach refers, each of sexes produce multiple masculinities and femininities, and power differentials within each category. The paradigm of being woman or man which has been created by gendered structures is not limited to the bodies of women or men. Being a woman or man consists of far deeper meanings within the gendered structure of power relations. Therefore, focussing the gendered structure is more complex than solely considering the power relations limited to distinguishing women and men. This will fail to account for cases of women perpetrators and male survivors.

### ***The Crime of Rape, History of Armed Conflicts and Transitional Justice***

As long as armed conflicts occurred throughout history, gender-based violence has been committed. Rape is considered as reward, boost morale, dehumanization, the messenger of defeat, and genocide.<sup>13</sup> The environment of vulnerability and lawlessness of armed conflict may contribute to the occurrence of sexual violence. Also, violence may continue in post-conflict periods.<sup>14</sup> As a matter of fact, rape also occurs within peacetime in domestic life, constrained to the private sphere. If rape is common in peacetime, it is not surprising that it is even more widespread in war.

The laws of war for a long time did not outlaw rape. When rape was considered to be a crime, it was seen as a crime related to property against a woman’s husband or father rather than a crime of violence against a woman herself. As Brownmiller states, “rape entered the law through the back door [...] as a property crime of man against man, and woman, of course, was viewed as the property.”<sup>15</sup> The acceptance of rape as a crime has evolved through history especially within the transitional justice mechanisms.

In the aftermath of World War II, the Nuremberg Trials listed rape as a crime against humanity but did not convict anyone despite horrendous sexual violence crimes. The Tokyo Indictment convicted several perpetrators for sexual violence, yet, classified sexual violence crimes as ‘failure to respect family honour and rights’. Although the Nuremberg and Tokyo Trials were ground-breaking efforts to establish individual accountability for crimes against humanity and despite setting an historical precedent, accountability for sexual crimes had waited for nearly five decades.<sup>16</sup> When the Bosnian and the Rwandan conflicts occurred, rape was used systematically and widespread. This issue is reflected in the Statutes of the International Criminal Tribunal for Former-Yugoslavia (ICTY) and the ICTR. Article 5 (g) of the ICTY Statute and Article 3 (g) of the ICTR Statute define rape as a crime against humanity for the first time in the history of international criminal tribunals. Yet, those Statutes do not list rape or other crimes of sexual violence as a grave breaches and war crimes.<sup>17</sup>

The ICTY and ICTR have made a significant progress by recognising and condemning sexual violence crimes. This also contributed to the jurisprudence of the Special Court for Sierra Leone, the International Criminal Court (ICC)’s inclusion of sexual violence crimes in its Statute as well as increased media and political attention to sexual violence crimes and to large-scale sexual violence conflict zones. These developments have helped to break the silence concerning wartime sexual violence in an international legal and political context.<sup>18</sup>

Despite these developments in transitional justice mechanisms on prosecuting especially the crime of rape, there are still several issues hampering further progress. Although the transitional justice mechanisms have taken all necessary measures to protect the safety, physical, and psychological well-being, dignity, and privacy of victims and witnesses, most sexual violence survivors rejected to continue to cooperate with transitional justice mechanisms. The reason for this is the lack of effectiveness of the protection measures which are meant to protect identity and to ensure a victim is not harassed and humiliated on the stand.<sup>19</sup> Survivors are regularly confronted with a general feeling of unsafety recounting their traumatic experiences. Furthermore, shame, humiliation, and exclusion are possible consequences survivors have to cope with when cooperating with transitional justice mechanisms. As a result, if the survivors will not testify in the tribunals then it is almost impossible to judge the criminals.

Note also that the approach that tribunals take in relation to survivors hampers the justice process for sexual offences. The investigation only focusses on women and children (sometimes only girls) as victims. For example, the ICC has a women and children’s unit to provide assistance related to sexual and gender based

crimes to the office of the prosecutor and others.<sup>20</sup> This lack of gender representation and narrow approach to sexual violence crimes is causes problems for the transitional justice process.

### **The ICTR and Its Approach to the Crime of Rape**

The ICTR was the international community's response to the atrocities in Rwanda. The United Nations (UN) Security Council Resolution 955 (1994) expresses that genocide and other systematic, widespread violations of international humanitarian law have been committed in Rwanda and this situation constitutes a threat to international peace and security. Because of this situation, the Security Council decided to put an end to such crimes and take effective measure to bring to justice the persons who are responsible. As a result, acting under Chapter VII of the Charter of the United Nations, the Security Council decided to establish an international tribunal to prosecute persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for such crimes committed in the territory of neighbouring countries between 1 January 1994 and 31 January 1994.<sup>21</sup>

In 1994, in the conflict of Rwanda, rape occurred on a large scale. The UN Special Rapporteur of the Commission on Human Rights reported that between 250,000 and 500,000 rapes occurred in total by expressing that "rape was systematic and was used as a weapon by the perpetrators of the massacres [...] a great many women were raped; rape was the rule and its absence the exception."<sup>22</sup> Rapporteur also expressed that there was no distinction between victims as to their sex, all that mattered was their ethnic origin or their connections with the targeted ethnic groups. While Tutsi women were the main target, Hutu women were raped because of their Tutsi husbands or Tutsi children. Also, age and medical condition did not matter during the genocide. Under-age children and elderly women were not spared and women aged between 6 and 65 were raped. Additionally, pregnant women were not spared either.<sup>23</sup>

The ICTR dealt with a number of gender related issues. This essay will analyse three of these cases: *The Prosecutor v. Jean-Paul Akayesu*; *The Prosecutor v. Sylvestre Gacumbitsi*; and *The Prosecutor v. Pauline Nyiramasuhuko et al.*

#### ***The Prosecutor v. Jean-Paul Akayesu***

Jean-Paul Akayesu was the *bourgmestre*<sup>24</sup> of the Taba commune, in Rwanda during the genocide. As *bourgmestre* Akayesu had the exclusive power over communal police and gendarmes, also, he had the responsibility for execution of laws and regulations and administration of justice. During Akayesu's term, at least two thousand Tutsis were killed in Taba between 7 April and the end of June 1994.<sup>25</sup>

Akayesu's trial was the first international judgement of the ICTR on genocide and crimes including rape and other crimes of sexual violence as acts constitutive of genocide and crimes against humanity. The importance of this case was the recognition of rape and other crimes of sexual violence as genocide and crimes against humanity. The Chamber considered rape as a form of aggression whose elements of crime cannot be defined in a mechanical description of objects and body parts. It defined rape as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive"<sup>26</sup> and added that sexual violence is not limited to physical invasion of the human body but that it also contains acts that do not involve penetration or even physical contact such as threats, intimidation, extortion and other forms of duress which prey on fear or desperation. Rape and other crimes of sexual violence were seen by the tribunal as genocide as long as "they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such [...] constitute infliction of serious bodily and mental harm on the victims."<sup>27</sup>

The prosecution of rape and other crimes of sexual violence were not considered in the beginning of the trial. During the testimony of Witness J, she mentioned that her six year old daughter had been raped. This off-track testimony took the interest of Judge Pillay and led to questions on rape and sexual violence and, as a result, more testimonies were taken. Before that, rape and sexual violence were not touched upon by the Prosecutor. Kaitesi argues that the ICTR investigators and prosecutors knew about rape committed but they did not mention it.<sup>28</sup> Even the prosecution accepted that "it came up not only in the testimony of Witness J or Witness H but it also came up in prior investigations, but the [...] information we received before [...] was not enough to link the accused to the acts of sexual violence."<sup>29</sup> But why did the prosecution not pursue perpetrators of rape in the same way they did for the killings?

During the genocide hundreds of civilians came to the *bureau communal* to seek refuge and talk with the *bourgmestre* to stop the violence. However, they faced beatings, killings, and sexual violence. Witness J and Witness H both testified that they were rape and heard other girls were raped in the *bureau communal* as well.<sup>30</sup> Witness JJ expressed that she went to the *bureau communal* hoping that the authorities would offer refuge, however, in the *bureau communal*, Interahamwe, a Hutu paramilitary organization, took young girls and women and raped them. She also gave details at the prosecutor's request that "a young man armed with an axe and a long knife, penetrated her vagina with his penis."<sup>31</sup> While Witness JJ testified that she never saw Akayesu rape anyone, he did not do anything to prevent these rapes either. Witness KK stated that Akayesu told Interahamwe to undress a young girl and ordered to her to do gymnastic naked. Witness KK said that Akayesu was watching the girl while laughing and, afterwards, ordered Interahamwe to take her away and said "you should first of all make sure that you sleep with this girl."<sup>32</sup>

However, Akayesu denied rape crimes and testified that he was surprised by the allegations of rape in Taba and stated that not even a single woman had been raped at the *bureau communal*. He claimed that the witnesses who testified about rape crimes were lying.<sup>33</sup> Yet, the Chamber decided that Akayesu had reason to know and knew that sexual violence was taking place on or near the premises of the *bureau communal* and he did not do anything to prevent those crimes or punish the perpetrators, but instead, encouraged and ordered them.<sup>34</sup>

It is clear to see from this case that the prosecution is reflecting the masculine nature of law. While the rape was known by everyone from the community and from the Prosecutor, it did not have any significance because of the acts 'normalization' within the gender norms. There is an obvious lack of political will to prosecute rape and other sexual violence crimes. In other words, this case shows the lack of women perspective in the trial and reproduction of gendered structure. However, this women perspective is not something so easy that only enough to achieve with women representatives. Even, the realization of rape within the testimonies of survivals was expressed by a woman judge, it is not directly proves the importance of woman and man judges in the gender related sexual violence crimes. Having an equal proportion of female and male representatives within the prosecution is essential. However, it is evident recently that even the quotations are applying to the representation and prosecution process, the masculine nature of law is going to continue to reproduce the gender norms.

#### ***The Prosecutor v. Sylvestre Gacumbitsi***

Sylvestre Gacumbitsi was the *bourgmestre* of Rusumo Commune during the genocide.<sup>35</sup> He organised campaigns to separate Tutsi and Hutu populations and incite acts of violence against Tutsis. Gacumbitsi killed people by his own hand and distributed weapons and gave orders to encourage the Hutu population to kill all Tutsis. He, furthermore, ensured that no one would escape by setting up roadblocks and taking all boats away from the river. As *bourgmestre*, Gacumbitsi was the hierarchical superior of the councillors of the sectors which is why his orders caused widespread lootings and killings.<sup>36</sup> He was found guilty of genocide, extermination and rape as crimes against humanity and imposed a sentence of thirty years' imprisonment.<sup>37</sup>

Sexual violence against Tutsi women occurred systematically with the widespread attacks in Rusumo Commune. Gacumbitsi knew or should have known that sexual violence against civilian Tutsi was carried out. Furthermore, he ordered that "Tutsi women should be raped and sexually degraded". He gave orders that Hutu people shall "rape Tutsi girls that had always refused to sleep with the Hutus" and to "search in the bushes, do not save a single snake".<sup>38</sup> Prosecution Witness TAP testified that a group of about thirty attackers attacked her mother and drove a stick into her mother's genitals shoving it up her entire body right through to her head. Several attackers raped her as well and then they put a branch slightly longer than a meter into her genitals, wounding her and causing her to bleed.<sup>39</sup>

Prosecution Witness TAS, a Hutu woman who was at the time married to a Tutsi, testified that when she was looking for a hiding place, she came across a Hutu who told her that he wanted to rape her but did not intend to kill her. At that moment, another Hutu came and stated that Gacumbitsi only authorised to rape Tutsi women and girls, no decision had yet been taken concerning Hutu women who were married to Tutsi men. However, the first Hutu raped her. The Chamber noted that through the woman, it was her husband, a Tutsi civilian, who was the target of an act of sexual violence.<sup>40</sup> This statement is noteworthy. The way that the Trial Chamber considers a Tutsi man, rather than a Hutu woman, to be the ultimate target of a sexual assault is reminiscent of the belief

that woman is not considered an independent agent who has her own will but instead she is just an object, the property of man. This shows that the court is reflecting the masculine nature of law and not considering women as active agents.

Under his command, Gacumbitsi did not offer protection to Tutsi civilians and facilitated several attacks. The Chamber believes that Gacumbitsi's orders related to raping Tutsi women and girls had the intention of genocide.<sup>41</sup> Also, The Chamber found that rape of Tutsi women and girls caused serious physical harm to members of the Tutsi ethnic group which results in responsibility of the crime of genocide.<sup>42</sup> The Chamber decided that "any penetration of the victim's vagina by the rapist with his genitals or with any object constituted rape, [despite] the definition of rape under Article 3(g) of the Statute of ICTR".<sup>43</sup>

***The Prosecutor v. Pauline Nyiramasuhuko et al.***

Pauline Nyiramasuhuko was holding position of authority in the prefecture of Butare in 1994 and played a part in the genocide by helping the government to massacre the Tutsi population.<sup>44</sup> The Chamber found Nyiramasuhuko guilty of rape as a crime against humanity, pursuant to Article 6 (3) of the Statute.<sup>45</sup> Nyiramasuhuko was the only woman prosecuted by the ICTR. Her role in the genocide caused reconsiderations of the traditional notions of women as victims, mothers, innocent nurturers, and being incapable of committing such crimes. However, the tribunal did not discuss Nyiramasuhuko's female identity, instead, Nyiramasuhuko used her identity in her defence.<sup>46</sup>

Nyiramasuhuko served as Minister of Family and Women's Development under the Interim government during the events of 1994. Nyiramasuhuko actively participated and supported the Interim Government's policies in committing genocide. During her testimony, she denied the killings and declared that she was concerned about the killings by stating that "we were opposed to the massacres and [...] we stood for peace."<sup>47</sup> Her defence asserted that "ordering killings and rape was contrary to her character as she had worked her entire life to help the women in Rwanda."<sup>48</sup> She also said that "it is not possible, I couldn't even kill a chicken [...] If there is a person who says a woman, a mother could have killed I'll tell you truly, then I am ready to confront that person."<sup>49</sup> However, she was found guilty by the Chamber as a result of her superiority over soldiers, commune police, Interahamwe, and civilians. It was decided that she ordered and have the effective control over the crimes, including rape and killings. Nyiramasuhuko stated that she did not carry out rapes or killings herself and that she did not know the identity of her subordinates who carried out rapes and killings and, therefore, she could not be responsible for any of these as she could not have been aware of their acts. Nevertheless, the Chamber found that one does not necessarily have to know the identity of subordinates who execute orders pursuant to Article 6 (3) of the Statute of the ICTR.<sup>50</sup>

Witness TA saw Nyiramasuhuko and her son Ntahobali visit the place where she was staying as refugee. According to her testimony, Nyiramasuhuko pointed out certain Tutsi refugees to Interahamwe members. These Tutsi were beaten up and forced into a vehicle. After beating and killing the refugees, Ntahobali took witness TA and raped her. While she was being raped, she saw other women who were also being raped by Interahamwe members. After this attack, Witness TA saw Nyiramasuhuko and Ntahobali enter the same car and driving away.<sup>51</sup> These attacks and rapes continued during the following days. Witness TK testified that she was brought to the same refugee camp by Interahamwe and she witnessed a family being separated by Ntahobali. He took the women, stripped her off her clothes and took her children to the vehicle in which Nyiramasuhuko was sitting.<sup>52</sup> Witness SU, FAP, and RE all testified that when they were in the refugee camp, Nyiramasuhuko arrived and shouted at Interahamwe members to "choose the young girls and the women that are still useful". She ordered that the women were to be raped because they refused to marry Hutus. Immediately following Nyiramasuhuko's order, Interahamwe members told women to stand up and they chose the ones that they were going to rape.<sup>53</sup> Apart from refugee camps, through the testimonies of witnesses TN, SX, and TB, it became clear that rapes were carried out in roadblocks as well.<sup>54</sup>

Even though rape and other crimes of sexual violence can be defined as a domination and destruction of classical male/female subordination, the hierarchies within masculinity and femininity paradigms exacerbate gender related crimes. Regarding the power relations in gender it is obvious that there is more than naming gender equality between women and men. For this case intersectionality approach will be useful to criticizing patriarchy for neglecting differences and power relations within each category and the way it explains dominant status within women. Categories such as gender, race, class, and sexuality are not different from each other, on

the contrary they are interdependent and interrelated. Therefore, this case is important to clarify the complexity in gendered structures and the new points of view of the roles that sexes have. Nyiramasuhuko was superior to Tutsi women and men because of her identity as Hutu and her political power. She ordered the killings and rape of the Tutsi men and women.<sup>56</sup>

#### ***Other Remarks***

The ICTR received criticism concerning the prosecutions on rape and other crimes of sexual violence. The Tribunal was criticised for its treatment of certain female witnesses. Lack of sensitivity to gender-based crimes had a negative effect on prosecutions and the reconciliation process. During the *Nyiramasuhuko et al.* trial when Witness TA was testifying, not only the length of the cross examination but the way of questioning was unusual and intensive. When the defence lawyer asked for details about the rape, the judges were laughing at the answers of the witness. Also the defence lawyer told Witness TA that she could not have been raped because she smelled.<sup>57</sup> Remembering and re-counting memories in court is often traumatising for survivors. Witness TA's life has been traumatised by her experiences in the ICTR and she regrets that she gave a testimony.<sup>57</sup> Also Witness J in the Akayesu trial felt offended by the defence lawyer who said that she does not need justice but needs a psychologist. Like Witness TA and Witness J, several other survivors and witnesses who cooperated with the ICTR complained that they felt besmirched by the experience.

The ICTR attempted not to emotionally relate to the survivors in the belief that this was necessary for the court's independence. However, by doing so the tribunal failed to reach out to survivors, to understand their concerns, and to explain how the adversarial system of trials works.<sup>58</sup> It is furthermore claimed that officers of the tribunal lacked awareness and sensitivity concerning rape and sexual violence crimes. Also, it should be noted that many members of the Chambers considered dealing with sexuality and naked bodies a taboo and felt embarrassed talking about it.<sup>59</sup> While the Tribunal could discuss the most horrendous crimes, sexual violence crimes remained largely untouched as a result of the private-public realm. In popular socio-legal discourse, it is common to keep women's problems in the private sphere and not let them be considered as part of the public sphere.

#### **Consequences of the ICTR's Approach to the Crime of Rape**

As Nowrojee said "justice is a process, not just a judgement"<sup>60</sup>, for a transitional justice process prosecuting the perpetrators is often not sufficient for reconciliation. Justice cannot be limited to courts but it must be visible after the trials. With regards to rape and other crimes of sexual violence, the reconciliation process is very complicated and complex. It is, therefore, crucial to examine the aftermath of the ICTR trials. After having established that several witnesses subsequently regretted giving testimony and felt harassed by members of the Chambers, I will now analyse the broader consequences of the ICTR's approaches.

#### ***Women - Forever Victims***

Rape and other crimes of sexual violence are very complex and difficult to reconcile. First of all, rape damages the body of the survivor. The injuries they suffer, especially in lack of medical assistance, makes recovery an arduous process. Additionally to their physical pain and illness, some of the survivors struggle with HIV/AIDS which they were infected with by their perpetrators. Rape survivors are usually not only physically but mentally damaged resulting from horrendous experiences. Recovery from traumas takes usually longer than the recovery of physical wounds. Again, due to a lack of medical assistance in Rwanda, survivors of rape and other crimes of sexual violence struggled with trauma, depression, and isolation.

Another substantial difficulty to survivors of rape and other crimes of sexual violence is posed by their families and societies. The existing gendered structure in society puts the shame and blame not on the 'male' perpetrator but the 'female' survivor. In Rwanda many families did not accept their daughters anymore because it is thought that they bring shame to the family. Even when their families accept them they could not get married because they are considered 'damaged goods'. Several husbands left their wives because of the same reason. This exclusion from families and from society made the recovery process longer and left the survivors in Rwanda without any economic protection.

Another consequence of the crime of rape is pregnancy. In Rwanda, babies born as a result of rape were labelled 'rape babies'. In many cases, babies and children remind their mothers of their horrific experiences



which cause deep-seated hatred to those babies or children. Even when mothers accept their babies, they may face prejudice from family members who do not accept the baby. Consequently, financial support is often cut and there are many cases where husbands leave their wives because of the babies.<sup>61</sup> This situation is not only traumatic for women but also for the children who will live by knowing that they were born as a result of rape.

The survivors carry that shame for the rest of their lives not as a result of something they did, but as a result of something done to them.<sup>62</sup> Several rape survivors explain that there is no life after a rape and they regret that they are still alive. Some women described their situation as ‘living as a dead person’.

Life after rape and sexual violence crimes must be understood in the context of social, cultural, and economic settings.<sup>63</sup> Considering these consequences, it might be argued that it is impossible for an ad hoc tribunal such as the ICTR to address all these issues. The Statute and mission of the ICTR are rather limited in this respect and do not provide for cultural reconciliation. However, the ICTR contributed to the gendered structure of society by treating women as victims exclusively. During the trials, the roles of women and power relations between men and women were not put into question but they were accepted as they stand. Also, the way that survivors were offended and examined during the trials did not contribute to the reconciliation process.

### ***Impunity of the Women Perpetrators***

The second important effect of the ICTR trials is the impunity of female perpetrators. The general myth about women attributes peaceful and passive roles to women. However, women played a central role in the Rwandan genocide which contrasts this myth. This was caused by the complexity of gendered power relations. Dominance and control is not a paradigm solely applicable to male and female actors but within the male and female models as well. Yet, it becomes evident from the ICTR trials that this old pattern of social construction must be reconsidered. Especially the case of Nyiramasuhuko has helped to erase the victim role of women and the perpetrator role of men. However, apart from the Nyiramasuhuko case the ICTR did not consider any other women as perpetrator and continued the prosecutions within the passive and victim role of women.

The gendered point of view characterizes rape as a male crime. Gendered assumptions about peacefulness of motherhood and female passivity are still prevalent. But in reality, not only in Rwanda but in other conflicts as well, women often played the role of perpetrator. Women participated in the genocide not only as a result of their political or religious leadership but also as ordinary village residents.

A common view in Rwanda states that women did not participate in the genocide at all. Also, there are some other views arguing that women were weak to stop their husbands or to rebel against them. Therefore, they were obedient to them. Yet, Omar explains that, for the masculine Rwandan society, “it is so shameful in Rwandan society to admit that women could be responsible for genocide.”<sup>64</sup>

The crimes committed by women in 1994 can be divided into two categories. The first category can be defined as acts of direct violence which includes the use of physical force, including killing, torture, rape, sexual assault and beatings. The second category can be defined as indirect violence including looting, theft, knowingly exposing those in hiding to a fatal end, inciting violence and supervising and ordering instances of direct and indirect violence.<sup>65</sup>

Several reports suggest that women forced young Tutsi boys to have sex with them without their consent or to take revenge and dishonour the survivors. One of the survivors explained how he was drugged, stripped, tied to the bed, and raped repeatedly by four women. The survivor stressed that he was not alone and there were other males who had experienced sexual violence as well. The same gendered narrative which hides the female perpetrator, hides male survivors as well, therefore, it is almost impossible to find a male survivor who is willing to provide testimony about his female perpetrator.<sup>66</sup> In the ICTR there was no male victim of rape and sexual violence crimes, since the notions of gendered structure consider rape to be a crime exclusively suffered by women.

Hence, male survivors never found a chance to reconcile. Women perpetrators were ignored and re-joined society, regardless of their past misdeeds. This causes future instability and difficulty related to a gender-based impunity culture in the reconstruction of the post-conflict society. Therefore, the blame will shift to the survivors which affects the future generation.

### **Conclusion**

“I think about what has happened to me all the time and at night I cannot sleep. I even see some of the Interahamwe who did these things to me and others around here. When I see them, I think about committing

suicide.”<sup>67</sup> These are the words of one of the rape survivors in Rwanda. Her words clearly show that the rape survivors of Rwanda could not find justice, peace, and reconciliation.

Part I of this essay demonstrates that law cannot be separated from political, economic, historical, and cultural contexts. In fact, masculine nature of law maintains and reproduces gendered structures as explained by feminist legal theory. Although the legal structure gave several rights to women it is only acting within the limitations of gendered structures. These findings of feminist legal theory lead us to question the way that the crime of rape has been dealt with in transitional justice processes. This essay suggests that several developments in international law have helped defining and prosecuting survivors of rape and other crimes of sexual violence. However, these developments are severely limited by being put within the limitations of gendered structures. Within reconciliation processes, women are still primarily considered to be victims, passive, and dominated and controlled by men.

In Part II, within the analysis of the ICTR process, three points are raised. Firstly, there was a lack of awareness and political will to prosecute rape and other crimes of sexual violence during the genocide on part of the prosecution team of the Akayesu trial. If Witness J had not mentioned rape in her testimony and Judge Pillay had not further inquired into this unsolicited statement, rape and other crimes of sexual violence might have gone unnoticed. This case showed the masculine nature of law and how it effects the prosecution of gender related sexual violence crimes. The inquiry of Judge Pillay revealed the lack of women perspective within the prosecution. Nevertheless, it also unveiled the inadequacy of women participation in changing the masculine nature of law. It is not enough to balance the gender differences of the agents unless these agents start to break the masculine nature of not only law but also society. Otherwise, if they continue to reproduce the gendered norms being woman or man in the decision role is not going to make any difference. Secondly, the Gacumbitsi case shows that the perception of seeing woman as a property continued in ICTR. The most outrageous is that the rape was not seen as a crime against women but some kind of message between men. By accepting that women are not active agents, the court contribute to the reproduction of masculine nature of law. Thirdly, the Nyiramasuhuko case broke the silence about women perpetrators. This case contributes to show that women were active agents during the war, in the sense that they were the ones who gave orders and contribute the decisions. Also, this case ruins the peaceful, passive image of women. However, Nyiramasuhuko used the peaceful nature women, which is, as discussed before, part of predominant discourse, in her defence.

Note, however, that this case should not be seen as proof that women are as equally violent to men. Statistics show numbers of women perpetrators to be considerably lower.<sup>68</sup> The important point is that women are not merely passive but act as agents equal to men that have the capacity to act out of their own will and make decisions. Moreover, the trials could not adequately address rape and other forms of sexual violence because they are still perceived as taboos. It seems that talking about sexuality causes embarrassment. Several survivors felt offended by the Chambers' treatments because of the lack of sensitivity of some of the judges and lawyers.

In the final Part, the consequences of the crime of rape showed that the reconciliation of the rape survivors is very difficult. Reconciliation cannot be successful only by putting in place legal mechanisms after the conflict, because reconciliation of rape for the survivors is integrated with cultural, political, and economic considerations. While the survivors' testimonies more focused on the prosecution of the perpetrators, since the gendered structures are so embedded in the social level it not only possible to find reconciliation solely through the legal process. Furthermore, while several female survivors' traumas continued after the tribunal, male survivors could not find any place to demand justice.

However, the contributions of the ICTR should not be disregarded. The developments regarding international law are considerable. The ICTR were one of the first international organs to address rape crimes and, therefore, its historical importance should not be understated. Yet, it must be noted that the ICTR has maintained and reproduced much of the gendered norms which have been persistent throughout history. This leads us to ask the question that Catherine MacKinnon poses: should we find solutions for “how to make rules fit reality” or “how to change reality”.<sup>69</sup>

- <sup>1</sup> This work has been submitted with minor changes to MA International Law, SOAS, University of London as a dissertation in 2014.
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- <sup>4</sup> Charlesworth et al., 'Feminist Approaches ...', 635.
- <sup>5</sup> Ellen C. DuBois, Mary C. Dunlap, Carol J. Gillian, Catherine A. MacKinnon and Carrie J. Menkel-Meadow, 'Feminist Discourse, Moral Values, and the Law – A Conversation', *Buffalo Law Review* No:34 (1985):29.
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- <sup>7</sup> Nicola Lacey, *Unspeakable Subjects Feminist Essays in Legal and Social Theory*, (Oxford:Hart Publishing 1998),15-16.
- <sup>8</sup> Hilaire Barnett, *Introduction to Feminist Jurisprudence*, (London:Cavendish Publishing Limited, 1998),257, 275.
- <sup>9</sup> Joshua S. Goldstein, *War and Gender*, (Cambridge:Cambridge University Press 2001), 363.
- <sup>10</sup> Lacey, *Unspeakable Subjects*,106-109.
- <sup>11</sup> Lacey, *Unspeakable Subjects*, 193.
- <sup>12</sup> Caroline O. N. Moser and Fiona C. Clark, 'Introduction', *Victims, Perpetrators or Actors?* eds. Caroline O. N. Moser and Fiona C. Clark,(London:Zed Books 2001),3-4.
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- <sup>17</sup> Nicole Hallett, 'The Evaluation of Gender Crimes in International Law', *Plight and Fate of Women During and Following Genocide* ed. Samuel Totten, (New Brunswick:Transaction Publishers, 2009), 188.
- <sup>18</sup> Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' *International Criminal Law Review*, No. 11 (2011): 418-420.
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- <sup>20</sup> Wildermuth and Kneuer, 'Addressing the Challenges,' 138.
- <sup>21</sup> S/RES/955 (1994).
- <sup>22</sup> Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994 - E/CN.4/1996/68 29 January 1996, para 16.
- <sup>23</sup> Report on the situation of human rights in Rwanda , 13, 14, 17.
- <sup>24</sup> Rwanda is divided into 11 prefectures which are governed by a prefect. Also the prefectures divided into communes which are placed under the authority of bourgmestres. Bourgmestres are appointed by the President of the Republic upon the recommendation of the Minister of the Interior. In Rwanda, bourgmestres are the most powerful authority figures in the communes. [The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 2].
- <sup>25</sup> ICTR-96-4-T, para 12.
- <sup>26</sup> ICTR-96-4-T, para 597-598.
- <sup>27</sup> ICTR-96-4-T, para 731.
- <sup>28</sup> Usta Kaitesi, *Genocidal Gender and Sexual Violence*, (London:Intersentia 2014), 126-127.
- <sup>29</sup> Kaitesi, *Genocidal Gender*, 128.
- <sup>30</sup> ICTR-96-4-T, para 121.
- <sup>31</sup> ICTR-96-4-T , para 419, 421.
- <sup>32</sup> ICTR-96-4-T , para 429.
- <sup>33</sup> ICTR-96-4-T, para 446.
- <sup>34</sup> ICTR-96-4-T , para 452.
- <sup>35</sup> The Prosecutor v. Sylvestre Gacumbitsi (Trial Judgement), ICTR-2001-64-T, International Criminal Tribunal for Rwanda (ICTR), 17 June 2004, para 5- 6.
- <sup>36</sup> ICTR-2001-64-T, para 52, 67.
- <sup>37</sup> ICTR-2001-64-T, para 35.
- <sup>38</sup> ICTR-2001-64-T, para 198.
- <sup>39</sup> ICTR-2001-64-T, para 207 -208.
- <sup>40</sup> ICTR-2001-64-T, para 209, 222.
- <sup>41</sup> ICTR-2001-64-T, para 259.
- <sup>42</sup> ICTR-2001-64-T, para 292.
- <sup>43</sup> ICTR-2001-64-T para 321.

- <sup>44</sup>The Prosecutor v. Pauline Nyiramasuhuko et al. (Trial Judgement), ICTR-98-42-T, International Criminal Tribunal for Rwanda (ICTR), 24 June 2011, (para 1-2)
- <sup>45</sup>ICTR-98-42-T, para 6093.
- <sup>46</sup>Carrie Sperling, 'Mother of Atrocities: Pauline Nyiramasuhuko's Role in the Rwandan Genocide' *Fordham Urban Law Journal* No:33 (2005): 101.
- <sup>47</sup>ICTR-98-42-T, para 479.
- <sup>48</sup>ICTR-98-42-T, para 2153.
- <sup>49</sup>Georgina Holmes, *Woman and War in Rwanda*, (London:I.B. Tauris 2014), 80.
- <sup>50</sup>ICTR-98-42-T, para 2158-2159.
- <sup>51</sup>ICTR-98-42-T, para 2178, 2180, 2181.
- <sup>52</sup>ICTR-98-42-T, para 2214-2215.
- <sup>53</sup>ICTR-98-42-T, para 2254-2255.
- <sup>54</sup>ICTR-98-42-T, para 3141.
- <sup>55</sup>Kaitesi, *Genocidal Gender...*, 168.
- <sup>56</sup>Binaifer Nowrojee, "Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?, Occasional Paper 10, November 2005, 24.
- <sup>57</sup>Kaitesi, *Genocidal Gender...*, 173.
- <sup>58</sup>Gerald Gahima, *Transitional Justice in Rwanda*, (London:Routledge, 2013), 96.
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- <sup>60</sup>Nowrojee, "Your Justice...".
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- <sup>64</sup>Nicole Hogg, 'Women's Participation in the Rwandan Genocide: Mothers or Monsters?', *International Review of the Red Cross* No: 92 (2010): 77, 82.
- <sup>65</sup>Sara E. Brown, 'Female Perpetrators of the Rwandan Genocide', *International Feminist Journal of Politics*, Volume, 16, Issue 3 (2014): 8, 11.
- <sup>66</sup>Brown, 'Female Perpetrators,' 12.
- <sup>67</sup>Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, (London:Intersentia, 2005), 2.
- <sup>68</sup>Hogg, 'Women's Participation...', 70.
- <sup>69</sup>DuBois et al., 'Feminist Discourse...', 25.

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