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ONE STEP FORWARD, BUT TWO STEPS BACK: WHY GACACA IN RWANDA IS JEOPARDIZING THE GOOD EFFECT OF AKAYESU ON WOMEN'S RIGHTS

INTRODUCTION

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INTRODUCTION

Rape undoubtedly is one of the most horrific experiences a woman can endure, nearly always resulting in traumatic after-effects, namely psychological distress and flashbacks of the scene.¹ For women in developing countries during times of conflict, the cultural and social stigmas surrounding rape many times lead the victims to blame themselves for the brutality endured.² Due to the taboos of rape in these areas, women many times are forced out of their communities, the rape altering not only their psychological makeup, but their social status as well.³ For women in these developing areas, widespread poverty, patriarchal norms, and the total lack of economic independence compounds the complicated and sensitive issues surrounding rape.⁴ Notably, the fact “[t]hat such sexual shame has been traditionally heaped upon women is a sad historical truth, one on which combatants rely when

1. See, e.g., Teresa Godwin Phelps, *Feminist Legal Theory in the Context of International Conflict*, 39.1 U. BALT. L.F. 173, 178 (2008) (describing how raped women who had suffered “deeply traumatizing events” often “received psychological counseling and had trouble sleeping”).

2. *Id.*; see also Eunice Menka, *Tackling Africa's Last Taboo: Talking About Sex*, AFR. WOMAN, Sept. 2003, at 2, available at www.coldtype.net/Assets/Africawoman/AW14.pdf (discussing the effects of wide scale rape on African women in times of war and conflict).

3. See Katrina Anderson, *Turning Reconciliation on Its Head: Responding to Sexual Violence Under the Khmer Rouge*, 3 SEATTLE J. SOC. JUST. 785, 811 (2005) (describing the ostracizing effects associated with the social taboos of being raped or discussing the rape in post-conflict Rwanda).

4. See Lori A. Nessel, *Rape and Recovery in Rwanda: The Viability of Local Justice Initiatives and the Availability of Surrogate State Protection for Women that Flee*, 15 MICH. ST. J. INT'L L. 101, 110 (2007) (noting that the lack of economic and social independence makes women in these areas more vulnerable to community pressures to stay silent about rape).

using rape to achieve military ends.”⁵ Historically considered part and parcel to the conquests of war,⁶ the use of rape during the course of warfare has evolved.⁷ Rape is now understood as a method to intentionally destroy and decimate a population, amounting to an effective tool in the execution of genocide.⁸

The growing use of this so-called “genocidal rape,”⁹ specifically in developing countries, did not gain full recognition within the realm of international humanitarian law until 1998, when the International Criminal Tribunal of Rwanda in *Prosecutor v. Jean Paul Akayesu* recognized rape as an actual form of genocide.¹⁰ Women’s and human rights activists applauded this decision as a great victory for the cause,¹¹ particularly because the classification allowed it to be tried as a “class one” offense” carrying great penalties.¹² However, recent legislation in Rwanda moving the genocidal rape cases from the international forum into a process called *gacaca*¹³ threatens the progress made for women’s rights by the *Akayesu* decision. Proponents of *gacaca*, which involves community-wide involvement in the prosecution proceedings, argue that the domestic model makes the rebuilding process more accessible to the local community.¹⁴ However, the *gacaca* approach is less feasible because of the potential repercussions associated with participating in *gacaca* prosecutions.¹⁵

5. Phelps, *supra* note 1, at 178.

6. Katherine Jones, *Rape as a Tool of Warfare*, ASSOCIATED CONTENT FROM YAHOO, Apr. 2, 2008, http://www.associatedcontent.com/article/690379/rape_as_a_tool_of_warfare.html?cat=7 (discussing the war practices of the Ancient Greeks, who viewed the rape of conquered women as a “right” (citing SHARON FREDERICK, RAPE: WEAPON OF TERROR 10 (2001))).

7. *See id.* (showing the evolution of rape as a tool of warfare).

8. *See* TANJA MRDJA, RAPE: ASYMMETRICAL WARFARE? 9-10 (Janja Bec-Neumann & Dan Bar-On eds., 2007), available at http://www.war-crimes-genocide-memories.org/fajlovi/Rape_Asymmetrical_Warfare.pdf (explaining how the raping of women in the course of warfare disrupts social relations within communities and is viewed as an attack against a whole community or population).

9. *Id.* at 15 (quoting BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA, HERZEGOVINA AND CROATIA (1996)).

10. *See* *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 731-34 (Sept. 2, 1998). The Prosecutor charged Akayesu with two counts of genocide for inciting several acts such as killing, executions, rape, and sexual violence. *Id.*

11. *See, e.g.*, Yael Weitz, Note, *Rwandan Genocide: Taking Notes from the Holocaust Reparations Movement*, 15 CARDOZO J.L. & GENDER 357, 369 (2009) (“[T]he *Akayesu* court ultimately characterized rape and similar crimes of sexual violence as both genocide and as crimes against humanity. This expanded definition, along with the subsequent prosecution of rape, is a significant step forward for women’s rights and has contributed to the development of international humanitarian law as a whole.” (internal citation omitted)).

12. Nessel, *supra* note 4, at 105.

13. Weitz, *supra* note 11, at 373 (discussing the creation of the 2001 *Gacaca* Law).

14. Nessel, *supra* note 4, at 102.

15. *See id.* at 103, 106 (positing that women’s participation in local *gacaca* proceedings threatens to re-traumatize and stigmatize rape victims).

This Note will set out the competing results that *Akayesu* and the movement towards gacaca proceedings present to the field of women rights, particularly for women in developing countries. Part I will trace the historical use of rape in the course of warfare, popularly viewed as a “reward” for the victorious soldiers in conquered towns and representing the patriarchal view that women were regarded as property of their husbands.¹⁶ Part II will focus on the change in the use of rape during war in the World War II and post-World War II era, as it was increasingly used as a tactic to humiliate and demoralize enemy soldiers and villages in an effort to decimate the population.¹⁷ Concentrating on the atrocities of the Holocaust, this section also traces the evolution of humanitarian law, with specific focus on treaties and conventions against events like the Holocaust.

Part III will analyze the landmark *Akayesu* decision to finally recognize the use of rape as a crime against humanity and act of genocide.¹⁸ Part IV will describe the gacaca proceedings in Rwanda and the ill-effects the process will have on women’s rights, both in theory and in practice, particularly for genocidal rape survivors in the country. Part V will then suggest alternative models of rape prosecution in Rwanda in order for *Akayesu* to again have legal teeth in the field of women’s rights.

I. RAPE AS A REWARD IN THE COURSE OF WARFARE: PRE-WORLD WAR I TACTICS AND THE EARLY EVOLUTION OF HUMANITARIAN LAW

Rape has long been used as a tool in warfare.¹⁹ Even great philosophers “such as Aristotle and Cicero” wrote about the common and “justified” practice of warfare, “which included the right to rape the women of the conquered party.”²⁰ Even in the Bible, the rape of women was regularly referenced as a commonplace act by the victorious tribe against those they conquered.²¹ Historically, rape was

16. Jones, *supra* note 6 (citation omitted); *see also* discussion *infra* Part I (detailing the historical use of rape in war).

17. *See* discussion *infra* Part II (explaining the evolution of rape as a tool of warfare).

18. *See* discussion *infra* Part III (highlighting the expansion of rape as an international crime).

19. Jones, *supra* note 6 (“[Despite] common belief, the use of rape during times of conflict is not a new phenomenon. In 1474, military officer and knight Peter van Hagenbach became the first individual to be tried under an international tribunal for the rapes committed against the women of Briesbach, Austria by troops under his command during the military occupation of the town.” (citing SHARON FREDERICK, *RAPE: WEAPON OF TERROR* 10 (2001))).

20. *Id.* (citing SHARON FREDERICK, *RAPE: WEAPON OF TERROR* 11 (2011)).

21. *See, e.g.,* *Zechariah* 14:2 (King James) (“For I will gather all nations against Jerusalem to battle; and the city shall be taken, and the houses rifled, and the women ravished . . .”).

not utilized as a combat tool, for example to advance on an enemy's territory, but more as a reward for winning the war or conquering an invaded territory, "included as part of the spoils of warfare."²² While the twelfth century saw the stirring of the need for protection against the rape of women during warfare, a soldier's obligation to follow his superior's orders, which may have included the command to rape and pillage a conquered village, remained the most important obligation.²³ Subsequent centuries saw various works of literature that advocated the prohibition of the rape of women during wartime.²⁴ These works, however, were much more the exception than the rule, and the use of rape during wartime was still viewed as a justified practice.²⁵

The prosecution of Hagenbach in 1474 marked the first time that rape, used for centuries as a customary practice in the course of warfare, was viewed as a grave violation, and commanding officers could be punished not only for the acts of their subordinates.²⁶ Furthermore, progressive doctrines such as the Lieber Code emerged in the nineteenth century, which prohibited the use of rape in the course of warfare.²⁷

Subsequently, the First Geneva Convention, promulgated in 1864 largely due to the horrors of the Battle of Solferino,²⁸ sought to regulate and "humanize" the conditions of war by providing aid to wounded and

22. KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* 21 (1997) (citing PETER KARSTEN, *LAW, SOLDIERS AND COMBAT* 5 (1978)); see also Laura Smith-Spark, *How Did Rape Become a Weapon of War?*, BBC NEWS, Dec. 8, 2004, <http://news.bbc.co.uk/2/hi/4078677.stm> ("The opportunistic rape and pillage of previous centuries has been replaced in modern conflict by rape used as an orchestrated combat tool.").

23. See ASKIN, *supra* note 22, at 24 (discussing John of Salisbury's *Policraticus*, in which he declares that rape, still considered a property crime, "should receive the most severe punishment"). However, irrespective of this position, "if the soldier's superior commanded the soldier [sic] to commit . . . rapine . . . ignoring that command would be the greatest crime." *Id.* at 24-25 (citation omitted). Therefore, Askin concludes that "obeying a superior's commands, whether legal or illegal, moral or immoral, was the ultimate duty of the soldier." *Id.* at 25.

24. *Id.* at 26.

25. See *id.* at 25 (explaining that regardless of the developments and restrictions on warfare, these protections did not extend to women, who remained subject to rape).

26. *Id.* at 29; Jones, *supra* note 6.

27. ASKIN, *supra* note 22, at 36. "This code, drafted by Francis Lieber in 1863 as General Orders No. 100, was derived from international custom and usage and became the official U.S. Army regulation guide on the laws of land warfare." *Id.* (citation omitted). Not only did this code give rise to the idea of safety for civilians in an attacked country, it "mandated, 'all rape . . . [is] prohibited under the penalty of death.'" *Id.* (alteration in original) (citation omitted).

28. See *From the Battle of Solferino to the Eve of the First World War*, INT'L COMM. FOR THE RED CROSS [ICRC], Dec. 28, 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNVP> (discussing the adoption of the First Geneva Convention following the Battle of Solferino).

sick soldiers in the battlefield.²⁹ While a short document, the First Geneva Convention is generally regarded as the “birth [of] a considerable part of the system of international law.”³⁰

After the passage of the First Geneva Convention in 1864, the Hague Conventions, adopted in 1899 and 1907, added to the rules and warfare regulations put into force by the Geneva Convention, and further aimed to protect individuals against the abusive use of force during war.³¹ Although no specific prohibition against rape during the course of warfare was written prior to the 1949 Geneva Conventions,³² the recognition of the dignity of the individual and increasing calls for humane tactics to be employed under the Geneva and Hague Conventions are generally regarded as the beginning of a solidified body of humanitarian law, including the advocacy against war rape.³³

The gruesomeness of War World I brought a renewed fury towards the utilization of rape as a war tactic.³⁴ This time, however, rape was not used as a method of “reward” for victory, but rather as “a weapon of terror, rage, and intimidation.”³⁵ After World War I ended, the War Crimes Commission was established to “report on the violations of the laws . . . of war committed by the Axis powers.”³⁶ Rape was one of the thirty-two offenses identified in the Commission’s report, which speaks to the increasing view that rape was not a justifiable or expected side-effect of warfare.³⁷

29. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 6, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 970 (regulating the treatment of wounded or sick combatants).

30. See ASKIN, *supra* note 22, at 37 (quoting GEZA HERCZEGH, DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW 21 (1984)). “The Geneva Convention of 1864 . . . was considered unique since it ‘aimed at regularizing in a permanent manner, a situation which until then had only been haphazard.’” *Id.* at 38 (quoting Perry Gulbrandsen, *A Commentary on the Geneva Conventions of August 12, 1949*, in 1 A TREATISE OF INTERNATIONAL CRIMINAL LAW 369 (Bassiouni & Nanda eds., 1973 (internal quotation marks and citation omitted))).

31. *Id.* at 39.

32. See Timothy Tree, Comment, *International Law: A Solution or a Hindrance Towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. INT’L L. & FOREIGN AFF. 461, 490 (2000) (discussing how, although the statutorily codified international war crime of rape did not exist before the 1949 Geneva Conventions, it arguably “existed prior to WWII as customary international law”).

33. See ASKIN, *supra* note 22, at 37, 47 (concluding that the expansion of international humanitarian law under the Hague and Geneva Conventions “provide[s] strong evidence that women were to be protected from sexual assault,” which includes rape).

34. See *id.* at 41 (highlighting the massive use of rape and sexual assault during World War I).

35. *Id.* Askin notes that “during the German invasion of Belgium . . . sexual assault was ‘catapulted into prominence as the international metaphor of Belgian humiliation.’” *Id.* (quoting SUSAN BROWNMILLER, AGAINST OUR WILL, MEN, WOMEN AND RAPE 40 (1975)).

36. *Id.* at 42, 47.

37. *Id.* at 47.

II. RAPE AS GENOCIDE: SYSTEMATIC USES OF RAPE DURING WORLD WAR II AND POST-WORLD WAR II CONFLICTS

The use of rape in the course of warfare escalated during World War II.³⁸ Instances of Nazi soldiers brutally and systematically raping, torturing and killing girls and women in ghettos, concentration camps and invaded territories speaks to the use of rape not only to dehumanize and demoralize the enemy, but also to decimate the population.³⁹

Although rape was used in this manner, the underlying roots of rape in warfare persisted.⁴⁰ Women, on a fundamental level, were still considered (and to some feminists arguably are still considered) property of their husbands.⁴¹ The argument behind this bleeds into the effectiveness of using rape as a tactic in warfare to destroy the enemy. In order to humiliate the enemy and destroy his honor, the rape of his wife is utilized by the perpetrator to disrupt the balance, peacefulness, and social workings of a population, effectively destroying the community in this manner.⁴² In addition, the brutality of the rapes and accompanying dishonor was so severe that suicide was common amongst women of conquered villages who knew that the invading soldiers would likely rape them upon victory.⁴³ Of course, the rape of women in concentration camps, many times followed by murder, was more of a systematic and sadistic method of destroying the spirit of the so-called enemy than bringing humiliation on the opposing soldiers.⁴⁴

38. *See id.* at 52 (noting that a shocking 100,000 rapes occurred in Berlin in the last two weeks of the war (citing HILKKA PIETILA & JEANNE VICKERS, MAKING WOMEN MATTER, THE ROLE OF THE UNITED NATIONS 146 (1994))).

39. *See, e.g.*, ASKIN, *supra* note 22, at 57 (discussing evidence produced at the Nuremberg Trials that, in many instances of invasion by the Nazis, every female resident of a town was sexually assaulted, "indicat[ing] an organized and systematic plan to rape and further destroy the women inhabitants").

40. *See id.* at 59 (arguing that the methodology of rape employed during World War II "reinforces the view of women as mere property").

41. *Id.*

42. *See* MRDJA, *supra* note 8, at 9 (discussing the effects of rape on men and the community).

43. *See, e.g.*, ASKIN, *supra* note 22, at 73 n.253 (discussing how, for many women, the extreme shame of rape degraded them to the point that life was no longer desired as they could no longer live with the pain or endure more sexual assault). In these instances, many women committed suicide, considering death to be preferable to rape. *Id.* During the latter part of World War II, this trend grew, particularly when the Russians invaded. *Id.* (citing CORNELIUS RYAN, THE LAST BATTLE 493 (1966)). Women regularly kept vials of poison on them in the event that a soldier came near them with clear intent to rape. *Id.*

44. *See id.* at 57 (arguing that the mass rapes are evidence of a "systematic plan" to destroy the women in these areas). "That rape committed by Germans against Jews was so prevalent during the war is in itself quite instructive of its force and perpetuity, since it was strictly forbidden for Germans to have sex with Jews." *Id.*

In the wake of World War II and the massive human rights abuses accompanying it, which provided arguably the best example of the evils of warfare, the world realized the need to hold the perpetrators of such grave abuses accountable for their actions.⁴⁵ The International Military Tribunal at Nuremberg (Nuremberg Tribunal) was established at the end of World War II to address four main crimes: “crimes against peace, war crimes [including genocide], and crimes against humanity, and conspiracy to commit such crimes.”⁴⁶ In defining crimes against humanity in the Charter of the International Military Tribunal for Nuremberg Trials in 1945, rape was not specifically mentioned.⁴⁷ However, the Nuremberg Principles, promulgated in 1950, recognized the need to hold individuals responsible for criminal acts on an international level.⁴⁸ In addition to the crimes specifically listed in the original charter, the definition of crimes against humanity set forth in the Principles leaves the door open for potential acts (such as rape) to be prosecuted under international law.⁴⁹

Out of the atrocities of the Holocaust also came the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly, and its accompanying definition of genocide and declaration of genocide as a violation of international law.⁵⁰ Furthermore, the adamant desire of the international

45. See *War Crimes Trials*, U.S. HOLOCAUST MEM’L MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005140> (last visited Apr. 1, 2011) (detailing the resolution of the Allied Powers to prosecute those responsible for committing war crimes following the atrocities of World War II).

46. *Id.*

47. See Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279 (“Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”).

48. *Report of the International Law Commission to the General Assembly*, [1950] 2 Y.B. Int’l L. Comm’n 374, U.N. Doc. A/CN.4/SER.A/1950/Add.1

49. *Id.* at 377 (“Crimes against humanity: [m]urder, extermination, enslavement, deportation and *other inhuman acts done against any civilian population* . . . when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.” (emphasis added)).

50. See United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, [hereinafter Convention on Genocide] (defining genocide as a crime against international law). Genocide is defined as:

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.

Id.

community to “end impunity for the perpetrators of [these] serious crimes” fueled the eventual creation of the International Criminal Court (ICC).⁵¹

The ICC is governed by the Rome Statute, adopted on July 17, 1998 in Rome, Italy by the United Nations Diplomatic Conference on the Establishment of an International Court.⁵² For the purposes of this Note, the relevant provisions of the Rome Statute are Articles 6, 7, and 8, defining genocide, crimes against humanity, and war crimes, respectively.⁵³ The definition of genocide in Article 6 is identical to that found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.⁵⁴

Importantly, Article 7 of the Rome Statute expands the definition of crimes against humanity, as stated in the Charter of the International Military Tribunal for Nuremberg Trials in 1945, adding “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”⁵⁵ Furthermore, the definition of war crimes includes the crimes of “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7”⁵⁶ In addition, the ICC has jurisdiction to prosecute such war crimes, particularly when such war crimes are regarded as “part of a plan or policy or as part of a large-scale commission of such crimes.”⁵⁷

While rape was not given a specific definition, it was finally recognized as a crime against humanity and a means to systematically wipe out and destroy a population.⁵⁸ The inclusion of rape as a crime against humanity and breach of the Geneva Conventions became

51. *Factsheets: The ICC at a Glance*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/NR/rdonlyres/6AC33C11-BOF2-4C32-A155-8992885320FF/282122/ICCatAGlanceEng.pdf> (last updated May 26, 2009). Over 100 countries have signed on to the ICC, which was created on July 17th, 1998. *Id.* The purpose of the ICC is to prosecute some of the most serious crimes under international law. *Id.* The Court does not have jurisdiction over all international crimes, but can exercise proper jurisdiction over an accused who is a national of a state that is party to the Court, a crime that took place on a state party's territory, or if the United Nations Security Council has referred the case to the ICC Prosecutor, regardless of whether the other two provisions are satisfied. *Id.*

52. *Id.*; Press Release, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Press Release L/ROM/22 (July 17, 1998).

53. Rome Statute of the International Criminal Court, art. 6-8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

54. *Compare id.* art. 6 (emphasizing the “intent” requirement for genocide), with Convention on Genocide, *supra* note 50, art. 2 (noting the exact language found in the ICC Charter).

55. Rome Statute, *supra* note 53, art. 7(g).

56. *Id.* art. 8(b)(xxii).

57. *Id.* art. 8(1).

58. *See id.* art. 7 (defining rape as a crime against humanity).

particularly crucial and important in the aftermath of the Rwandan genocide of 1994.⁵⁹

III. RWANDAN GENOCIDE: RAPE AS A CRIME AGAINST HUMANITY

The 1994 Rwandan genocide saw the systematic and brutal killings of 800,000 Tutsis⁶⁰ and “moderate Hutus” by Hutus⁶¹ in a period spanning less than 100 days as part of an ethnic conflict between the groups.⁶² The atrocities and methods of killing in Rwanda were horrendous. Machetes were regularly used to rip people apart savagely.⁶³

Equally as savage in nature, rape was used as a widespread method to terrorize and destroy, with victims often killed after the rape or left to live with the shame, humiliation and sadness that remained.⁶⁴ In fact, the vast majority of women who survived the mass slaughter were gang-raped by those that destroyed their families and communities.⁶⁵ Not only is the residual emotional pain present for these women,

59. See discussion *infra* Part III (analyzing the International Criminal Tribunal for Rwanda’s prosecution of rape as a war crime and crime against humanity).

60. *Rwanda: How the Genocide Happened*, BBC NEWS, Dec. 18, 2008, <http://news.bbc.co.uk/2/hi/1288230.stm>. A Tutsi is a member of an ethnic minority group in Rwanda and Burundi, traditionally considered aristocratic. *Tutsi*, THE FREE ONLINE ENCYCLOPEDIA, <http://encyclopedia2.thefreedictionary.com/Tutsi> (last visited Feb. 27, 2010). Through history, Tutsis typically have been dominant over Hutus, perpetuating a cultural rivalry between the two groups. *Id.*

61. While holding similar religious and cultural beliefs to the Tutsi, the Hutus historically have been dominated by the Tutsi, who created a “lord-vassal” system in Rwanda and Burundi, where both groups resided. *Tutsi*, THE FREE ONLINE ENCYCLOPEDIA, <http://encyclopedia2.thefreedictionary.com/Tutsi> (last visited Apr. 1, 2011). After unsuccessful attempts to overthrow the Tutsi rule, the Hutu instituted a genocidal campaign in 1994, killing many Tutsis and Hutus who had aligned themselves with the Tutsi government. *Id.*

62. See *Rwanda: How the Genocide Happened*, *supra* note 60.

63. Mark Doyle, *Ex-Rwandan PM Reveals Genocide Planning*, BBC NEWS, Mar. 26, 2004, <http://news.bbc.co.uk/2/hi/africa/3572887.stm>.

64. See, HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDA GENOCIDE AND ITS AFTERMATH, <http://www.hrw.org/legacy/reports/1996/Rwanda.htm> (describing the means in which rape was used to terrorize victims in Rwanda).

Although the exact number of women raped will never be known, testimonies from survivors confirm that rape was extremely widespread and that thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or through forced “marriage”) or sexually mutilated. These crimes were frequently part of a pattern in which Tutsi women were raped after they had witnessed the torture and killings of their relatives and the destruction and looting of their homes. According to witnesses, many women were killed immediately after being raped. Other women managed to survive, only to be told that they were being allowed to live so that they would “die of sadness.”

Id.

65. Lindsey Hilsum, *Don’t Abandon Rwandan Women Again*, N.Y. TIMES, Apr. 10, 2004, at A15.

estimates of those infected with AIDS from the widespread rapes range up to 14,000, many of whom eventually died from the virus.⁶⁶

After the genocide, which involved the killing of mostly men, Rwanda was left as “a predominantly female society” with few economic resources and extremely limited social rights, namely property rights.⁶⁷ Because of the lack of rights available for women, and the accompanying stigma attached to the survivors of rape, many women have equated death and rape during the genocide as the same, in some cases stating that death was preferable to the aftermath associated with rape.⁶⁸

In response to the Rwandan genocide, the U.N. Security Council created the International Criminal Tribunal for Rwanda (ICTR) in 1994 to deal with the horrific aftermath.⁶⁹ The ICTR possesses “the authority to prosecute persons responsible for serious violations of international humanitarian law committed in . . . Rwanda and Rwandan citizens responsible for such violations . . . in . . . neighboring states.”⁷⁰ Those subject to prosecution under the ICTR are “individuals suspected of committing genocide, crimes against humanity, and violations of Article 3 [of] the Geneva Conventions.”⁷¹

Although many criticized the slow speed at which cases moved through the ICTR,⁷² the landmark case of *Prosecutor v. Jean-Paul*

66. *Id.*

67. Nessel, *supra* note 4, at 109-10 (citations omitted). Under customary Rwandan law, “women were not permitted to own or inherit property” because women, themselves, were thought of as the property to their husbands. *Id.* at 110. Many widows after the genocide were unable to inherit the land they farmed and lived on due to the inheritance laws that excluded women as land owners. *Id.* Coupled with the lack of income and lack of spousal support, women have become “more vulnerable in post-genocide Rwanda.” *Id.* This factor, along with the extreme communal shaming that is associated with rape, has made women more reluctant to share their accounts of rape. *Id.* This point will become increasingly important in the gacaca discussion below. See *infra* Part IV (discussing the gacaca courts).

68. See John D. Haskell, *The Complicity and Limits of International Law in Armed Conflict Rape*, 29 B.C. THIRD WORLD L.J. 35, 53 (2009) (detailing the accounts of Rwandan rape victims who compare their rapes to death).

69. Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENV. J. INT'L L. & POL'Y 125, 128 (2008).

70. *Id.* (quoting JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* 474 (2d ed. 2000)). Interestingly, the Rwandan government did not support the formation of the ICTR, mainly because the Charter did not provide for the death penalty. *Id.* at 129. Because many of the lower-level perpetrators were to be tried in national courts, the government worried that the most significant leaders of the genocide would get prison sentences, while those that were involved in the killing, and not planning stages, would be subjected to death. *Id.* Furthermore, the “limited temporal jurisdiction” given to the ICTR, spanning events between January 1, 1994 and December 31, 1994, was met with disfavor by the Rwandan government because the plans for genocide began in 1990. *Id.*

71. *Id.* at 128-29.

72. See *id.* at 131 (noting that the Rwandan government resorted to granting jurisdiction to the local courts of Rwanda to address, among other factors, “the slow speed of the ICTR”).

*Akayesu*⁷³ was applauded as the first case to enforce the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in the context of international criminal law.⁷⁴ In the area of rape, this case “demonstrated . . . the significant developments in the prosecution of rape” under international humanitarian law.⁷⁵

While the initial 1996 indictment against *Akayesu* did not include sexual violence,⁷⁶ the Prosecution amended the indictment to include “three counts of rape and other inhumane acts as crimes against humanity” after female witnesses testified, unprompted, about instances of rape during the initial trial proceedings.⁷⁷ Witness testimony following the amended indictment revealed that sexual violence was rampant and implemented in a systematic way, “with the intent to humiliate, harm, and ultimately *destroy* the Tutsi group physically or mentally.”⁷⁸

In the judgment against *Akayesu*, the Trial Chamber stated that rape and sexual violence:

“[C]onstitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute . . . one of the worst ways of inflict [sic] harm on the victim as he or she suffers both bodily and mental harm . . . Sexual violence was an integral part of the process of destruction . . . of the Tutsi group as a whole. . . . Sexual violence was a step in the process of destruction of the tutsi [sic] group—destruction of the spirit, of the will to live, and of life itself.”⁷⁹

The judgment goes on to provide a definition of rape, the first by an international criminal court, as the “‘physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’”⁸⁰

73. Prosecutor v. *Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (Sept. 2, 1998).

74. Judge Inés Mónica Weinberg De Roca, *Ten Years and Counting: The Development of International Law at the ICTR*, 12 NEW ENG. J. INT'L & COMP. L. 69, 69 (2005).

75. *Id.* at 73.

76. *Id.* The initial case was intended only to try *Akayesu* on counts of genocide and crimes against humanity due to his alleged involvement in the genocide while serving as a mayor of a Rwandan province. Andrea R. Phelps, *Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution*, 12 WM. & MARY J. WOMEN & L. 499, 510 (2006). However, during trial, a female witness gave spontaneous testimony about her six-year-old daughter being raped while *Akayesu* was present. *Id.* Subsequent witnesses followed suit. *Id.* After much pressure, the prosecutorial team amended the complaint to include sexual violence charges against *Akayesu*. *Id.* at 511.

77. Weinberg De Roca, *supra* note 74, at 73 (citation omitted).

78. *Id.* (emphasis added) (citation omitted).

79. *Id.* at 74 (alterations in original) (quoting Prosecutor v. *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 731-32 (Sept. 2, 1998)).

80. *Id.* (quoting Prosecutor v. *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 598 (Sept. 2, 1998)).

In addition to his convictions for war crimes, Akayesu was convicted of "crimes against humanity for rape, other forms of sexual violence charged as rape, and other inhumane acts; in addition to rape as constituting genocide."⁸¹ This landmark decision represents the first time sexual violence was deemed a violation of international law, as well as the first time rape was found to be a genocidal act.⁸²

Despite this landmark decision and the positive effect it, along with other ICTR cases, has had on the view that these crimes are a gross violation of international humanitarian law,⁸³ the ICTR was still criticized for the speed at which the cases before it were tried and the tremendous cost of the trials.⁸⁴ *Akayesu* also represents an outlier, as ninety percent of the cases tried by the Prosecutor's Office had no accompanying rape charges and, for those that did, only two cases resulted in convictions.⁸⁵ Four rape cases resulted in acquittal.⁸⁶ With the amount of evidence showing how many rapes actually took place during the genocide, it is not fitting that only two defendants have been held responsible for rape.⁸⁷

Because the U.N. set an end-date for the ICTR and progress was slow (and expensive), the ICTR began to transfer some of its cases into national courts of Rwanda and several other countries.⁸⁸ Additionally, in 2008, the Rwandan government passed Organic Law No. 08/96 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990.⁸⁹ This law granted jurisdiction to the criminal courts of Rwanda to prosecute those that committed genocide and crimes against humanity as defined by the Geneva Convention on the Prevention and Punishment of the Crime of Genocide.⁹⁰ The defendants were classified

81. *Id.* (citing Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Judgment, ¶ 731 (Sept. 2, 1998)).

82. *Id.*

83. See Weinberg De Roca, *supra* note 74, at 79 (highlighting the significant role of the ICTR in the development of international law).

84. Sosnov, *supra* note 69, at 130 (highlighting some of the criticisms of the ICTR). By September 2004, the ICTR had resolved only twenty-three cases, even though investigations had begun ten years earlier. *Id.* Over two years later, in December 2006, the ICTR had convicted twenty-six people and acquitted five people. *Id.* It was estimated that the ICTR would spend over one billion dollars prosecuting approximately forty genocidaires in the period from 1995 through 2007. *Id.* However, by the end of 2007, only thirty-five accused had been tried. *Id.* (internal citations omitted).

85. Binaifer Nowrojee, "Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims? 6 (Bos. Consortium on Gender, Sec., & Human Rights, Working Paper No. 105, 2003), available at <http://www.genderandsecurity.umb.edu/Nowrojee.pdf>.

86. *Id.*

87. *Id.*

88. Sosnov, *supra* note 69, at 130-31 (citation omitted).

89. *Id.* at 131.

90. Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed

into four categories, with the first category containing four sub-parts: a) the masterminds of the genocide, b) authoritative figures who helped to foster the crimes, c) “notorious murderers” whose actions were particularly malicious, and d) “persons who committed acts of sexual torture.”⁹¹ Notably, the first category was limited to perpetrators of the most serious crimes.⁹² Because of the serious nature of the crimes in the first category, the ICTR maintained the authority to hold superseding jurisdiction and, in fact, limited some of these Category 1 cases from being tried in front of the Rwandan national courts.⁹³ While the speed at which trials progressed did increase, these national courts did not exceptionally expedite the start and completion of many trials, due mainly to the devastation of the country’s criminal justice system during the genocide.⁹⁴

Additionally, the ICC has not brought many charges of rape or sexual assault within its jurisdiction, only opening investigations in the Congo, Uganda, Darfur, and the Central African Republic.⁹⁵ While many other countries have experienced widespread instances of rape amidst conflict, namely Rwanda, the ICC has failed to investigate these incidents.⁹⁶ The Rwandan government in 1996 sought to address these issues by enabling the domestic courts to hear these cases.⁹⁷

However, because of the difficulties faced by the ICTR and national courts, the Rwandan president, officials and citizens established a commission to expedite the process.⁹⁸ On January 26, 2001, legislation was passed setting up Gacaca Jurisdiction to accomplish this goal.⁹⁹ Translated as “the grassy lawn” in the Rwandan local language, gacaca is the traditional communal conflict resolution system used to resolve disputes in Rwanda.¹⁰⁰ The general approach of gacaca is to recruit and enlist public participation of members of the

since October 1, 1990, art. 1, *available at* <http://www.preventgenocide.org/law/domestic/rwanda.htm>. [hereinafter Organic Law No. 08/96]; Sosnov, *supra* note 69, at 131.

91. Organic Law No. 08/96, art. 2. Additionally, Category 2 was comprised of perpetrators or accomplices of intentional homicide or harmful assault, Category 3 was comprised of those whose acts are qualified as serious assaults, and Category 4 included those who committed property offenses. *Id.*

92. *Id.*

93. Sosnov, *supra* note 69, at 131.

94. *Id.* at 132 (discussing the already poor and under-funded criminal justice system in Rwanda, which suffered additional financial drain from the long term imprisonment of those accused of participating in the atrocities, and from the death of many judges and lawyers during the genocide).

95. Haskell, *supra* note 68, at 62.

96. *Id.*

97. Sosnov, *supra* note 69, at 131.

98. *Id.* at 134.

99. Haskell, *supra* note 68, at 75.

100. Sosnov, *supra* note 69, at 134 (citation omitted).

Rwandan community in public hearing forums to try the accused for genocide.¹⁰¹

Gacaca courts, created to work alongside national courts, have jurisdiction to adjudicate cases that took place between October 1, 1990 and December 31, 1994, and over the same four categories of genocide suspects detailed in Organic Law 08/96.¹⁰² In the original legislation passed in 2001, Category 1 suspects were excluded from the jurisdiction of gacaca, but gacaca held jurisdiction over the other three categories.¹⁰³ Although the courts were slated to close in 2009, as of September 29, 2010, the official closure of the courts had yet again been suspended indefinitely.¹⁰⁴

The practical system of gacaca allows judges, mostly illiterate and lacking any form of legal training, to preside over cases in a public setting.¹⁰⁵ The judges are elected if they are over the age of twenty-one and have a communal reputation “for being honest, truthful and trustworthy, ha[ve] good behavior and morals, a spirit of sharing speech and [are] free of sectarian and discriminatory beliefs.”¹⁰⁶ The stated goals for gacaca proceedings are to speed up the rate at which genocide trials occur, and in turn relieve the overcrowding in prisons, procure the truth about what happened during the genocide and promote reconciliation through alternative dispute methods.¹⁰⁷ To further expedite the trying of cases, gacaca courts encourage confessions.¹⁰⁸ The accused who confesses before the gacaca court must provide “a detailed description of the offense” and include specifics such as the names of victims in order to receive the benefits of the procedure.¹⁰⁹ If this right to confess is exercised, the accused is required to publicly apologize to the victims, should they be alive, and to the community.¹¹⁰ Those exercising the right to confess receive a reduction in penalties.¹¹¹

101. Haskell, *supra* note 68, at 75.

102. Sosnov, *supra* note 69, at 135 (citation omitted).

103. *Id.* (citation omitted).

104. *Gacaca Official Closure Postponed Sine Die*, HIRONDELLE NEWS AGENCY (Arusha), Sept. 29, 2010, <http://www.hirondellenews.com/content/view/13738/1169/>.

105. *Rwanda's Grass Courts*, N.Y. TIMES, July 10, 2004, at A28.

106. Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L. L. REV. 31, 44 (2002) (citation omitted).

107. *Id.* at 47.

108. *See id.* at 44-45 (noting that the Gacaca Law provides incentives for defendants to confess, including reduced sentences).

109. *Id.*

110. Gary Edmonds & Randy Stime, *The Healing Begins in Rwanda*, SEATTLE TIMES, Apr. 18, 2007, http://seattletimes.nwsourc.com/html/opinion/2003670260_rwanda18.html.

111. Ironside, *supra* note 106, at 45.

IV. GACACA TRIALS FOR RAPE: LESSENING THE LEGAL TEETH OF *AKAYESU*

There are several valid criticisms made regarding gacaca,¹¹² but, with specific regard to the legal force behind the landmark *Akayesu* decision, the passage of such legislation renders women's rights and the recognition of rape as a crime against humanity essentially void.¹¹³

The idea behind the gacaca proceedings was not entirely without merit. Notably, the courts have contributed to tackling the enormous backlog of genocide cases in Rwanda, with hopes to prosecute over one million Rwandans for acts committed during the genocide.¹¹⁴ This is in stark contrast to the mere forty-four judgments delivered by the U.N. Tribunal since its creation in 1994.¹¹⁵ Additionally, while western critics have perceived the gacaca method with skepticism, the goal of gacaca is to encourage reconciliation and diffuse animosity amongst Rwandans by employing a traditional mechanism that involves the entire community in the prosecution of the perpetrators of the crimes.¹¹⁶

While an underlying goal of gacaca may be to respect the cultural practices and utilize community-wide opinions to facilitate reconciliation and justice,¹¹⁷ the other, albeit unstated and therefore unofficial cultural practice of shaming women who are victims of rape, gets lost in the shuffle.¹¹⁸ Along with the depression, stigmatization, and

112. See, e.g., *Rwanda Gacaca Criticized as Unfair for Genocide Trials*, VOICE OF AM., Apr. 9, 2009, <http://www.voanews.com/english/archive/2009-04/2009-04-09-voa32.cfm?moddate=2009-04-09> (“[M]any have criticized gacaca, saying genocide is too big a crime to go before the village courts, or that the courts fail to deliver justice. . . . ‘The person who is deciding the case generally is not legally trained. . . . Under international fair trial standards, the proceeding is not fair.’” (quoting Georgette Gagnon, Africa Director for Human Rights Watch)) [hereinafter *Rwanda Gacaca Criticized*].

113. See, e.g., Int'l Justice Tribune, *The Ever-Changing Gacaca*, RADIO NETH. WORLDWIDE (Apr. 20, 2008, 11:00 PM), <http://www.rnw.nl/international-justice/article/ever-changing-gacaca> (“[R]ape has been used to eliminate the Tutsi group within the country. And it was done with the aim of deliberately infecting them with AIDS. It was done to destroy their sexual parts so they cannot reproduce themselves’ . . . The . . . 2008 law keeps rape in Category 1, but would move rape trials to gacaca courts. . . . [I]t seems unlikely that rape survivors will feel comfortable having their cases heard by lay judges they may well know.”).

114. William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L CRIM. JUST. 879, 881-82 (2005); see also *Status of Cases*, INT'L CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/Cases/tabid/204/Default.aspx> (last visited Apr. 1, 2011) (noting the status of current and past cases).

115. *1994 Genocide: Gacaca Trials Have Discharged One Million Cases So Far*, HIRONDELLE NEWS AGENCY, Apr. 3, 2009, <http://www.hirondellenews.com/content/view/12201/26/>.

116. Ironside, *supra* note 106, at 47-48.

117. See *id.* at 49 (noting the benefits of gacaca's local and inclusive approach).

118. See HUMAN RIGHTS WATCH, *STRUGGLING TO SURVIVE: BARRIERS TO JUSTICE FOR SEXUAL VIOLENCE CRIMES 25-27* (2004), available at <http://www.hrw.org/en/node/11975/>

isolation associated with rape, Rwandan women are also victims of community rejection, preventing many of them from even reporting the crimes, let alone going in front of a public hearing on the matter.¹¹⁹ Many married rape victims in Rwanda view the act as a sin of adultery, blaming themselves for the attacks that occur.¹²⁰ In fact, a 2002 study conducted by the Rwanda Unity and Reconciliation Commission revealed that women were more than sixty percent less likely to testify to the events of rape because of the intimate nature of the crime and the associated stigma.¹²¹ Rejection by a rape survivor's husband is common in Rwanda, as is the assumption that rape has led to the contraction of HIV, yet another taboo topic of discussion in the country.¹²²

Out of this societal stigmatization stems retaliation against many women and witnesses who do testify in gacaca.¹²³ Witnesses and rape survivors are afforded little protection by the state or the police and are many times intimidated by government officials and police into not testifying.¹²⁴ While the 2001 and 2004 Gacaca Laws prohibit such intimidation, intimidation and threats are common.¹²⁵ For example, despite the threat of both life imprisonment and the death sentence for those who kill survivors planning to testify in gacaca,¹²⁶ in 2006 "there were at least 16 killings and 24 attempted killings of witnesses. Several of the murdered individuals were executed with [a] machete, the same farm tool used to carry out the genocide."¹²⁷

Additionally, the Code of Criminal Procedure in Rwanda does not require the names or identification of rape victims to be redacted from criminal complaints,¹²⁸ which opens victims up to an even more public

section/1 (discussing the challenges faced by rape victims in gacaca courts as a result of the stigma attached to rape) [hereinafter STRUGGLING TO SURVIVE].

119. *Id.*

120. *See id.* at 24 (explaining the story of a woman who describes her rape as an act of adultery).

121. Sosnov, *supra* note 69, at 137-38.

122. STRUGGLING TO SURVIVE, *supra* note 118, at 27 (noting that many women fear that their husbands will leave them if they report these crimes).

Because they wish to lead full and normal lives, they hesitate to testify to rape for fear that the revelation will lead their husbands to reject them or, if they are unmarried, make them unmarriageable. [An] official described the cases of three women who were raped during the genocide and are now married with children. They had privately recounted their experiences to her but refused to testify in gacaca courts for fear that their husbands would abandon them.

Id.

123. *Id.* at 25-29 (explaining that women are reluctant to testify against their perpetrators for fear of retaliation by their community and family).

124. *Rwanda Gacaca Critized*, *supra* note 112 (citation omitted).

125. STRUGGLING TO SURVIVE, *supra* note 118, at 28.

126. Sosnov, *supra* note 69, at 138.

127. *Id.* (internal citations omitted).

128. STRUGGLING TO SURVIVE, *supra* note 118, at 28.

form of ridicule and vulnerability to attack. The societal ridicule and ostracism, combined with the resulting dismissal of many rape survivors from their communities,¹²⁹ has coincided with another disturbing occurrence: a higher likelihood that these women will become prostitutes.¹³⁰ No longer accepted in their communities or by their families, many victims turn to prostitution after they are discovered as survivors of sexual violence.¹³¹ Prostitutes are similarly treated as aberrations of society, regularly raped, beaten and tortured by police, military and civilians alike.¹³²

The very public nature of gacaca, therefore, submits all these victims to the effects of being forced to publicly declare the trauma they went through, which challenges the progress made by the *Akayesu* decision that declared rape a crime against humanity.¹³³ While *Akayesu* provided a step forward in the realm of women's rights and human rights,¹³⁴ the legal teeth are significantly weakened if women are increasingly dissuaded from stepping forward to report the crimes.¹³⁵

Furthermore, because many of these gacaca proceedings rely upon previously gathered evidence from the prosecutors' offices, there is a high incidence of error and contamination.¹³⁶ Moreover, the lack of sufficient evidence leads to high rates of dismissal due to a lack of sufficient evidence.¹³⁷ Additionally, because of the lack of training for those conducting medical examinations of rape victims, high rates of error in both the collection and preservation of proper and sufficient evidence makes it difficult for judges to evaluate such evidence.¹³⁸

While the collection of evidence in preparation for gacaca does allow the rape survivors to be interviewed and testify, many are reluctant to do so.¹³⁹ This reluctance is due to the lack of action taken after victims initially testified or were interviewed prior to

129. *See id.* (arguing that this lack of confidentiality discourages women from testifying).

130. *Id.* at 29.

131. *Id.* at 29-30.

132. *Id.* at 30.

133. Weitz, *supra* note 11, at 369 (citation omitted).

134. *Id.*

135. *See* STRUGGLING TO SURVIVE, *supra* note 118, at 28 (reporting that many women are afraid to testify in gacaca courts).

136. *Id.* at 31.

137. *Id.* ("In thirty-two judgments handed down from 1997-2002 involving rape during the genocide, courts acquitted several defendants accused of rape due to insufficient evidence. . . . With respect to seven other defendants, the court held that the testimony of the victim and other witnesses alone did not adequately prove that the accused committed rape.")

138. *See id.* at 31-32 (explaining that because of the lack of training, medical reports often lack sufficient evidence (citation omitted)).

139. Sosnov, *supra* note 69, at 138 (citation omitted).

the institution of gacaca proceedings.¹⁴⁰ Following initial testimony, “[n]o one helped them. That’s why it is difficult to tell these women that they should tell it to their neighbors during Gacaca, neighbors who have no training and who cannot help them with their trauma.”¹⁴¹ Combined with a commonplace misconception that most rape victims somehow are to blame, the bar set for conviction, assuming the stigmatization of a public trial is overcome at all, is extremely high.¹⁴²

In addition to the very harsh effects gacaca has on women who survived genocidal rape in Rwanda, there is little proof that gacaca has actually accomplished its stated goals.¹⁴³ Namely, there is no hard evidence to suggest that this alternative, in the form of community-wide participation and reconciliation, is actually unifying the community.¹⁴⁴ For example, in stark contrast to the old form of gacaca, which allowed the community to decide which form of dispute resolution would be utilized,¹⁴⁵ punishment is now legislated by the state,¹⁴⁶ with judges having the ability to put individuals in prison.¹⁴⁷

Therefore, the intention of bringing a community together to unite and heal in the aftermath of the genocide is not accomplished, as the process is largely focused on retribution and is controlled by judge-made law.¹⁴⁸ Combined with the practical flaws listed above, the gacaca courts fail to follow any sort of procedures that afford due process or fair trial guarantees “enumerated in domestic law and the international and regional treaties to which Rwanda subscribes.”¹⁴⁹ Indeed, this “[f]ailure to do so weakens gacaca in the eyes of the local populace and the international community.”¹⁵⁰

V. RAPE CASE TRIAL REFORM: NECESSARY FOR WOMEN’S RIGHTS IN RWANDA

The use of such a structurally-flawed process to try the most horrendous violence of the Rwandan genocide specifically affects rape

140. *See id.* (“At first women who were raped used to testify, but nowadays they don’t want to because nothing happened after their testimony.”).

141. *Id.*

142. *STRUGGLING TO SURVIVE*, *supra* note 118, at 29. Furthermore, a number of accused defendants have been acquitted because of a lack of sufficient evidence. *Id.* at 31.

143. *See Sosnov*, *supra* note 69, at 144 (discussing gacaca’s failure to achieve reconciliation in Rwanda).

144. *See id.* (arguing that rather than reunifying the country, gacaca has actually proven divisive).

145. *Id.* at 146.

146. *Id.* (citation omitted).

147. *Id.* (citation omitted).

148. *See id.* (noting that judges have the sole discretion to imprison the accused).

149. *Sosnov*, *supra* note 69, at 147.

150. *Id.*

survivors, and furthers the oppression and lack of recourse faced by these women.¹⁵¹ While *Akayesu* has been lauded for the landmark path it set forth for women's rights,¹⁵² with the transfer of rape cases into gacaca, the progress made is merely in theory, not in action. In theory, classifying genocidal rape as a category one offense should aid in highlighting the offense as a serious crime.¹⁵³ This has the effect of shifting the focus of the crime from the outdated notion that rape is a given consequence of the spoils of war, to its use as an intentional effort to demoralize the enemy population.¹⁵⁴ Additionally, forcing the victims of rape to participate in gacaca investigations threatens to re-traumatize and marginalize these women and further eliminates any shred of theoretical progress in bringing women's rights, particularly those rights of already marginalized women in developing countries, any meaningful change.¹⁵⁵

Ideally, for women's rights to truly forge ahead and for *Akayesu* to sufficiently represent unparalleled change, genocidal rape cases should be removed from gacaca proceedings altogether. However, because gacaca was introduced in order to speed up slow and backlogged genocide proceedings,¹⁵⁶ it is unlikely that shifting rape cases back to national courts will occur.¹⁵⁷ What then must occur is, at a minimum, a heightened sensitivity of the special problems rape survivors face and a re-structuring of the gacaca method of serving justice.

While it is true that cultural considerations must come into play and that the western model of adjudication of crimes cannot be lauded as the best and only method of resolution,¹⁵⁸ heightened protections, both practical and procedural, must be put into place if gacaca will be

151. See *supra* Part IV (criticizing the structure of gacaca and its effects on female rape victims).

152. See, e.g., Kelly Dawn Askin, *Gender Crimes Jurisprudence in the ICTR: Positive Developments*, 3 J. INT'L CRIM. JUST. 1007, 1012 (2005) ("The *Akayesu* judgment formally recognized that gender-related crimes are systematically used as instruments of war and terror, and the impact of the crime is extensive and devastating, resulting in harm inflicted far beyond the immediate victim The significance of the law developed in this case is unparalleled." (citation omitted)).

153. See Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since October 1, 1990, art. 2, available at <http://www.preventgenocide.org/law/domestic/rwanda.htm> (setting forth the Category 1 offenses).

154. See Nessel, *supra* note 4, at 103 (arguing that this classification will promote the view of war rape as an intentional crime).

155. *Id.*

156. Sosnov, *supra* note 69, at 136.

157. See *id.* at 132 (explaining the extent to which the Rwandan judicial system is overburdened with criminal cases following the genocide). With over 135,000 suspects detained in prisons awaiting criminal trial, this makes it unlikely that gacaca cases will be shifted back to the already overloaded national courts. *Id.*

158. See, e.g., Ironside, *supra* note 106, at 34, 56 (arguing that there is a "misplaced faith" that the Western criminal model is best suited to achieve reconciliation in Rwanda).

at all effective in ensuring a fair and just result. For example, there is a lack of focus on training judges and prosecutors about the issue of gender sensitivity, such as communicating with rape victims, and the lack of witness protection, two overtly obvious problems with gacaca proceedings.¹⁵⁹ Because gacaca judges are members of the Rwanda community, they should know first hand the delicate nature of the crime and the potential for rape survivors to be killed or, at the very least, disowned from their community.¹⁶⁰ It would seem that, in order for gacaca to be viewed as an ethical and effective body,¹⁶¹ gender sensitivity training should be a minimal and obvious requirement.

Procedural safeguards must be implemented as well to ensure justice and, ultimately, the protection of women's rights. For example, pursuant to the 2001 Gacaca Law, rape survivors are allowed to both request closed chambers to provide testimony and provide an anonymous letter to be read during the trial.¹⁶² Additionally, the Gacaca Law of 2004 aimed to increase the privacy safeguards by disallowing public accusations and public confessions of sexual violence and requiring that a victim make accusations in private.¹⁶³ However, despite these laws, women are often unaware of these safeguards, and no extra steps are taken to ensure that rape survivors know or utilize these procedures.¹⁶⁴ This lack of information must be reversed. While extra time might be required for the judges to be privately spoken to, the cost would be greatly outweighed by the mal-effects of being publicly required to testify to the trauma again.

Additionally, the model for reparations could be altered in order to enable rape survivors to emerge from the trauma and actually begin a process of true healing, rather than being ostracized. That is, while punishments for rape under gacaca generally includes imprisonment for the perpetrators,¹⁶⁵ punishment should also include reparations for the victims, particularly women who are rape survivors.¹⁶⁶ Due in part

159. See STRUGGLING TO SURVIVE, *supra* note 118, at 45-47 (discussing the lack of training of judges, prosecutors and policemen, and concerns raised by the flaws in witness protection).

160. See *id.* at 28. (noting that women commonly face threats and retaliation from the community).

161. See Sosnov, *supra* note 69, at 147-48 (discussing several criticisms of gacaca, including allegations that judges are not impartial, and are prone to corruption and manipulation).

162. Nessel, *supra* note 4, at 120.

163. *Id.*

164. *Id.*

165. See Chiseche Mibenge, *Enforcing International Humanitarian Law at the National Level: The Gacaca Jurisdictions of Rwanda*, 7 Y.B INT'L HUMANITARIAN L. 410, 418 (2004) (charting the minimum and maximum penalties for Category 1, 2, and 3 offenders).

166. See, e.g., Nessel, *supra* note 4, at 123 ("[I]t is essential that the punishment include less traditional aspects, such as paying for medical treatment for HIV or economic restitution. For women survivors of genocidal rape, medical treatment and economic assistance would be essential components of justice." (citation omitted)).

to the patriarchal system in the country, Rwandan rape survivors are left with little prospect of marriage, in addition to a lack of material resources, such as land or adequate housing.¹⁶⁷ Therefore, many rape survivors feel that “justice” afforded in the form of punishment for the crime is inadequate.¹⁶⁸ The crime itself affects the victim’s position in society, leaving the survivor essentially without any necessary and basic requirements to live.¹⁶⁹

Importantly, because many perpetrators raped women with the intent to not only destroy the female population, but also infect them with the HIV virus,¹⁷⁰ the lack of treatment afforded to rape survivors from gacaca is a major concern and criticism of the process.¹⁷¹ Gacaca does not begin to address a survivor’s lack of ability to financially afford treatment.¹⁷² Due to both the patriarchal nature of the country¹⁷³ and the ostracizing effect of the proceedings, the survivor is left without any realistic means to provide for themselves or maintain housing.¹⁷⁴ Many rape survivors justifiably feel that the gacaca courts’ inability to address these harms make the process unable to successfully eliminate “a culture of impunity, create a lasting peace, or contribute to reconciliation in the country.”¹⁷⁵

Ironically, while the rape survivors are left to die with the virus,¹⁷⁶ the perpetrators of the crimes are put into jail, clothed, housed, and treated. Granting reparations in gacaca for rape victims may assist in shifting this viewpoint. Such a shift would provide not only meaningful change in the field of women’s rights, but also the community’s trust in the process’s ability to reach communal interests and needs.

While gacaca laws have guaranteed a compensation fund to reward victims, no government action has been taken to create

167. Sarah L. Wells, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda*, 14 S. CAL. REV. L. & WOMEN’S STUD. 167, 195 (2005) (citation omitted).

168. *See id.* at 194 (positing that many women feel that the traditional justice system fails to address the harm suffered by women during the genocide).

169. *Id.* at 194-95.

170. *See, e.g.*, Françoise Nduwimana, *Women and Rwanda’s Genocide: What Goes Unsaid*, 14(2) LIBERTAS, Nov. 2004, at 1, available at <http://peacewomen.org/news/Rwanda/Dec04.genocide.html> (noting that on January 29, 1996, a U.N. report stated that the HIV positive militiamen used their HIV status as a “‘weapon, intending to cause delayed death’” (citation omitted)). Based on testimony from victims raped by men who told them things such as, “I have AIDS and I want to give it to you,” many women who have survived the genocide are now infected with AIDS. *Id.*

171. Wells, *supra* note 167, at 194-195 (“Of foremost concern to many female survivors is treatment for HIV/AIDS . . . resulting from wartime rapes. Many women believe there will not be justice until their health concerns are met and ask, ‘what good is truth or compensation if you are dying?’” (citation omitted)).

172. *See id.* (discussing that survivors have a lack of resources).

173. *Id.* at 195.

174. *Id.*; *see also* discussion *supra* Part IV (analyzing the ostracizing effects of gacaca).

175. Wells, *supra* note 167, at 194 (citation omitted).

176. Nduwimana, *supra* note 170, at 3.

one.¹⁷⁷ Furthermore, “[w]ithout providing victims with material benefits through compensation . . . , there exists little reason to invest in gacaca. Reconciliation remains possible for Rwandans; however, it is unattainable under the current gacaca system.”¹⁷⁸

In addition, a system of witness and victim protection in Rwanda must be implemented. The Rwandan community generally does not give high priority to women’s safety.¹⁷⁹ For women and witnesses alike, despite the 2004 Gacaca Law reform, which prohibits the threatening or intimidation of witnesses and victims planning on testifying in gacaca, such intimidation still keeps many from testifying at all.¹⁸⁰ Recommendations have even been made to the ICTR to increase protections for witnesses and victims through both anonymity during trial and, in some instances, relocation and the issuance of new identities after testimony is given.¹⁸¹ Such measures have not been taken by gacaca courts, despite the increasing numbers of retaliation against witnesses and victims alike.¹⁸² Unless there are increased protections for women testifying publicly in gacaca or for witnesses, who provide crucial evidence in the absence of legitimate and trustworthy direct testimony,¹⁸³ the gacaca proceedings will be essentially pointless in granting any sort of justice to rape survivors.

The above measures are necessary. They do, however, require that certain financial resources are available to implement them. In this instance, the international community needs to aid in the process. Rwanda is in a severe state of poverty, magnifying the problems associated with instituting justice and reconciliation.¹⁸⁴ While the ICTR budget, funded by the UN, is nearly \$246 million,¹⁸⁵ the budget for the gacaca court is a fraction of that amount, making the amount largely disproportionate to the ever-growing list of tasks and cases it is expected to try.¹⁸⁶ Created to take the burden off of the national courts

177. Sosnov, *supra* note 69, at 145.

178. *Id.*

179. Anderson, *supra* note 3, at 813.

180. STRUGGLING TO SURVIVE, *supra* note 118, at 28.

181. Eva Gazurek & Anne Saris, *The Protection of Women as Witnesses and the ICTR*, COAL. FOR WOMEN’S HUMAN RIGHTS IN CONFLICT SITUATIONS, http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/protectionofwitnesses_en.php (last visited Mar. 28, 2011).

182. See STRUGGLING TO SURVIVE, *supra* note 118, at 28 (highlighting that gacaca procedural guidelines fail to even expressly require judges and the authorities to keep the identity and information of victims and witnesses confidential).

183. See *id.* at 31 (detailing the significant challenges posed by inadequate and suspect evidence).

184. *Id.* at 10, 43 (discussing the barriers poverty places on reconciliation).

185. *General Information*, INT’L CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Apr. 1, 2011).

186. *Gacaca Courts*, CTR. FOR THE STUDY OF VIOLENCE & RECONCILIATION, http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=27&Itemid=60

and the ICTR,¹⁸⁷ this figure represents the barriers to effectively instituting proper justice for the victims it is intended to aid.

In terms of funding, the international community provides nearly all of the money used to maintain and build the judicial institutions in Rwanda.¹⁸⁸ Despite many foreign nations' acknowledgements of their duties to aid the war-torn country,¹⁸⁹ the sufficient aid needed to achieve the goals of reconciliation is lacking. With specific regard to the United States, and contrary to popular misconception, the budget for foreign aid is actually close to one percent.¹⁹⁰ Most Americans believe the figure is closer to twenty percent, which encourages the notion that this country is doing "enough."¹⁹¹ This figure is extremely low for a nation that boasts to be the wealthiest in the world. That small amount of money shared among the rest of the nations in need spreads quite thin per nation. Per survivor, the figure is, therefore, even lower.

In order to adequately do its job of restoring hope and justice to the Rwandan community, particularly rape survivors, the international community must aid the impoverished nation with funds.

CONCLUSION

It is undeniable that *Akayesu* has had a great impact on women's rights, particularly in the human rights realm, by recognizing rape as a crime against humanity.¹⁹² However, when up against a history and tradition of rape utilized as a warfare tactic,¹⁹³ the force behind the decision will only be realized by action supporting its legal conclusion. Particularly in developing countries, sexual shame associated with rape brings to the forefront the essential importance of bringing culturally sensitive proceedings against perpetrators in a timely fashion.¹⁹⁴ With the diminished social status of women and girls in developing countries,¹⁹⁵ the additional shame brought upon them as

(last visited Apr. 1, 2011) (citing the budget of the gacaca courts at \$1.03 million for 2007).

187. Sosnov, *supra* note 69, at 134.

188. *Rwanda: Gacaca Courts Get Under Way*, INTEGRATED REG'L INFO. NETWORKS (IRIN), <http://www.irinnews.org/report.aspx?reportid=32637> (last visited Apr. 1, 2011).

189. See Edwin Musoni & Gilbert Ndikubwayezu, *Rwanda: Country to Rely Less on Foreign Aid*, ALLAFRICA.COM (Feb. 15, 2009), <http://allafrica.com/stories/200902160856.html> (stating that, between 1994-2000, Rwanda relied completely on foreign aid following the genocide).

190. *Discussion: International Health Aid*, PBS.ORG, <http://www.pbs.org/wgbh/rxforsurvival/series/experts/aid.html> (last visited Apr. 1, 2011).

191. *Id.*

192. Nessel, *supra* note 4, at 105; Weinberg De Roca, *supra* note 74, at 74.

193. Nessel, *supra* note 4, at 131.

194. *Id.* at 103, 131.

195. See, e.g., E. Torun, *Socio-Economic Status of Women According to Development Levels of Countries and Structure in Turkey*, 5 AFR. J. AGRIC. RESEARCH 1154, 1154-55

a result of rape causes the already low status of women in those societies to plummet to almost non-existence. This further limits their opportunities for access to health care, education, and basic necessities required for survival.¹⁹⁶

While the modern recognition and understanding of warfare rape as a tool to humiliate and demoralize the enemy has solidified a hypothetical recognition of such an act as a crime against humanity, particularly in the post-Rwanda genocide era,¹⁹⁷ the current trend will relegate the recognition to indefinitely remain as theoretical and not tangible. To this effect, the transfer of rape crimes into informal communal proceedings compromises the progress made by the 1998 *Akayesu* decision.¹⁹⁸ While the reasons behind the transfer are practical and valid,¹⁹⁹ more must be done in order to safeguard the victims involved in the gacaca process.

Without such safeguards, the *Akayesu* decision will only exist as a needle in the haystack for the development of women's rights. While the stated goal of the transfer is to allow for community-wide involvement to facilitate the healing of a nation,²⁰⁰ the cultural respect paid to such communal proceedings casts aside the cultural practice of shaming, killing, or brutalizing women who publicly state their stories of rape in Rwanda.²⁰¹ Additionally, because sexual violence against women has increasingly become protracted in conflict settings, epitomized in the brutal stories stemming from the Rwandan genocide, the legal remedies, while potentially coupled with good faith efforts, may be insufficient to lead to any real relief for the victims.²⁰² To that end, even if it may not be feasible to require all rape proceedings to stay out of gacaca, a heightened sensitivity of the special problems rape survivors face, along with a re-structuring of the gacaca method must occur. Gender awareness training for judges, closed testimony hearings, and witness and victim protection would be simple, yet extraordinary steps to increase the safety of the victims in post-conflict settings.

Additionally, the model for damages should be modified in order to put the victims on a path to recovery. More specifically, rather than

(2010) (discussing the depressed socio-economic status of women in developing countries).

196. *Id.*

197. Nessel, *supra* note 4, at 128.

198. See discussion *supra* Part IV (discussing the negative impact of gacaca in post-genocide Rwanda).

199. See Ironside, *supra* note 106, at 47 (discussing the intended goals of gacaca).

200. Wells, *supra* note 167, at 176-77.

201. STRUGGLING TO SURVIVE, *supra* note 118, at 24-25, 28.

202. Dina Francesca Haynes, Professor, New Eng. Sch. of L., Address at the William & Mary Journal of Women and the Law Symposium: A Man's World? Challenges and Solutions as Women Take Center Stage in Global Theater (Feb. 27, 2010).

simply doling out punishments for the perpetrators, monetary reparations would be extremely effective in protecting the victims from the total and complete loss of housing or support.²⁰³ Because victims who go public with their stories often are disowned by their patriarchally-headed families,²⁰⁴ basic and necessary requirements to live become impossible to achieve.

Access to health care in Rwanda should also become a part of the damages model, as many of those attacked contracted HIV and have no financial means to care for themselves.²⁰⁵ To enable the creation of an adequate model of healing for victims of rape in Rwanda, the international community needs to provide funds to the impoverished nation. While there generally is widespread international support for post-conflict constitution-building,²⁰⁶ there is generally little tangible support and relief.

With a worldwide recognition of rape as an act of genocide comes the obligation to put force behind the notion, through both legal recognition and financial aid. Without any force behind *Akayesu's* recognition of rape as a war crime and the momentous mark it created for women's rights, the decision will stand for nothing.

BRITTANY A. OLWINE*

203. See Wells, *supra* note 167, at 194-95 (noting the criticism of female rape victims regarding the system's failure to provide financial relief).

204. *Id.* at 188-89.

205. Nduwimana, *supra* note 170, at 1, 3.

206. Haynes, *supra* note 202.

* J.D. Candidate 2011, William & Mary School of Law; B.A. 2005, Trinity College (Hartford, CT). I would like to thank my parents, Ed and Lee-Lee, for always believing in me and supporting all my endeavors. I would also like to thank Professor Nancy Combs for her guidance in developing this Note.

