

Rape as an Act of Genocide

A Feminist Interpretation of the Akayesu Judgement

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INTRODUCTION

Jean-Paul Akayesu's trial was the first time that the crime of genocide had been prosecuted under the Genocide Convention, and its judgement was the first to rule that rape and sexual violence could constitute genocide.¹ The judgement's analysis of the issue of genocidal rape served as the foundation for many developments in international law, such as the UN Security Council's Resolutions 1325² and 1820³ on women, peace, and security, which recognise the impact of armed conflict on women.

It is of utmost importance to adopt a feminist perspective when considering the issue of genocidal rape, as it is an issue that primarily affects women. Without such an analysis, women could not be afforded full legal protection in wartime. The entire concept of genocidal rape owes its existence to the development of feminist thought, as applied in the Akayesu trial, which recognised the severity of the crime and called for its prosecution.

Rape has always been part of war. In recent conflicts, the estimated numbers of rape victims have been shocking.⁴ Wartime rape features in Greek and Roman epics, the Bible,⁵ countless myths, and historical accounts of war. From the wars of Genghis Khan to the actions of the Soviet Red Army in Berlin, rape has undeniably been part of war for centuries. It is a powerful way to terrorise populations, with many destructive effects. Analysing the causes, consequences, and legal repercussions of wartime rape is vital when creating a more insightful legal framework for international criminal prosecution, and it is essential to a more comprehensive approach to warfare legislation.



50,000	women raped in Bosnia and Herzegovina
64,000	women raped in Sierra Leone
500,000	women raped in Rwanda

The stigma which has historically surrounded genocidal rape stems in part from an incomprehension of this serious form of violence, and this has contributed to the suppression of awareness and accountability.⁶ It is clear, after the Rwandan and Yugoslavian genocides, that we can no longer ignore the topic, as this silence only encourages the use of sexual violence as a tool of war.

¹ *The Prosecutor v Jean-Paul Akayesu (Trial Judgement)* [1998] ICTR-96-4-T (*Akayesu* (1998)).

² United Nations Security Council Resolution (UNSC Res) 1325 (2000) UN Doc S/RES/1325.

³ UNSC Res 1820 (2008) UN Doc S/RES/1820.

⁴ United Nations Department of Political Affairs, "Guidance for Mediators, Addressing Conflict-Related Sexual Violence in Ceasefire and Peace Agreements" (2012) fn 3.

⁵ Zechariah 14:2, Isaiah 13:16 King James Version.

⁶ Janie Leatherman, *Sexual Violence and Armed Conflict* (Polity Press 2011) 40.

To analyse the *Akayesu* judgement in a feminist light, this report will first consider the connections between patriarchy and wartime rape, as well as the effects of wartime rape. The following section will discuss the historical context of the Rwandan Genocide and then examine the *Akayesu* judgement and its interaction with the definition of genocide, and consider feminist theories with regard to genocidal rape. The remaining sections will discuss some of the issues not covered by the *Akayesu* judgement, such as HIV transmission, sexual mutilation, and forced impregnation. Finally, this report will consider whether the definition of genocide in conventions and treaties should be expanded to include rape as a genocidal act.

1. PATRIARCHY AND WARTIME RAPE

Rape in armed conflict can be thought of as a result of the social and cultural influences of patriarchal societies. Historically in war, the ‘taking’ of women was considered as an invading soldier’s right, as women were the spoils of war, part of their prize.⁷ Abducting and enslaving women for sexual purposes was even encouraged by superiors.⁸ In patriarchal societies, women were seen as property which could be taken from the conquered. Wartime rape was (and in many instances, still is) seen not only as an attack against women but also as an assault on the honour of men, proving their inability to protect ‘their’ women.⁹ Feminism challenges this traditional perception of rape as a violation of the property rights of the husband rather than a violation of the woman’s human rights.¹⁰

Feminists such as Gerda Lerner also question interpretations which claim that “human nature” is responsible for rape in conflict situations, arguing instead that “[wartime rape] is a practice built into and essential to the structure of patriarchal institutions and inseparable from them”.¹¹ Militaries, largely masculine and patriarchal institutions, determine and strengthen hierarchies of power, reinforce and re-create gender relations and patriarchy, and legitimise violence as a way of solving conflict.¹² Furthermore, the increased militarisation of society “calls on patriarchal values and mechanisms of domination and control, heightening hierarchical relations between men and women and equating constructions of masculinity with violence”.¹³ These patriarchal hierarchies and values interact and intersect with the militarisation of society, fuelling the construction of gender relations which underlie wartime rape. Such patriarchal attitudes interact with the increased opportunities afforded by the context of conflict to rape with impunity, ultimately leading to wartime rape.¹⁴

⁷ United Nations Division for the Advancement of Women, Department of Economic and Social Affairs, ‘Sexual Violence and Armed Conflict: United Nations Response’ (April 1998).

⁸ Division 42 - Governance and Democracy, Sector Project against Trafficking in Women, ‘Armed Conflict and Trafficking in Women; Desk Study’(2004) 13-14.

⁹ Nancy Farwell, ‘War Rape: New Conceptualizations and Responses’ (2004) 19 *Affilia* 4, 395; Jonathan Gottschall, ‘Explaining Wartime Rape’ (2004) 41 *Journal of Sex Research*, 395; Susan Brownmiller, *Against Our Will* (Fawcett Colombine, 1975) 38.

¹⁰ Vanessa Farr and Kiflemariam Gebre Wold, ‘Gender Perspectives on Small Arms and Light Weapons: Regional and International Concerns’ (2002) Bonn International Centre for Conversion.

¹¹ Gerda Lerner, ‘The Creation of The Patriarchy’ (1987 Oxford University Press).

¹² Nancy Farwell, ‘War Rape: New Conceptualizations and Responses’ (2004) 19 *Affilia* 4, 394.

¹³ *Ibid.*

¹⁴ Gavin S Vance et al. ‘Inevitable or Preventable? The Biosocial Theory of Wartime Rape’ (2024) *Evolutionary Psychological Science*, 4. See also Susan Brownmiller, *Against Our Will* (Fawcett Colombine, 1975) 32.

Jonathan Gottschall contests this, noting how widespread the phenomenon is and mentioning the long history of rape in armed conflict.¹⁵ He argues that under this feminist theory, rape in war can only occur in Western, patriarchal societies, which he states history has shown to be untrue. However, taking a broader view, the vast majority (if not all) of the cases of rape in armed conflict throughout history occurred in patriarchal societies. Gottschall's examples of the "timeless uniqueness" of sexual violence in war include accounts taken from the Torah, Homer, Anglo-Saxon chronicles, and the rape of the Sabine women, all accounts coming from inherently patriarchal societies. It must also be emphasised that there have been many conflicts where rape has been relatively infrequent. For comparison, there were 29 reports of rape during the 12-year civil war in El Salvador.¹⁶

Specifically with regards to rape during ethnic conflicts, it should be highlighted that women in patriarchal societies play a major role in constructing and defending ethnic and nationalist identity, protecting the honour of their community through marriage and cultural practices that maintain a pure lineage and pure ethnic-cultural identity.¹⁷ Rape and sexual violence during ethnic conflict are therefore strategies for infiltrating or destroying these boundaries, and the selective targeting of women is indeed based on patriarchal constructions of the role of women in society.

*The idea of rape as a method of ethnic cleansing [...] represents a deep patriarchal construction: women as objects, as passive recipients of men's seeds who add nothing original to it. In this view, the identity of the child depends only on men [...].*¹⁸

The patriarchal influence upon society is far-reaching. Women are less likely to report sexual violence due to the stigma it provokes, they are less likely to get treatment for HIV, and they are more likely to reject any children born of their rape. In Rwanda, these effects were deeply felt.

¹⁵ Jonathan Gottschall, 'Explaining Wartime Rape' (2004) 41 Journal of Sex Research.

¹⁶ Gavin S Vance et al. 'Inevitable or Preventable? The Biosocial Theory of Wartime Rape' (2024) Evolutionary Psychological Science, 3.

¹⁷ Nancy Farwell, 'War Rape: New Conceptualizations and Responses' (2004) 19 Affilia 4, 395.

¹⁸ Nikolic-Ristanovic, 'Living without democracy and peace: Violence against women in the former Yugoslavia' (1999) Violence Against Women, 5(1), 78.

1.1 EFFECTS OF WARTIME RAPE

Rape has undeniable long-term physical, psychological, and social consequences. When it comes to the effects felt by survivors in Rwanda, the UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy, listed trauma, sexual apathy or promiscuity, substance abuse, depression, psychosomatic ailments, anger, loss of sense of womanhood, and confusion about one's identity.¹⁹ Rape survivors became social outcasts, as culturally, women symbolise the honour of the group. After the genocide, they became "damaged goods, living symbols of a nation's humiliation and bearers of 'enemy' children".²⁰ The severe stigma surrounding women who have been raped in this traditional society, coupled with their victimisation, is referred to as a "second rape" by Lisa Sharlach.²¹ Their family and community may even have viewed them as having been complicit in the crime. "From society's point of view there is little sympathy, for at the moment that men and children died without defence, these women used the sex card, 'selling their bodies' to save their lives".²² This highlights the patriarchal nature of Rwandan society, as women, once raped, no longer had any value, and their community regarded them as being broken.

Trauma
Sexual apathy or promiscuity
Substance abuse
Depression
Psychosomatic ailments
Anger
Loss of sense of womanhood
Confusion about one's identity

2. THE RWANDAN GENOCIDE

Rwanda was colonised by Germany in 1897 and administered by Belgium from 1917, though it was ruled through official representatives coming from the Tutsi nobility.²³ The Tutsi had access to better education and job opportunities under Belgian rule, fostering resentment amongst the Hutu, who were an 85 percent majority.²⁴ However, the distinction between the Hutu and the Tutsi was quite fluid; individuals moved from one status to the other. This changed in 1933 when authorities introduced mandatory identity cards mentioning the ethnicity of the holder, creating a permanent ethnic division between the two.

¹⁹ United Nations High Commission on Human Rights, 'Fundamental Freedoms: Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy: Addendum Report of the Mission to Rwanda on the Issues of Violence against Women in Situations of Armed Conflict' (1998) UN ECOSOC E/CN.4/1998/54/Add.1.

²⁰ Vanessa Farr and Kifleariam Gebre Wold, 'Gender Perspectives on Small Arms and Light Weapons: Regional and International Concerns' (2002) Bonn International Centre for Conversion.

²¹ Lisa Sharlach, 'Rape as Genocide: Bangladesh, The Former Yugoslavia, And Rwanda' (2000) 22 New Political Science.

²² Felicite Umutanguha Layika, "War Crimes Against Women in Rwanda," in Niamh Reilly (ed.), *Without Reservation: The Beijing Tribunal on Accountability for Women's Human Rights* (New Brunswick: The Centre for Women's Global Leadership 1995) 38.

²³ This was most likely born of racial considerations, linked to the height and skin colour of the Tutsi.

²⁴ About 85 percent of the country's population was Hutu, with 14 percent being Tutsi, and 1 percent being Twa. Outreach Programme on the 1994 Genocide against the Tutsi in Rwanda and the United Nations
<<https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml>> accessed 18 April 2024.

After the Rwandan Revolution in 1961, which saw the transition to a Hutu-led republic, many Tutsi fled to neighbouring countries.²⁵ Some of these Tutsi in Uganda formed the Rwandan Patriotic Front (RPF), under Paul Kagame, with the goal of overthrowing Rwandan president Juvenal Habyarimana. After months of unrest, negotiations, and a weak peace accord in August 1993, Habyarimana's plane was shot down on April 6th, 1994. This provoked the presidential guard in Kigali to immediately begin setting up blockades around the city; opposition leaders were murdered, and the slaughter of Tutsis and moderate Hutus by Interahamwe²⁶ and the Rwandan Armed Forces (RAF)²⁷ began almost instantly. The conflict was fuelled by government propaganda which exaggerated perceived differences between Tutsi and Hutu and dehumanised the Tutsi, spreading throughout the country usually by way of radio broadcast.²⁸ From April 7th to July 15th of 1994, up to a million people were killed. It is estimated that there were between 250,000 and 500,000 rapes during that time.²⁹ In certain regions, virtually all the surviving women had been raped.

3. THE AKAYESU JUDGEMENT

Jean-Paul Akayesu was the Hutu *bourgmestre*³⁰ of his native commune of Taba in Rwanda. On September 2nd, 1998, the International Criminal Tribunal for Rwanda (ICTR)³¹ found him guilty on nine counts, including genocide and crimes against humanity.

Rape was not one of the original charges brought against Akayesu. When witnesses began to testify about the sexual assaults which took place in Taba, there was pressure from human rights groups such as SEVOTA and activists such as Binaifer Nowrojee to amend the indictment to include sexual assault among the charges.³² The Tribunal therefore faced the challenge of determining to what extent sexual assault could constitute genocide, one of the most serious international crimes.

Under the new indictment, Akayesu was accused of having “facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence [...] to occur on or near the Bureau Communal premises”,³³ as “[b]y virtue of his presence, by failing to prevent the violence, he encouraged these activities”.³⁴

²⁵ Burundi, Uganda, Tanzania.

²⁶ Roughly translated as ‘Those who fight together’ in Kinyarwanda.

²⁷ The Rwandan government’s military.

²⁸ Matthew Lower and Thomas Hauschildt, ‘The Media as a Tool of War: Propaganda in the Rwandan Genocide’ (2014) 2 Human Rights and Conflict Resolution 1.

²⁹ Special Rapporteur of the Commission of Human Rights, *Report on the Situation of Human Rights in Rwanda* (1996) E/CN.4/1996/68.

³⁰ A similar role to that of a mayor.

³¹ The International Criminal Tribunal for Rwanda was set up in 1994 to prosecute genocide, crimes against humanity and violations of Common Article 3 of and the Additional Protocol II of the Geneva Conventions during the Rwandan genocide. UNSC Res 955 (1994) UN Doc S/RES/955.

³² Diane Marie Amann, ‘Prosecutor V. Akayesu. Case ICTR-96-4-T’ (1999) 93 The American Journal of International Law.

³³ Akayesu’s Office as *Bourgmestre*.

³⁴ *Akayesu* (1998) 12B.

Akayesu testified in his defence that he did not commit, order, or participate in any of the alleged sexual violence. He claimed that he was helpless to prevent the genocide, and that he had no authority once the massacres had become more widespread. He argued that if even General Dallaire, in charge of the United Nations Assistance Mission for Rwanda (UNAMIR) and 2,500 troops, couldn't prevent the genocide, he could not do any better. He flatly denied that any rapes took place at the Bureau Communal and claimed that he was being used as a "scapegoat" as he was a Hutu *bourgmestre*.³⁵

The Tribunal rejected this defence, as based on the evidence, Akayesu certainly knew that sexual violence was taking place on or near the premises of the Bureau Communal, and he did not take any measures to prevent or punish these acts but instead ordered, instigated, or otherwise aided and abetted the sexual violence.³⁶ Several witnesses testified that due to the power and influence of his role as *bourgmestre*, he indeed had the capability of stopping the violence in Taba.³⁷ Akayesu was therefore sentenced to life imprisonment.³⁸

The *Akayesu* judgement was truly ground-breaking, as it was the first time it was ruled that rape and sexual violence may constitute genocide. Thus, it has allowed for the development of the prosecution of gender-based crimes in international law.

4. GENOCIDE DEFINITION AND ELEMENTS

Article 2 of the 1948 Genocide Convention defines genocide as:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.³⁹

In the *Akayesu* case, the Tribunal had to consider firstly whether the events in Rwanda in 1994 constituted a genocide, or if they were just part of the war between the RAF and the RPF. Specific intent is a requirement for the crime of genocide; that is, the wrongful acts

³⁵ *Ibid*, 35.

³⁶ *Ibid*, 452.

³⁷ *Ibid*, 180.

³⁸ *The Prosecutor v Jean-Paul Akayesu (Sentence)* (1998) ICTR-96-4-T.

³⁹ Prevention and Punishment of the Crime of Genocide, UN General Assembly (1948) 78 Treaty Series, 277.

must have been specifically targeted towards a particular group, and victims must have been targeted solely because of their association to that group. The Tribunal found that, considering the scale of the killings and violence, its systematic nature and its atrociousness, the massacres did indeed aim to destroy the Tutsi ethnic group. The majority of Tutsi victims were non-combatants (even children and foetuses were murdered) and were killed by civilians.⁴⁰ The Tribunal ultimately found that the acts of rape and sexual violence “reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process”.⁴¹ There was therefore a clear intent to commit genocide.

To understand how Akayesu, a *bourgmestre* of a small community, was convicted of genocide, one must consider the application by the Tribunal of the concept of individual criminal responsibility. Individual criminal responsibility was outlined in Article 6 of the Statute of the International Criminal Tribunal for Rwanda as:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime. [...]⁴²

Akayesu was found to be directly individually criminally responsible for genocide, by ordering, committing, or otherwise aiding and abetting in the preparation or execution of crimes against Tutsis. Genocidal intent was inferred from Akayesu’s acts and his words inciting the public to acts of genocide, from the systematic and deliberate selection of Tutsis as victims, and from the systematic rape of Tutsi women with the intent to bring about the destruction of that group.⁴³

4.1. GENOCIDAL RAPE

In conflict situations, gender-based violence often increases, becoming a tool of war. The systematic use of sexual violence and its cruelty can escalate to such an extent that it fits the definition of genocide in certain conflicts. Sexual violence is not explicitly included in the Genocide Convention as a genocidal crime, and therefore the Tribunal had to rely on the definition of genocide contained in the Convention to convict Akayesu. Furthermore, rape is not featured as an act of genocide in any other main instrument of international law, but the Geneva Convention IV explicitly prohibits wartime rape in international conflicts.⁴⁴

⁴⁰ *Akayesu* (1998) 128. See also *Akayesu* (1998) 732-733.

⁴¹ *Ibid.*

⁴² Statute of the International Criminal Tribunal for Rwanda, UN Security Council (1994).

⁴³ *Akayesu* (1998) 731-734.

⁴⁴ Article 27 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949) ICRC.

4.2. GENOCIDAL RAPE IN AKAYESU

In Akayesu's trial, rape was only specifically mentioned in the charges for crimes against humanity, and it was defined there as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. This focus on the general concept of rape rather than the clinical detail which is more common in rape definitions underlines the Tribunal's aim to give even the most vulnerable victims the full protection of international law.⁴⁵

Many of the sexual assaults were planned battlefield tactics of genocide.⁴⁶ The context of a military group fosters conformity and obedience, and where leaders encouraged rape, men obliged. Victims were often made to strip and walk naked, which was a method of shaming the victim, their families, and their communities.⁴⁷ Many people were forced to watch their family members being raped and murdered, with numerous rapes being carried out in gangs.⁴⁸ The victims were considered to be less than human, and were dehumanised by perpetrators, being referred to as "cockroaches" ("Inyenzi").⁴⁹

In the context of rape as a battlefield tactic, the question arises as to whether there are any similarities in the rapes which take place during conflict and those that occur in peace time. Does wartime rape purely stem from the desire for power over another? Is this type of rape then purely political or genocidal?

For Alexandra Stiglmayer, rape in war is akin to rape in peace, as it is a crime coming from a man's desire to exert dominance over a woman. It is a question of power, violence, and strategy.

[...] A rape is an aggressive and humiliating act, as even a soldier knows, or at least suspects. He rapes because he wants to engage in violence. He rapes because he wants to demonstrate his power. He rapes because he is the victor. He rapes because the woman is the enemy's woman, and he wants to humiliate and annihilate the enemy. He rapes because the woman is herself the enemy whom he wishes to humiliate and annihilate. He rapes because he despises women. He rapes to prove his virility. He rapes because the acquisition of the female body means a piece of territory conquered... He rapes because war, a man's business, has awakened his aggressiveness, and he directs it at those who play a subordinate role in the world of war.⁵⁰

Genocidal rape was a tactic which suited the Rwandan *génocidaires*, as due to the shame and stigma surrounding rape, women would be less likely to file charges, making

⁴⁵ Diane Marie Amann, 'Prosecutor V. Akayesu. Case ICTR-96-4-T' (1999) 93 *The American Journal of International Law*.

⁴⁶ Rachel Sitkin, 'To Destroy a People: Sexual Violence as Genocide during Conflict' (2017) Senior Honours Thesis, 17.

⁴⁷ Binaifer Nowrojee, 'Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath' (1996) Human Rights Watch.

⁴⁸ Rachel Sitkin, 'To Destroy a People: Sexual Violence as Genocide during Conflict' (2017) Senior Honours Thesis, 24.

⁴⁹ Binaifer Nowrojee, 'Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath' (1996) Human Rights Watch.

⁵⁰ Alexandra Stiglmayer, *Mass Rape: The War Against Women in Bosnia-Herzegovina* (University of Nebraska Press 1994) 82-169.

investigations less likely. It was therefore a highly efficient way of destroying an ethnic group. “Sexual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself”.⁵¹ It was used to humiliate and to sow fear, and in a patriarchal system such as Rwanda, it undermined the stability of the entire community. Victims of rape were no longer desirable as wives, and they were left to look after mixed-ethnicity children in a society which had completely rejected them.

All over Rwanda, hundreds of thousands of Tutsi women were obliged to endure sexual violence and rape, often repeatedly and in public. A witness at the *Akayesu* trial testified that “each time you encountered attackers, they would rape you”,⁵² and that “rape was the rule and its absence was the exception”.⁵³ The corpses of raped victims were sometimes “left spread-eagled in public view, as a reminder of the brutality and power of the genocide’s perpetrators”.⁵⁴

Rape was the rule and its absence was the exception

Clearly, rape was used as a political weapon during the Rwandan genocide, with the majority of the assaults targeting Tutsi women. The mass rapes were made a public spectacle, and victims were raped and murdered in places they sought refuge.

In Taba, violence happened inside or near the Bureau Communal, and Akayesu was sometimes present while the rapes took place. He was witnessed encouraging those acts, telling the Interahamwe to “never ask me again what a Tutsi woman tastes like”.⁵⁵ The Trial Chamber ruled that his presence and his words constituted tacit encouragement to the rapes.⁵⁶

In the opinion of the Trial Chamber, “rape and sexual violence constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy in whole or in part, a particular group, targeted as such”.⁵⁷ They refused any defence based on consent, as implied consent is “inapplicable in any circumstances of genocide, crimes against humanity or war crimes”.⁵⁸ Rape is one of the most destructive means of inflicting harm upon someone, as they suffer from both serious bodily and mental harm. This, along with the fact that the sexual violence was targeted solely towards Tutsi women with the goal of humiliating and mutilating them, led to a physical and psychological destruction of

⁵¹ *Akayesu* (1998) 732.

⁵² *Ibid*, 421.

⁵³ Special Rapporteur of the Commission of Human Rights, *Report on the Situation of Human Rights in Rwanda*, (1996) E/CN.4/1996/68.

⁵⁴ Sandra Ka Hon Chu and Anne Marie de Brower, 'Rwanda Genocide Victims Speak Out' (Herizons Winter 2009) Herizons Winter.

⁵⁵ *Akayesu* (1998) 706.

⁵⁶ *Ibid*, 705.

⁵⁷ *Ibid*, 731.

⁵⁸ Odio Benito, 'Sexual Violence as A War Crime' (2005) *The New Challenges of Humanitarian Law in Armed Conflicts*.

not only the victims, but of their community, contributing to the devastation of the entire group.

This genocidal aspect of the rapes is in complete opposition to the “pressure cooker” theory, which claims that the chaos of war simply encourages men to express their sexual feelings and desires, and that rape in armed conflicts is coincidental.⁵⁹ For example, Gottschall believes that there is a fear of accepting that rape in war could be a question of human nature and not of politics, as we would then be powerless to fight it, and the grim reality of human nature is difficult to accept.⁶⁰ This accompanies the perception that implicating a biological factor in rape mitigates the culpability of the perpetrator, insinuating that he has no control over his biological impulses. This theory of wartime sexual violence as being due to the biological need for sexual release, interacting with the stress and chaos of armed combat, ignores the coordinated nature of sexual assaults in the genocides in Rwanda (and the former Yugoslavia, for instance). There, the sexual violence was organised, as opposed to the “opportunistic and retaliatory” rapes seen in Berlin during World War II, for example.⁶¹

Rape in Rwanda was used as a method of extermination. It was meant as a massacre, a forced exile, and a spectacle, ultimately intended to shatter a society and destroy a people.⁶² While the sexual violence was not as systematic as in Bosnia and Kosovo, it was widespread throughout the country, advocated for, and organised by military and political leaders such as Akayesu. Even though genocidal rape is defined as a systematically organised military tactic of terror and genocide,⁶³ the rapes in Rwanda were still considered by the ICTR as genocidal in nature. It was not only the rapes in themselves which were genocidal, however. The intentional transmission of HIV, sexual mutilation, and forced impregnation were also crimes with genocidal intent.

5. HIV

One particular aspect of the use of sexual assault in the Rwandan genocide, which maybe ought to have been considered in the *Akayesu* judgement, was the deliberate transmission of HIV. An estimated 70 percent of the survivors of the rapes in Rwanda tested positive for HIV.⁶⁴ The *génocidaires* actively recruited HIV-infected men to inflict a slow, inescapable death on their victims as treatment for HIV was expensive and difficult to obtain.⁶⁵

⁵⁹ Jonathan Gottschall, 'Explaining Wartime Rape' (2004) 41 Journal of Sex Research.

⁶⁰ *Ibid.*

⁶¹ Christopher W Mullins, 'We Are Going to Rape You and Taste Tutsi Women': Rape During The 1994 Rwandan Genocide' (2009) 49 British Journal of Criminology.

⁶² Catharine MacKinnon, 'Rape, Genocide and Women's Human Rights' (1994) Harvard Women's Law Journal.

⁶³ Christopher W Mullins, 'We Are Going to Rape You and Taste Tutsi Women': Rape During The 1994 Rwandan Genocide' (2009) 49 British Journal of Criminology.

⁶⁴ Sandra Ka Hon Chu and Anne Marie de Brower, 'Rwanda Genocide Victims Speak Out' (2009) Herizons Winter.

⁶⁵ Medical Action: “Marked for Death”- Rape Survivors Living with HIV/AIDs in Rwanda (2004) Amnesty International AFR 47/11/2004.

I was raped by two gendarmes... One of the gendarmes was seriously ill, you could see that he had AIDs, his face was covered with spots...he had abscesses on his neck. Then he told me “take a good look at me... I could kill you right now but I don’t feel like wasting my bullet. I want you to die slowly like me.”

*Textbox.*⁶⁶

The transmission of HIV could certainly have genocidal intent, although this can be difficult to definitively prove. The stigma associated with HIV stands in the way of truly being able to assess the extent of the issue, and it makes it difficult to link the sexual assaults that took place during a genocide and a future diagnosis of HIV. Is the transmission deliberate, or is it simply coincidental? Due to the violent nature of rape, which often inflicts internal injuries, the transmission of HIV is more likely, and this may be partly why the numbers of HIV-infected victims were so high.

6. SEXUAL MUTILATION

Another crime often committed during the Rwandan genocide was sexual mutilation in the aftermath of rape: removing breasts or penises, or mutilating vaginas with machetes was common.⁶⁷ This clearly had genocidal intent, as the victims would often no longer be able to have children, or in many cases, intercourse.⁶⁸ Binaifer Nowrojee recounted the story of a woman who had been gang raped, and her assailants cut off the outer part of her vagina with a pair of scissors and displayed it on a stick.⁶⁹ In certain cases, women had to have reconstructive surgery after genital mutilation, but once again due to stigma and the lack of proper medical facilities, many victims did not receive the assistance they needed.

It is obvious that during the Rwandan genocide, sexual mutilation, similarly to rape, could not stem from sexual desire. This mutilation confirms the genocidal nature of the sexual violence in Rwanda, and therefore the issue of sexual mutilation demands the same attention as any other act of genocide.

⁶⁶ Francoise Nduwimana, “The Right to Survive: Sexual Violence, Women and HIV-AIDS” (2004) Canada International Centre for Human Rights and Democratic Development.

⁶⁷ Christopher W Mullins, 'We Are Going to Rape You and Taste Tutsi Women': Rape During The 1994 Rwandan Genocide' (2009) 49 British Journal of Criminology.

⁶⁸ Binaifer Nowrojee, 'Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath' (1996) Human Rights Watch.

⁶⁹ Michele Mitchell and Nick Louvel, *The Uncondemned* (2016) at 16:50.

7. FORCED IMPREGNATION AND CHILDREN BORN OF RAPE

The question of forced impregnation was given attention after the genocide in the former Yugoslavia. This crime is separate from the crime of rape, but both may constitute genocide.⁷⁰ In Rwanda, unlike in Yugoslavia, the rapes were not specifically aimed at changing the ethnic composition of the group through forced pregnancies. On this issue, Siobhan Fisher argues that not all forms of rape constitute genocide, and that the establishing factor is instead forced impregnation.⁷¹ This view that only forced impregnation, creating children of a different ethnicity to the mother, can be genocidal, does not account for the rapes of children, the elderly, or those unable to reproduce. The *Akayesu* judgement clarifies that these, too, can be genocidal, as they reflect the attackers' intentions to destroy the group.

There were between 5,000 and 10,000 children born of rape and forced impregnation during the Rwandan genocide.⁷² As Rwanda is a patriarchal society and lineage is therefore determined by the father, many children born of Interahamwe fathers were rejected. Some women resorted to illegal abortions, suicide, or infanticide.⁷³ Of these “*enfants mauvais souvenir*”,⁷⁴ an estimated 80 percent were abandoned by their mothers.⁷⁵

She yelled and kicked during two hours of labour, hoping her heart would stop, her soul would drift away and she and her infant would pass to a world where they could live in peace... Her pregnancy was not conceived in love, or in a casual encounter.

Textbox.⁷⁶

8. POSSIBLE LEGAL DEVELOPMENTS ON GENOCIDAL RAPE

While the *Akayesu* judgement paved the way for future law on the issue of genocide and rape, at the time there was no thought of incorporating sexual violence into the acts of genocide as defined in the Genocide Convention. This would be a remarkable step forward in the recognition of the severity of the crime and a stark reminder of its consequences.

⁷⁰ Siobhan K Fisher, 'Occupation of The Womb: Forced Impregnation as Genocide' (1996) 46 Duke Law Journal.

⁷¹ *Ibid.*

⁷² R. Charli Carpenter, *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press, 2007) 40- 47.

⁷³ Binaifer Nowrojee, 'Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath' (1996) Human Rights Watch.

⁷⁴ The children of bad memories, a term used to reference these children.

⁷⁵ Judith Matloff, 'Rwanda Copes with Babies of Mass Rape' (1995) Christian Science Monitor.

⁷⁶ R. Charli Carpenter, *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press, 2007) 40- 47.

Genocidal rape does not just cause serious bodily or mental harm, it is not only an imposed measure intended to prevent births, it does not simply deliberately inflict upon the group conditions of life calculated to bring about its destruction. It is an amalgamation of all these categories of genocide, encompassing a vast range of consequences, intentions, and results, and the definition of genocide should reflect this.

To counter this, Rhonda Copelon claims that treating genocidal rape separately would indicate that the courts do not consider non-genocidal rape as a crime of equal magnitude.⁷⁷ Of course, rape is destructive, regardless of whether it happens during a genocide or not. However, it could be argued that the crimes of rape and of genocidal rape have different intent requirements, differentiating the two and therefore bypassing the issue raised by Copelon.

Kelly D. Askin calls for an international treaty which would directly address the treatment of women during armed conflict. It would specifically criminalise gender-based violence, or crimes which are directed towards women or disproportionately affect them.⁷⁸ This would ensure legal equality between gender-based crimes and those more traditionally thought of as war crimes. A proper discussion and legal analysis of forced impregnation and the transmission of HIV in conflict situations would precede such a treaty, further clarifying the law, and thus ensuring the full protection of the female victims of conflict. Catharine MacKinnon suggests abandoning traditional legal categories entirely and restructuring international and national legal systems to include women's interests in order to effectively deal with gender-based violence. She points out that legal training often turns women into perpetrators of the system and that even feminist legal thinkers are therefore only concerned with small changes rather than the reshaping of the system as a whole.⁷⁹

⁷⁷ Rhonda Copelon, 'Women and War Crimes' (1994) 69 St. John's Law Review.

⁷⁸ Kelly D. Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav And Rwandan Tribunals: Current Status' (1999) 93 The American Journal of International Law.

⁷⁹ Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987).

CONCLUSION

Faced with the atrocity of the rapes in Rwanda, the Tribunal in *Akayesu* had to include a new crime in the definition of genocide. There were several factors contributing to the efficacy of rape as a tool of genocide, such as the perception of women as property in the patriarchal society of Rwanda, and the enduring harm which rape inflicts physically, psychologically, and socially, all aspects recognised by a feminist analysis on wartime rape.

As clearly demonstrated by the *Akayesu* judgement, rape was used with the intention of committing genocide. It is critical to recognise that sexual desire played no part in the horrific nature of the violence. Rape was meant to instil fear and destroy the Tutsi ethnic group. The shame and stigma felt by the victims was worsened by the deliberate transmission of HIV and the sexual mutilation that took place all over Rwanda. The children born of these rapes were reminders of the genocide, and also bear this generational trauma.

Sexual violence in conflict is primarily aimed at women. A group whose issues have traditionally been ignored by international law, this is partly why genocidal rape had never truly been examined before the *Akayesu* case. There was a hope that the judgement would bring about new developments in women's rights, and that their victimisation would be fully recognised. In the past, rape was not seen as serious enough of a crime to warrant much attention, it was instead an expected aspect of war. This perception has gradually changed, and with the *Akayesu* case, wartime rape has become legally unacceptable and unjustifiable.

The genocidal rapes in Rwanda demonstrated the desperate need for specific legal recognition of the crime. While the *Akayesu* case was innovative and forward-thinking in prosecuting rape as genocide, feminists such as Askin now call for a treaty which would consolidate and clarify all the international law on the topic of the treatment of women during armed conflict. This would legally and symbolically reflect the severity of gender-based crimes. Unfortunately, while women are offered protection under international humanitarian law, complete protection, especially in conflicts which take place in patriarchies and where women are primarily targeted, could never be guaranteed without some form of international treaty on the matter. This would be easier to accomplish than a complete reform of the existing international legal framework, which MacKinnon proposes.

Lastly, it is unfortunately evident that African women have been consistently perceived as being “utterly helpless”.⁸⁰ This racist, sexist, and demeaning view permeates the culture surrounding international law, where African women's voices are disregarded in favour of the “expert” view. The *Akayesu* judgement managed to challenge these perceptions, by acknowledging the severe consequences of genocidal rape, and especially by listening to the voices of female witnesses⁸¹ and local activists.⁸² Some hope is permitted here, as Rwanda

⁸⁰ Binyavanga Wainaina, 'How to Write About Africa' (Granta 2005).

⁸¹ Cecile Mukarugwiza, Witness OO. Serafina Mukakinani, Witness NN. Victoire Mukambanda, Witness JJ.

⁸² SEVOTA, Godelieve Mukasarasi.

now has the highest representation of women in national parliament in the world.⁸³ Changing Akayesu's indictment to include sexual assault was a bold move in itself.

In Navanethem Pillay's⁸⁴ words,⁸⁵

From time immemorial, rape has been regarded as spoils of war. Now it will be considered a war crime. We want to send out a strong message that rape is no longer a trophy of war.

⁸³ 61.3 percent in 2024. Inter-Parliamentary Union <<https://data.ipu.org/women-ranking?month=1&year=2024>> accessed 14 April 2024.

⁸⁴ Served as judge in *Akayesu's* trial, served as UN High Commissioner for Human Rights 2008-2014.

⁸⁵ Navanethem Pillay, quoted by Professor Paul Walters (2005), 26 September 2006, archived at the Wayback Machine <https://web.archive.org/web/20060926231120/http://www.ru.ac.za/academic/graduation/addresses_and_citations/2005/Judge_Pillay_citation.doc> accessed 14 April 2024.

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