

Injustice after sexual violence:

Problems in Practice at the International Criminal Tribunal for Rwanda

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A million people were killed and up to half a million women were raped during the genocide in Rwanda, from April to July 1994, according to recent estimates.¹ Following the assassination of President Juvénal Habyarimana on 6 April, extremist Hutu politicians and military leaders sought to eliminate all Tutsis and any Hutu opponents, mobilising the army, the Forces Armées Rwandaises (FAR), militia groups, and ordinary civilians to murder Tutsi men and destroy women (see Prunier, 2002; Mamdani 2002). Tutsi women and girls of all ages were targets of sexual violence, frequently they were raped repeatedly or forced into sexual slavery as the price of survival (African Rights 2004; Human Rights Watch 2004; Nowrojee 1996). Sexual violence was encouraged by national and local leaders; it was part of a political strategy to destroy the Tutsis as a group (Nowrojee 2005:2). Some were left pregnant with the child of their rapist; many were infected with HIV, sometimes deliberately (Whiteside et al 2006). “Survivors report that Hutu men diagnosed with HIV raped Tutsi women during the civil war, then told the women that they would die slowly and gruelingly from AIDS” (Sharlach, 2000:99). One study showed that 70% of genocide survivors were HIV positive (Krug et al. 2002). Over the 15 years since the genocide, some victims died from infections, others committed suicide, while most suffered persistent illnesses, social stigma, trauma and deprivation (African Rights, 2004; Hamilton, 2000).

Despite substantial evidence of mass rape and sexual cruelty in Rwanda, the question of how to deliver justice for its survivors was given remarkably little consideration at the inception of the International Criminal Tribunal for Rwanda (ICTR). Initially there was a failure to include sexual

crimes on indictments. When victims were eventually called to testify, they were given limited support; they were subject to intense, sometimes inappropriate questioning, and were left feeling marginalized and humiliated (Nowrojee, 2005). It was not until 2005 that greater priority was given to the prosecution of sexual violence (Møse, 2005: 935). Since then, the Office of the Prosecutor (OTP) has acknowledged, and promised to address past errors and omissions (Warren, 2008). However, with the deadline for the closure of the ICTR scheduled for 2010, time is short and the workload remains heavy (UNSC 2009). In this context, and with the work of the International Criminal Court (ICC) in view, it is essential to evaluate the nature and effects of the prosecution of sexual violence at the ICTR and to understand how and why mistakes were made.

This article begins with an outline of the work of the ICTR and the sexual violence jurisprudence that has emanated from it. We identify and examine an apparent reluctance on the part of the Tribunal to confront the challenges of prosecuting rape and provide adequate support to its victims. We look at flaws in institutional practices, revealed in interviews with ICTR staff,² and at the nature of the courtroom experience from the perspective of victims of sexual violence. Among other questions, we consider whether witnesses and potential witnesses received adequate support and protection before, during and after testifying; whether and how HIV/AIDS affected the outcome of trials in the ICTR; and how survivors felt after participating in the process. Our analysis is based on interviews with key ICTR personnel, on documentary sources, including survivor testimonies gathered by human rights organisations, and on observations of trials.

We argue that the prosecution of rape and sexual violence has been undermined by inadequate procedures and insensitive treatment of the victims. In this regard, we support the conclusions of previous research (Nowrojee, 2005). We find that the problems at the ICTR are not simply due to ignorance; individual staff have been aware of a series of shortcomings in the prosecution of sexual violence and treatment of victims. But despite this understanding within the ICTR and strong criticisms coming from outside it, the institution did not respond either promptly or adequately.

A recent internal review indicated a shift in attitudes and a new commitment to reform (Warren, 2008). The lessons learnt at the ICTR are a step forward for international justice; it is to be hoped that they will benefit future victims of sexual violence. However, we point out that recommendations are not sufficient at this late stage in the justice process. Institutional learning cannot compensate for the treatment victims of sexual violence in Rwanda have experienced at the ICTR. For many, the reforms come too late, and for most, they are too little: the genocide trials have had their own painful costs and consequences.

2. THE LEGAL FRAMEWORK

The UN Security Council established the ICTR by Resolution 955 in November 1994, giving it jurisdiction to try acts of genocide, crimes against humanity, and violations of international humanitarian law committed in Rwanda and neighbouring states between 1 January 1994 and 31 December 1994 (ICTR 2006b; Nowrojee 1996). In part the ICTR was designed to respond to criticism of UN inaction during the genocide (Driscoll et al. 2004; Drumbl 2000; Fitzgerald 1997). Based in Arusha, Tanzania, it began work in 1995, focusing on the leading genocide suspects, many of whom had fled Rwanda³. By October 2009, it had completed 45 cases, convicting 32 and acquitting six of the accused, with seven appeals pending, 27 cases in progress and three awaiting trial (ICTR 2009).

The ICTR's statute lists rape as a crime against humanity and a violation of Common Article 3 of the Geneva Conventions of 1949 and of Additional Protocol II of 1977, along with other "outrages upon personal dignity" including enforced prostitution and indecent assault (UN 1994, Articles 3 & 4). Historically, there was an absence of international legal provisions dealing with such offences and a failure by international tribunals to prosecute them. The Fourth Geneva Convention of 1949 and the Additional Protocols to the Geneva Conventions, adopted in 1977, listed crimes of sexual violence as relevant to honour and dignity or "special respect", separate

from other crimes of violence (Farwell 2004, Additional Protocol I 1977: Art 76, Additional Protocol II 1977: Art 4, Gardam 1997:57,74). This had legally reinforced a prejudiced view of victims; it queried the 'honour' of the victim instead of the act (Lyth 2001:5). By the 1990s, there was still no international legal definition of rape. It took case law emanating from the ICTR, along with that of the International Criminal Tribunal for the former Yugoslavia, to give international sexual violence jurisprudence new life (Askin 2005).⁴

Although the ICTR represented progress in juridical terms, in practice its record on sexual violence prosecutions was disappointing. Sexual crimes were not given priority at the ICTR, indeed no such charges were included in the ICTR's first indictments. It was only half way through the trial of Jean-Paul Akayesu in 1998 that the issue came to attention as a result of spontaneous testimony given by a survivor, Witness H, who described how her six year old daughter was raped by three men in 1994. This was the first mention of sexual violence in the ICTR courtroom. The prosecution had not asked any of the scheduled witnesses about sexual violence, yet many were women explicitly targeted with the knowledge of the defendant. Witness H's testimony was the last before a fortuitous several month break in the trial calendar. On the instruction of the Tribunal's only female judge, Navanethem Pillay, the prosecution re-examined their case during the break and came back to trial with a new indictment including charges of sexual violence (Charlesworth and Chinkin 2000:232; Neuffer 2003; Nowrojee 1996).

In September 1998, Akayesu was found guilty of rape as a means of genocide and of rape as a crime against humanity (Askin 1999; Askin 2005). The Akayesu case was the first verdict of the ICTR and broke new ground by adopting a conceptual definition of the offence of rape (de Brouwer 2005:105-8 Hansen-Young 2005:480). The Chamber held that "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts." (ICTR 1998:para.597). Bearing in mind the context of the genocidal conflict within which sexual violence occurred, the definition of rape was said to be "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes

rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.” (ICTR 1998:para.598).

The judgment in the case of Akayesu was important for its radical approach to the definition of rape and for the precedent it set on the international legal stage (Hansen-Young 2005:484). In rejecting a mechanical definition of rape, the Chamber appeared to be responding to cultural sensitivities which make it problematic for victims to include physiological descriptions of sexual violence within their testimony (de Brouwer 2005:107,114, Hansen-Young 2005:486). By rejecting a consent-based model for the definition, the Chamber acknowledged the reality of the widespread and extreme sexual violence that takes place during conflict (Hansen-Young 2005:485, MacKinnon 2008:101-4). Crucially, “coercive circumstances need not be evidenced by a show of physical force” but “may be inherent in certain circumstances,” such as armed conflict or the military presence of threatening forces on an ethnic basis (ICTR 1998:para.688, MacKinnon 2006:943). This was the first ruling in which an international court punished sexual violence in a civil conflict and the first time that rape was recognized as an act of genocide and an act of torture (Lyth 2001). The judges also affirmed that mass rape can constitute a crime against humanity.

The ICTR’s broad conceptual definition of rape in Akayesu was an advance for victims of sexual violence (MacKinnon 2006, 2008). Yet, despite this definition, evidence of the systematic use of rape during the genocide, and pressure from women's organisations and the public (Askin 2005; Haffajee 2006; Ngendahayo 2000), the prosecution at the ICTR was reluctant to include rape in charges of genocide and torture in indictments (Askin 1999; MacKinnon 2006; Nowrojee 1996). Part of the problem was that the Akayesu precedent was not followed consistently. Post-Akayesu there were important convictions, including the cases of Musema (2000), Niyitegeka (2003) and Muhimana (2005) which reaffirmed the broad conceptual definition of rape. However, Semanza (2003), Kajelijeli (2003), Kamuhanda (2004) and Gacumbitsi (2006) appeared to focus on a restrictive mechanical and consent-based approach (de Brouwer 2005: 127), influenced by the

Kunarac decision from the ICTY in 2002 (Cole 2008:62) which held that rape is constituted by “penetration, however slight... without the consent of the victim” (ICTY 2002,para. 127).

This latter definition requires victim testimony of the biological manifestations of rape, exposing victims to “painful and humiliating questions which are not relevant in situations where force, coercion or coercive circumstances are present” (de Brouwer 2005:122), and can “lead to revictimisation.” (de Brouwer 2005:122, Hansen-Young 2005:491). Charges have gone unfiled at the ICTR partly because women are reluctant to testify and prosecutors are afraid that the evidence is not strong enough—in several cases, rape convictions have been overturned on appeal. Moreover, as we shall see, the experience of trial at the ICTR has costs for the victims of sexual violence.

3. SURVIVORS’ EXPERIENCES AT THE ICTR

This section of the article examines those costs. In particular, it presents, in context, the findings from qualitative interviews with ICTR professionals who either prosecute trials that include sexual violence charges or work closely with witnesses that have experienced sexual violence. The interviews explored witness testimony, witness support and protection, the impact of media pressure on support of witnesses, and the impact of sexual violence on the willingness and ability of witnesses to testify. Face to face, semi-structured interviews were conducted with high level officials from three branches of the ICTR; their anonymity is preserved here. Three interviewees were from the Office of the Prosecutor (OTP) and shall be referred to as Prosecutor 1 (male, North American, based in ICTR Arusha), Prosecutor 2 (male, African, ICTR Arusha), and Prosecutor 3 (female, North American, ICTR Arusha). Three interviewees were high level officials from Witness and Victim Support Services (WVSS) or the Office of the Registrar and shall be referred to Officer 1 (male, African, ICTR Kigali), Officer 2 (female, African, ICTR Arusha), and Officer 3 (female, African, ICTR Arusha). All interviews used the same topic guide; however, prosecutors were more informed about witness selection and testifying and the other

officers were more informed about witness support during and after trials. Interviews were conducted in both the ICTR Kigali office and the ICTR Arusha Tribunal in the offices of the interviewee and were all one-on-one interviews. Participants were first asked about their role in ICTR and how they came into contact with witnesses in order to ensure that interviews were conducted with people who would have first hand knowledge of the process of testifying for witnesses. All interviewees confirmed their role had regular direct contact with witnesses. The findings from the interviews are integrated with an analysis of secondary data, in the form of victims' statements about their experiences at the ICTR, drawn from reports by women's and human rights organisations.⁵ What the interviews reveal, and victim's statements confirm, is that staff at the ICTR have been aware of recurrent problems in the treatment of victims of sexual violence: both staff and victims concur that entrenched practices have consistently undermined the prospects for justice at each stage of the process. Below we detail the main themes that emerge from these interviews and secondary data.

THE STIGMA OF SEXUAL VIOLENCE

Before a case can come to court, the victims, and witnesses, must first be prepared to risk exposure to the social stigma associated with sexual violence in Rwanda (Amnesty International 2004; Logan 2006; Turshen and Twagiramariya 1998). Not only has this deterred women from volunteering information about sexual crimes, it has discouraged investigators from asking. Rape and sexual violence survivors feared, often with good reason, that family and neighbours would regard them as morally tainted, or even complicit in the genocide (Nowrojee 1996; Lyaike, in Sharlach 2000:99). Some worried about threats from perpetrators still living among them (Muhimakazi cited in Nowrojee 1996). Many concealed their trauma, they did not talk about being raped (Schiessl 2002) because they risked rejection by their husbands or being cast out of their homes for bringing shame upon the family: "It is unlikely that women who have been raped will admit it, much less file charges, because of the stigma that tends to be associated with rape"

(Sharlach 2000:90). A Rwandan survivor explains: "... genocide witnesses are viewed with suspicion and people fear associating with them because of fear of being identified with them. This problem is more severe for raped witnesses who are the most stigmatized witnesses," (Byakatonda 2004:40).

Prosecutors at the ICTR are conscious of the problem of stigma. All three of those interviewed agreed that shame was the main reason women did not want to talk about their experiences of sexual violence. Prosecutor 1 said "women fear their communities will assume they have been raped if they talk to us, so they don't talk." Yet it is also clear that the prosecutors' awareness of this issue has not led to concerted efforts to find ways to overcome the problem. Prosecutor 3 recalled that in the initial interviews with witnesses there was hardly a mention of sexual violence; it was only after a witness spoke of rape in the trial of Jean-Paul Akayesu that prosecutors reinvestigated his case and uncovered the systematic use of rape as genocide. Similarly, Human Rights Watch found that the Deputy Prosecutor explained the failure to collect rape testimonies as a consequence of a cultural problem: "African women don't want to talk about rape ... We haven't received any real complaints. It's rare in investigations that women refer to rape,"" (cited in Nowrojee 1996:59). Survivors have said they are more comfortable giving testimony to women investigators, and, where necessary, with female interpreters, because of the stigma attached to rape (Nowrojee 1996). Despite an awareness of this fear and shame, the ICTR did little to counter it.

While the Prosecution argues that the main reason for the abysmal number of rape convictions stems from the reluctance of Rwandan women to talk about rape, women's organisations claim the lack of convictions is due to a lack of coordinated strategy to include sexual violence in Tribunal indictments (Nowrojee 1996). Rwandan women have told researchers on several occasions that if they believe telling their stories will help bring about justice, they will talk (Askin 2005; Lyth 2001; Ngendahayo 2000; Nowrojee 1996). In the trial of Emmanuel

Bagambiki, the former préfet of Cyangugu, one survivor spoke of her sense that the ICTR were not interested in pursuing the case fully:

I became suspicious about the ICTR as soon as I arrived in Arusha. I told them that I wanted to speak about the rape which my daughter and I endured at the hands of the interahamwe who committed the massacre in Kadasomwa, just after the departure of Bagambiki. An employee of the ICTR stopped me from bringing up this crime, saying that it wouldn't have any impact on the charge against Bagambiki. But I, who had been the victim of this crime, I saw very clearly the relevance to the responsibility of Bagambiki, (AR and Redress, 2008: 9).

Emmanuel Bagambiki was never charged with crimes relating to sexual violence and was acquitted of genocide at the ICTR. He was tried *in absentia* in Rwanda and convicted of rape and incitement to commit rape on 10 October 2007 (African Rights and Redress 2008: 2).

The OTP has repeatedly failed to investigate sexual violence thoroughly, and on occasion it has made matters worse through inefficiency. Notably, when Akayesu's crimes were reinvestigated, the investigators gathered as many written statements as they could to submit to the trial chamber as background testimony. The prosecution collected these statements to corroborate the accounts given by the few witnesses that would testify before the tribunal. However, when the statements were submitted as evidence in a later trial (Government Case 1), the judges ruled they were inadmissible as they had not been verified by a court clerk and the authors were not listed as 'oral witnesses.' The prosecution had to retrace the witnesses, by which time many had died, become sick, moved or were unwilling to go back over testimony which was painful and often not put to any use (interview with Prosecutor 1).

There is clearly an understanding among staff at the ICTR that sexual violence survivors seek to conceal their identity and the crime committed against them, but the OTP manifestly failed to take steps to ensure that their investigations were discreet. Prosecutor 1 explained that researchers for the prosecution (often prosecutors themselves) visited villages in Rwanda at the inception of the ICTR and interviewed survivors. He was aware of the "jarring effect of UN personnel arriving in SUVs to remote villages" and the ill-considered consequences of the mostly Western

prosecution team leaving their vehicles outside the houses of potential witnesses while they were interviewed. All three prosecutors concurred that locating witnesses was very difficult, arguing that the majority of Rwandans did not want to talk to outsiders about what had happened to them. Prosecutor 2 claimed that it was very difficult to find survivors who would talk on the record about what they had seen and experienced during the genocide, and thought it likely that this was due to the “blatancy of UN presence when conducting interviews.” Prosecutor 1 said that at the conclusion of the initial research, a registry of potential witnesses was assembled which comprised approximately 9000 survivors. Yet despite the fact that the majority of genocide survivors were women, in the first ten years of ICTR trials only 300 of the 1420 witnesses before the tribunal were female (ICTR 2006c).

THE DIFFICULT TRIAL EXPERIENCE

Survivors are living with grief and trauma and, inevitably, find the trial process demanding and distressing; in general “they find testifying overwhelming” (Cohen et al. 2005:613-614). Many of the trials at the Tribunal are joint trials with numerous defendants and rape victims may be subjected to days and weeks on the stand, being cross-examined by each defence counsel, sometimes going over the same questions again and again (Nowrojee 2005). Staff in the Prosecutor’s Office were aware that the trial process was upsetting for victims and that there was room for improvement. Prosecutor 1 stated that one of the key difficulties was that Rwandan women were questioned about sexual violence, something that is very difficult for them to talk about, by men.

It is not possible to be certain about the scale or depth of the distress associated with testifying at the ICTR, either for victims of sexual violence or other survivors, because it has not been effectively monitored or fully investigated. But in a number of cases involving sexual violence victims witnesses have manifestly been given little consideration or respect. For one survivor

called to testify against Juvénal Kajelijeli, the process was harrowing. She was prepared to describe her experience, however, when questioned intensely about her rape, she broke down. The proximity of Kajelijeli in the courtroom and the fact that the investigators, lawyers, judges and interpreters were all male contributed to her distress. She felt humiliated: “I was questioned about the rape by three men. The Tribunal showed they didn’t understand and I cried. I felt ashamed to be crying in front of Kajelijeli” (former ICTR witness, in African Rights 2004:78).

Another woman who testified against Kajelijeli described a similar sense of anguish:

What I found most difficult in Arusha was speaking about rape, especially in front of men. Talking of sex, and in such detail was difficult for me. I tried my best but I didn't give all the details and show the full extent of what I had gone through. I felt I had not said enough. At one point they asked me to explain things further. I said, "Don't you understand? I was raped!" The judge said they needed more detail and that they didn't understand. I asked in French: "You don't understand about being raped?" They said they didn't so I spelt it out. At that point, I was asking myself what I was there for. What had I come to do here? I felt tortured, (former ICTR witness, in African Rights 2004:78).

Kajelijeli was convicted of genocide, but acquitted of the rape charge. For both the women cited above, distress persisted after the Kajelijeli trial: they returned home to find that local people knew about their testimony and faced new threats and insecurity as a result (African Rights, 2004: 84-85). Furthermore, despite a dissenting opinion from one of the judges, the prosecutor’s office failed to file an appeal against the rape acquittal. This particular trial, was in several respects uniquely “unforgivable and negligent” as Nowjroee observed (2005: 18), however the women’s courtroom experience was not unusual.

Regardless of the Akayesu precedent, women testifying about sexual violence at the ICTR are subjected to intense and insensitive questioning, as the lead investigator on this study found during observation of a trial at Arusha in 2006. On the stand was a survivor who had been gang-raped during the genocide. Her testimony was continually interrupted by objections from the defence. She recalled watching as her family were slaughtered and then spoke of how she was

raped repeatedly by groups of soldiers. The defence sought to undermine her credibility in a manner at odds with the Akayesu ruling that coercion was inherent in the circumstances of the genocide. Despite the evidence of the massacre, they asked the witness how she could be certain that her attackers were soldiers and, crucially, why she had not been killed, the implication seemed to be that coercion, and hence rape, was in question because she would not have survived if she had struggled.

The determination of defence lawyers to cast doubt on the credibility of rape testimonies has also given rise to references to the witness' physical state at the time of the attack. In October 2001, during the Butare trial, a defence lawyer interrogated Witness TA, repeatedly questioning her about the intimate details of the rape, highlighting the fact that she had not bathed with "the implication that she could not have been raped because she smelled," (Nowrojee 2005: 24). Alongside the distress caused by these questions, Witness TA faced an extraordinary humiliation when the judges laughed at the lawyer's cross examination. Whatever the reason for their laughter, it contributed to the pain and exhaustion felt by the witness (African Rights, 2004: 84), who did not even receive an apology from the judges (Nowrojee, 2005: 24). When lawyers and judges show a lack of respect for the women testifying it increases the distress felt by vulnerable individuals and becomes more difficult to convince women to testify in the future.

Alongside emotional distress, practical problems can hinder the participation of sexual violence survivors, or add to their burdens. Again, staff in the Prosecutor's Office were aware of this issue. Indeed, Prosecutor 2 felt that some of the biggest obstacles to finding women to testify were the many delays that occur during cases. The nature of the justice process at the ICTR forces witnesses to travel many times to Arusha or spend far longer away than they had anticipated; a daunting prospect for someone who is trying to conceal their absence, and may not be used to travelling.

INADEQUATE WITNESS PROTECTION

Sexual violence victims who have given statements to the prosecution team, like all other potential witnesses, receive no support or protection until they are confirmed and listed as ICTR witnesses (as confirmed by each of the ICTR staff interviewed). This is a matter of concern because by speaking to the ICTR, survivors can immediately endanger themselves, and rape survivors especially risk public suspicion and condemnation. In at least two cases women were killed before the trial, apparently for cooperating with the prosecution (Byakatonda 2004; Human Rights Watch 2004). Moreover, court protection itself, when it applies, does not extend far. The Tribunal is very keen to protect survivors while they are in Arusha, not allowing them to watch any of the court proceedings before or after they testify and keeping them under close watch during their stay in Arusha. Witnesses have complained that as soon as they are back in Rwanda the court forgets them and they receive no protection from harassment or threats (African Rights 2004; Human Rights Watch 2004; Nowrojee 2005). “Witnesses continue to complain of harassment in the form of verbal or other threats they receive after testifying in Arusha” (Nowrojee 2005:25). Officer 2 stated that “protection must rely on the witness first” and that witnesses are told to “keep a low profile” when they return to their villages. Both Officer 2 and 3 reported that the ‘protection’ provided by the ICTR to witnesses after testifying would only come into play after they had reported harassment to local police authorities and the Rwandan government had looked into the incident: a scenario not likely to be reassuring to someone trying to keep a low profile in a tight-knit community.

POOR TREATMENT OF HIV+ WITNESSES

The moral and practical problems surrounding the treatment of witness are most acute as regards women that were raped and possibly infected with HIV during the genocide. These survivors were not entitled to any form of health care support or access to antiretroviral medications (ARVs) until listed as court witnesses. The ICTR staff were open about the consequences. Officer 2 stated that “most witnesses with HIV got it during the genocide” and that with “no direct access

to medical care many couldn't take care of themselves” and became too sick to travel to court or died in the intervening period. Prosecutor 1 asserted that “at least a third, maybe half the witnesses are either too sick to testify or have died by the time we call on them to come to trial” and so, despite cooperating fully with the prosecution, such women never qualified to receive ARV and other medications. At least three witnesses were listed to appear in trial but “died before they were able to testify from TB, which is well known to be the leading killer of people with AIDS” (interview with Prosecutor 2). Officer 1 simply said “of course HIV is affecting the trials: it is killing witnesses before they can testify.”

The Tribunal has received more criticism over the disparity in health care treatment between detainees and survivors than for any other shortcoming (African Rights 2004; Donovan 2002; Ngendahayo 2000). “Only in Rwanda is there any evidence that rapists considered infection with HIV to be a deliberate component of their sexual violence,” (Whiteside et al. 2006:214) and yet high level perpetrators of the genocide are detained in facilities which allow visitors, phone calls, letters, “culturally appropriate food” and full access to healthcare including ARVs (ICTR 2006b:1). Survivors are most often left in poverty without access to any medical care, let alone treatments for the HIV/AIDS they may have contracted through intentional infection during the genocide (Ngendahayo 2000). Prosecutor 2 acknowledged that there should be “more sensitivity to those that are ill.”

Prior to 2000, there was no treatment given to witnesses at all (ICTR 2006c). Since then, the ICTR has developed a programme to support witnesses living with HIV/AIDS, but its impact has been limited. Both Officers 2 and 3 stated that treatment is now only given to those witnesses who are listed to come to trial or have already testified and “the programme will only run until 2010 when the Rwandan government is responsible for the treatment of survivor witnesses” (interview with Officer 2).

THE CONCERNS OF ICTR STAFF

Throughout the interviews with ICTR staff, it was apparent that they all wanted to treat the witnesses better than they were able to. The prosecutors were especially damning of the Tribunal's actions (or inactions) and repeatedly came back to the lack of time and money to fully support survivors. While the prosecution team seemed to view all victims as potential witnesses, and deserving of UN support by virtue of surviving the genocide, officers from the other ICTR branches were clear that their mandate only included listed witnesses and seemed unwilling to consider supporting any other survivors. In interviews with Officers 2 and 3 it was apparent that they were doing their utmost to support the women in their care; they simply were not given enough resources to support them properly.

The sample size was very small, so it is not possible to generalise, but it is worth noting that the two African women interviewed did not at any point criticise the UN or the Tribunal whereas every other interviewee did. Even when referring to the enormous gap between allotted medical care funding per witness and the annual cost of ARVs they did not suggest the UN should increase the mandate or funding for the Tribunal. This is all the more surprising because these women were particularly active in seeking to assist HIV positive witnesses. On the whole, however, ICTR staff seemed aware of deficits in the practices of the institution. Unfortunately, the trials have been underway for more than a decade, and are due to end in 2010; at this stage, good intentions are not enough.

4. LESSONS LEARNT?

In part, the ability of ICTR staff to address deep-seated flaws in their practices has been undermined by the lack of commitment at the top, and the changing priorities of successive Prosecutors (Haddad, 2008: 13-14). Over time, there has been some progress. By mid-2005, the OTP had decided to identify sexual crimes as “a prioritized area” and the number of indictments increased (Møse, 2005: 935). Around the same period, there were efforts to increase support to victims, including the provision of treatment for HIV/AIDS (de Brouwer 2007: 216).

In June 2007, the ICTR Prosecutor established a Committee for the Review of the Investigation and Prosecution of Sexual Violence. This equated to recognition of past problems, in particular of the relatively low conviction rate (Bianchi, 2008: 9). Criticisms levelled at the ICTR by women's groups and others in Rwanda and internationally were now being taken seriously within the institution and investigated. The result was a set of substantive recommendations, contained in a 'Best Practices Manual' (Warren, 2008) offering a guide for future prosecutions of sexual violence based on lessons learnt at the ICTR. Notably, many of the issues identified above are addressed in the manual. It seemed that the equivocation and frustration expressed by ICTR staff, recorded in interviews in 2006, eventually gave way to a sense of possibility and resolve.

The OTP Committee was concerned with promoting prosecutions, but it also looked at the needs of victims. It found that the prosecution of sexual violence ought to be treated as a special case (Warren, 2008: 1) and it proposed reforms in all aspects of the process. It observed the tendency to "overlook" (ibid) sexual violence crimes or to treat them as "secondary" (Warren, 2008: 2) and argued that resources should be specifically allocated to investigations of sexual violence. It urged the OTP to set out a clear strategy and to strengthen communications within the investigation and trial teams in the OTP, and between them and the witness protection unit and the gender advisor in the Registry. It called for training, the recruitment of more female staff, monitoring, and greater respect and support for victims and better witness preparation. It took the view that dedicated sexual violence teams were beneficial, and might take various forms provided that they are well-integrated into the organisation and include senior staff (Warren, 2008). Moreover, citing the Gacumbitsi judgement, the manual reminded investigators that; "the court is free to infer non-consent from the background circumstances" (Warren, 2008: 7).

The extent to which these recent developments have influenced procedures in sexual violence cases is not yet clear—as the trials proceeded at the ICTR, the Committee needed not only to set out aspirations but to deliver achievements. By 2008, of the 13 cases in which rape had been included in the indictment, there had been just four convictions of rape as genocide, crime against

humanity or war crime, and nine acquittals. There were, however, still 23 cases involving rape charges not yet completed (Bianchi, 2008) and it is notable that among them Emmanuel Rukundo in February 2009 and Tharcisse Renzaho in July 2009 were convicted of crimes of sexual violence as well as genocide and crimes against humanity.

5. CONCLUSION: NO SURVIVORS' JUSTICE

This article has charted the development of sexual violence jurisprudence and examined the experiences of justice of rape victims of the Rwandan genocide. Rape and sexual abuse have been successfully prosecuted at the ICTR, a significant positive development in international law (Lyth 2001); in particular the Akayesu case set an important precedent that rape is a form of genocide and a crime against humanity. Nevertheless, it is questionable whether these developments have directly benefited many women who were victims of sexual violence during the Rwandan genocide. The prosecution has shown insensitivity during investigations of these crimes and has failed to effectively support witnesses. Women feel ignored, belittled and used: “we were treated like cattle” (in Lyth 2001:12). Interviews are often carried out by men; persistent questions by investigators, lawyers, and judges in court are intrusive and traumatising; protection offered is minimal and only available while in Arusha. This research has documented good intentions made powerless largely though institutional inertia: a seeming incapacity or reluctance to reform.

The experiences of sexual violence victims at the ICTR indicate profound deficits in the practices of international justice and give weight to the claim that “international tribunals are bound to be exercises in symbolism rather than systematic justice,” (Driscoll et al. 2004:76). Instead of systematically targeting perpetrators of sexual violence as a component of their strategy, prosecutors have often omitted to look for evidence, ignored it, or been too disorganised to include it in their indictments. Victims want the international community to recognise and condemn sexual violence (Dixon 2002:710; African Rights 2004; Cobban 2003; Human Rights

Watch 2004). “They want the ICTR to say loudly and in no uncertain terms that what was done to women was a crime of genocide, and that as rape survivors they did not willingly collaborate” (Nowrojee 2005:6). So poor has been its performance, that the record of the ICTR may seem to deny that rapes occurred (Nowrojee 2005.7); this threatens to undermine the Akayesu precedent and thus future sexual violence prosecutions: it “may de-legitimize the theories under which the rape charges are brought, and the investigative techniques used in conjunction with prosecutions” (Haffajee 2006: 206).

ICTR staff members were aware of a number of basic reasons why the Tribunal was failing to deliver justice for sexual violence survivors, at least by 2006, as interviews showed. They also offer some relatively straightforward recommendations for improvements. But, until recently, the commitment was lacking. This was not simply a problem of resources. Cost would be a factor in effecting some necessary reforms and extending support, but a concerted effort to respond to the particular needs of sexual violence survivors could have made an important difference at an earlier stage. Some energy is now being invested in reforms, a welcome step, likely to benefit current and future witnesses. However, this cannot address the “traumatizing” (Warren, 2008: 7) effects which former witnesses suffered.

This article highlighted flaws in international justice for sexual violence survivors, injustices which may never be repaired. A lack of accountability in the justice sector is a contradiction in terms. In mapping out strategies for the future prosecution of sexual violence, Renifa Madenga, an appeals counsel at the ICTR (2008: 3) identifies the core of this problem: “Representatives of justice institutions must be liable for their actions and should be called to account for malpractice. As prosecuting authorities we have obligations to ensure our institutions operate efficiently and effectively while respecting the rule of law” (Valasek cited in Madenga, 2008: 3). Reforms in the prosecution of sexual violence at the ICTR must consider not only future policies and practices, but the consequences of past mistakes and the need for public acknowledgement and restitution. The ICTR was established to administer international justice for the crimes of the 1994 genocide

in Rwanda; from the perspective of many victims of sexual violence, it has failed to deliver on this promise.

NOTES

¹ In 2001 the Ministry of local government in Rwanda reported 934,218 victims (Straus 2006, p.51, fn. 28). Academic sources often give lower figures. The number of victims of rape during the genocide is not known and estimates vary widely (Hamilton 2000); this article focuses on women targeted in the genocide, overwhelmingly Tutsi, but Hutu women were also subject to rape and sexual violence in the war (1990-1994) or as refugees post 1994 (ibid).

² Many thanks to all that contributed to this study, especially the men and women of the Arusha Tribunal who found time to talk to Natasha.

³ The majority were tried by Rwandan courts, including the community-based *gacaca* see (Clark 2008).

⁴ For an insight into the contribution of the ICTY see Campbell 2004.

⁵ Rather than interviewing survivors, it was decided to analyse existing sources, partly because of concerns about trauma and an awareness that the research process places demands on - and has proven unrewarding for - some Rwandan survivors (see Lyth 2001). Throughout the study, a concern to promote a level playing field between the researcher and researched and to ensure women's voices were given just representation in the study without causing any undue harm was maintained, consistent with feminist research methods (see Baines 2005; Bryman 2004; Kennedy-Bergen, in Renzetti & Lee 1993; and Kirsh 1999 for more).

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