

**UNIVERSITY OF NAIROBI**  
**INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES.**

**A GENDER ANALYSIS OF THE TRANSITIONAL JUSTICE SYSTEMS OF RWANDA  
AND SIERRA LEONE.**

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**A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS OF THE DEGREE OF MASTER OF ARTS (M.A.) DEGREE IN  
DIPLOMACY.**


**Declaration.**

I, Chelangat Beatrice Chebochok hereby declare that this research project is my original work and has not been presented for a degree in any other University.

Signed.......... Date 18<sup>th</sup> NOV 2011

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This project has been submitted for examination with my approval as University Supervisor;

Signed.......... Date 20<sup>th</sup> NOV 2011

Prof Maria Nzomo

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## ABSTRACT.

As societies move from long periods of dictatorships and authoritarian regimes to democracy and from prolonged civil wars to peace, a question arises as to how should these societies should deal with the horrors of their past. But more importantly, as per the particular circumstances of each country's history and transition, what mechanisms can bring justice to citizens, more specifically to women and to set the stage for sustainable peace and development?

It will be argued that transitions provide opportunities to further gender justice, in particular through the implementation of a gender-sensitive transitional justice agenda. However in many instances, transitional justice systems fail to address gender concerns leaving the social inequalities that were prevalent prior to the war to prevail.

This thesis will therefore explore how the transitional justice systems of Rwanda and Sierra Leone have failed to address gender inequalities. Drawing upon the lessons learnt through the gender analysis of the transitional justice systems adopted by the two countries, recommendations will be made regarding a more gender sensitive framework for justice in Rwanda and Sierra Leone.

## ACRONYMS.

<b>AFRC</b>	Armed Forces Revolutionary Council
<b>CDF</b>	Civil Defence Forces
<b>DDR</b>	Disarmament, Demobilization and Reintegration
<b>ICC</b>	International Criminal Court
<b>ICTR</b>	International Criminal Tribunal for Rwanda.
<b>ICTY</b>	International Criminal Tribunal for Yugoslavia
<b>IDP</b>	Internally Displaced People
<b>NaCSA</b>	National Commission for Social Action
<b>RUF</b>	Revolutionary United Front
<b>SLTRC</b>	Sierra Leone Truth and Reconciliation Commission
<b>UN</b>	United Nations

## TABLE OF CONTENTS

Declaration	i
Acknowledgement	ii
Dedication	iii
Abstract	iv
Acronyms	v
<b>CHAPTER 1. BACKGROUND TO THE RESEARCH PROJECT</b>	
1.1. Introduction	1
1.2. Scope	2
1.3 Research problem	3
1.4 Objectives	4
1.5 Justification	4
1.5 Literature review	4
1.6 Theoretical framework	9
1.7 Study hypotheses	25
1.8 Research methodology	26
1.9 Chapter outline	28
<b>CHAPTER 2: TRANSITIONAL JUSTICE OF RWANDA</b>	30
2.1. Introduction	31
2.2 Gender Analysis of conflict	32
2.3 Transitional Justice mechanism	33
2.4 International Criminal Tribunal for Rwanda	39
2.5 National Court	45
2.6 Gacaca court.	
<b>CHAPTER 3: TRANSITIONAL JUSTICE SYSTEM OF SIERRA LEONE</b>	52
3.1 Introduction	53
3.2 Gender Analysis of conflict	55
3.3 Transitional Justice Mechanism	56
3.4 Special Court for Sierra Leone	59
3.5 Sierra Leone truth and reconciliation Commission	58
<b>CHAPTER 4: COMPARISON OF TRANSITIONAL JUSTICE SYSTEMS OF RWANDA AND SIERRA LEONE</b>	66
4.1 Introduction	66
4.2 International Approach	67
4.3 Regional Approach	70
4.4 conclusion	74
<b>CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS</b>	75
<b>BIBLIOGRAPHY</b>	78

## CHAPTER ONE.

### BACKGROUND TO THE RESEARCH PROJECT.

#### Introduction.

Efforts to integrate a gender perspective into transitional justice have come about over the last fifteen (15) years in response to the relative neglect of women's experiences during and after conflict, biases in the law and in the constructs of human rights themselves that have been carried through into the working of transitional justice mechanisms and biases in processes such as peace negotiations, where deals are reached without women's representation.<sup>1</sup>

This efforts have been supported at the international level by the United Nations' growing role in providing technical support and funding to transitional justice processes and establishing guidance for gender-sensitive programming which have had a significant impact on women's access to justice through these mechanisms. Likewise, the Beijing Declaration and Platform for Action, adopted unanimously at the United Nations Fourth World Conference on Women in 1995, encourages Governments to promote an active and visible policy of gender mainstreaming in all policies and programmes so that, before decisions are taken, an analysis is made of the effects on women and men, respectively.<sup>2</sup>

Africa in the post-Cold War period has featured predominantly in the peace and security discourse due to the many conflicts that plagued the continent. This has been brought about as result of poverty, corruption, bad governance, gender inequality, marginalization, nepotism and underdevelopment rendering the region prone to further instability. A notable feature of

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<sup>1</sup> Valji N (2010) "Gender Justice and Reconciliation, Berlin: Springer Publications, 2009

<sup>2</sup> Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF 177/20 (1995) and A/CONF.177/20/Add.1 (1995): <http://www1.umn.edu/humanrts/instree/e5dplw.htm>

the authoritarian regimes and conflicts in Africa is the gross injustices and human rights violations that are occasioned and are targeted mostly at women. This can be attributed mainly to the fact that women in Africa, like the rest of the world, constitute half of the population, and also form the majority of the victims. While there is an increasing realization of women as active participants in political struggles and conflicts, women are still face marginalization when it comes to transitional justice systems adopted.

This study will examine the transitional systems adopted by Rwanda and Sierra Leone from a gender perspective. It will examine how failure to incorporate a gender perspective on the transitional justice systems, has led to systems that are not fully operational and effective for women, ultimately leading to prevalence of social inequalities and escalation of violence.

Rwanda and Sierra Leone are considered as case studies because despite their varied geographic locations, histories and type of conflict, they have similar experiences when it comes to atrocities against women.

### Scope

This study will broadly analyse the issue of gender and transitional justice in two countries Rwanda and Sierra Leone. Rwanda is chosen as it is the first country to successfully manage a continuous progression towards gender equality after genocide. Sierra Leone on the other hand is chosen because of its protracted civil war that took years and had devastating effects on women. Consequently, this will help bring a balance to the study in so far as capturing the injustices that mitigate against justice for women prior to the conflict and during post conflict reconstruction. The study will also analyze gender relations prior to the conflict, during the conflict and post conflict reconstruction in order to present a full picture.



### **Research Problem.**

Transitional justice mechanisms have valuable potential for transforming gender relations in post-conflict situations. Despite this, during post conflict reconstruction, there is a tendency to sideline gender issues terming them as being secondary. When an attempt is made to introduce the gender dimension it is often an afterthought, limited in scope, and heavily focused on issues relating to women as victims only. This approach is misleading as it fails to consider other aspects related to conflict such as the notion that periods of conflict and post-conflict reconstruction often destabilize gender relations.

Following the return to constitutional rule and peace in societies, transitional justice mechanisms employed to deal with crimes committed during the conflict have often neglected the complex dynamics and consequences of political and social violence on gender and in particular on the lives of women. Thus opportunities for social justice and in particular gender justice in these contexts remain underutilized. While there is no doubt that women are marginalized in general, they face a double marginalization as their particular needs and claims to justice are mostly overlooked when transitional justice mechanisms are established.

The transitional justice systems of Rwanda and Sierra Leone failed to take the changes on social roles into perspective, thus creating systems that are not effective for women. The processes adopted by both countries have led to escalation of sexual and gender based violence and stereo typing of women to continue during post conflict reconstruction. The process has also led to the return of social inequalities that were prevalent prior to the conflict.

### **Objectives of the study.**

The overall objective of transitional justice is to secure justice and peace for citizens. Using a comparative analysis of transitional justice systems adopted by Rwanda and Sierra Leone the study

1. Examine the extent to which gender perspectives have been taken aboard by the transitional justice processes of Rwanda and Sierra Leone
2. Evaluate the ways in which transitional justice systems can be used to address social inequalities and transform gender relations.
3. Examine the ways in which transitional justice systems of Rwanda and Sierra Leone can be used to provide access to justice for women

### **Justification.**

Transitional systems of justice are the principal legal recourse for the majority of women in post-conflict countries. However this systems are often gender biased, due to the prevailing cultural or traditional norms This study has therefore been prompted by the fact that many transitional justice processes and scholars tend to neglect to give due consideration to gender issues and women's experiences during post conflict situations. In addition, during peace building reconstruction, most of the people involved are generally men who ideally would not consider women's issues. A gender perspective of transitional justice systems therefore presents a unique opportunity to secure gender justice. This study will therefore contribute to the limited material available for engendering transitional justice system and give recommendations on how to make transitional justice systems gender responsive. The study will hopefully provide guidelines on how transitional justice systems can be used to secure

justice for women in the African context and address gender inequalities that were prevalent prior to the conflict.

### Literature Review.

There is a very large body of literature on transitional justice and gender relations. There is also a vast amount of published material and scholarly work in the area of peace building and conflict resolution. The challenge at hand is to bring this together, and enrich the body of literature that intersects these fields.

Transitional justice refers to the short-term and often temporary judicial and non judicial mechanisms and processes that address human rights abuses and violence during a society's transition away from conflict. The brand of justice to be applied in a post-conflict society is especially relevant in the context of societies where gross violations of human rights have been committed on a massive scale, not only by authority figures, but also by members of the community at large.<sup>3</sup>

Within the field of transitional justice, questions are raised as to whether justice should be retributive or restorative in nature, whether, for example, transitional societies should focus on conducting individual prosecutions, establishing truth and reconciliation commissions, or utilizing traditional courts. The challenge facing transitional governments is that they 'must think creatively about building institutions that bring justice to the past, while at the same time demonstrate a commitment that justice will form a bedrock of governance in the present and the future.'<sup>4</sup> In a transitional society emerging out of mass violence, therefore, justice represents a path between too much memory and too much forgetting. It is imperative to

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<sup>3</sup> Teitel, G. R (2000), *Transitional Justice*, Oxford and New York: Oxford University Press

<sup>4</sup> Franke, K ( 2005) 'Gendered subjects of transitional justice' 15 (3) *Columbia Journal of Gender Law* 813.

retain the memory of conflict through acknowledgement of the atrocities that were committed. Similarly, it is imperative to institute measures that address such atrocities in a manner that ensures they can never again occur.

Transitional justice is not entirely new concept, it was practiced as far back in history as in ancient Greece.<sup>5</sup> However, its modern origins can be traced back to the post-World War II Europe, and especially International Military Tribunal at Nuremberg (1946-1949) and the de-nazification programs in Germany.<sup>6</sup> The central feature of the first use of transitional justice was the articulation and application of international law, and in particular the idea that individuals can and should be held accountable for violations of international human rights and humanitarian law.

The growing number of democratized states in the 1980s and 1990s around the world led to the growth of transitional justice as a field of inquiry and practice. Questions arose of how, and whether, to address the human rights violations committed by previous usually military and/or authoritarian regimes. Other contributory factors include the increasing prominence of human rights, the emergence and proliferation of human rights organizations, and the end of the Cold War.

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<sup>5</sup> Paige A, (2009) "How 'Transitions' reshaped human rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly*.

<sup>6</sup> Elster J, (2004) *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press.

The central feature of this second wave of transitional justice was the truth commission which in some cases is called the truth and reconciliation commission such as that of South Africa.<sup>7</sup>

They emerged within the framework of negotiated transitions from authoritarianism to democracy .In these settings, criminal prosecutions were either impossible or extremely dangerous because the outgoing regime still retained considerable power and had the ability to derail the democratization process.

The third wave gave rise to international criminal tribunals .These was precipitated by the brutal wars in the former Yugoslavia and the genocide in Rwanda. They were the International Criminal Tribunal for the former Yugoslavia (ICTY), based in The Hague, Netherlands, and the International Criminal Tribunal for Rwanda (ICTR), based in Arusha, Tanzania. These tribunals, like their post-World War II predecessors, were mandated to prosecute individuals suspected of having committed serious violations of international human rights and humanitarian law, including genocide, crimes against humanity, and war crimes.

International justice was further institutionalized by the establishment of the International Criminal Court (ICC) in 2002, which is a permanent tribunal charged with prosecuting individuals for genocide, crimes against humanity, war crimes, and the crime of aggression. The ICC can however only prosecute crimes that occurred on or after July 1, 2002 that is the date it came into existence. 109 states are members of the Court and another 40 states have

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<sup>7</sup> Hayner P (2000) 'Truth commissions' Paper presented at the Conference on truth, justice, accountability and reconciliation in societies emerging from crimes against humanity. Peter Wall Institute of Advanced Studies at the University of British Columbia, October

signed but not ratified the Rome Statute, the ICC's founding treaty. This study will focus on the Rwanda and Sierra Leone transitional justice systems.<sup>8</sup>

Countries determine their own interventions according to the contexts of their transitions, taking into account the seriousness of the crimes committed and the resources available to deal with the issues. According to Sarkin,<sup>9</sup> the options available to a new democratic society include criminal sanctions, non-criminal sanctions and the rehabilitation of the society.

Rwanda and Sierra Leone, like other African states, are patriarchal and paternalistic societies. The socio-economic as well as political systems and structures of these societies show grave cases of gender inequality and social injustices that are themselves deeply rooted in paternalistic socio-cultural and structural systems and practices. Discriminatory customs and laws, especially as regards marriage, property rights and sexual offenses, all exacerbate these institutionalised gender inequalities and makes gender-based violations possible and prevalent in both countries.

The 1994 Rwandan genocide was one of the cruelest events of the twentieth century. The shooting down of President Juvénal Habyarimana's plane on the evening of 6 April triggered the genocide. However, several factors had contributed to the severe tension that existed at the time between Hutu and Tutsi, two groups that had lived peacefully together in the past. Economic issues and land shortage, as well as different social roles assigned to the two groups by the former colonial power, had contributed to growing cleavages between them. A

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<sup>8</sup> Teitel, G.R (2003), "Transitional Justice Genealogy" in *Harvard Human Rights Journal*, Vol. 16, pp 65-94

<sup>9</sup> Sarkin, J (2001) The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and The Role of the *Gacaca Courts* in dealing with the Genocide'45(2) *Journal of African Law* 143.

crucial element of this severe tension, before and during the Rwandan genocide, was the diabolizing and dehumanizing of the Tutsi by the media and political elite and the blaming of the other for social and economic problems.<sup>10</sup>

During the 1994 genocide, up to one million people perished and as many as 250,000 women were raped. The killings shocked the international community and left the country's population traumatized and its infrastructure decimated. Since then, Rwanda has embarked on a Justice and reconciliation process with the aim of having all people live together in peace. However, this initiative has not adequately addressed gender disparities that were prevalent during pre conflict period. Rwanda has chosen a three pronged approach to address the social inequalities. They include the International Criminal Tribunal for Rwanda, the domestic court and the Traditional court also referred to as the Gacaca court.

The transitional mechanisms employed by Rwanda at both the national and international level have been tasked with dealing with overwhelming obstacles primarily due to the sheer volume of perpetrators and victims, and due to the effects on a society and State literally and figuratively torn apart by gross violations of human rights. The next chapter will analyse Rwanda's retributive mechanisms of transitional justice ,the ICTR and the national formal courts and its largely restorative mechanism of transitional justice ,the traditional *gacaca* courts to demonstrate that the implementation process has been plagued by numerous substantial and procedural limitations which have effectively placed a myriad of obstacles in

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<sup>10</sup> Human Rights Watch,(1995)*Slaughter Among Neighbors: The Political Origins of Communal Violence* New Haven: Human Rights Watch/Yale University Press, pp. 3, 13-32.

the path towards justice and reconciliation for victims of sexual and gender-based violence specifically, and for Rwandan society in general.<sup>11</sup>

Sierra Leone like Rwanda underwent years of turmoil. The conflict lasted ten years and turned out to be the worst civil war in West Africa. It began in 1991, when the Revolutionary United Front (RUF), led by a former corporal in the Sierra Leone Army, invaded Sierra Leone from Liberia sparking a decade-long conflict. Hallmarks of the RUF's brutal campaign included mutilations, amputations, abduction of children into their forces and widespread sexual violence. A peace accord was eventually concluded in Lomé in 1999, and United Nations peacekeepers were brought to Sierra Leone to operationalize the agreement. Sporadic violence continued, however, until the official end of the conflict in 2002.<sup>12</sup>

Myriad interventions toward gender equality have been undertaken by both state and non-state actors in both countries. Yet wide gender gaps still exist in matters of women's access to, control over and ownership of productive and valuable cultural resources. Prior gender injustices thus set the stage for further victimisation of women under authoritarian rule and during war.

In an effort to address past atrocities, Sierra Leone established two key transitional justice institutions. The Truth and Reconciliation Commission (TRC) and the Special Court for Sierra Leone. It also adopted related policies and programmes for reparations to victims,

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<sup>11</sup> Ibid

<sup>12</sup> Schabas, A. W. (2006a), 'The Sierra Leone Truth and Reconciliation Commission', in Roht-Arriaza, Naomi and Mariezcurrena, Javier, eds., *Transitional Justice in the Twenty-first Century: Beyond Truth versus Justice*, New York: Cambridge University Press



follow-up on the recommendations of the TRC and implementation of institutional and legislative reforms. This will be dealt with in depth in chapter 5.

Using the transitional justice systems adopted by Sierra Leone, this study will therefore provide recommendations on how to make transitional justice work effectively for women in Rwanda.

### **Theoretical Framework**

This study will examine the possible approaches that societies can take to implement transitional justice. It sets out the principles of transitional justice and outlines the feminist theoretical debate concerning whether or not a strictly retributive or restorative approach to transitional justice is most effective. This study will establish that there are significant limitations to employing a purely retributive or a purely restorative approach to transitional justice in post-conflict societies. As such, a country must employ a comprehensive model of transitional justice that incorporates key aspects of both restorative and retributive justice, bridges the gap between international and domestic law, and takes into consideration the specific circumstances of the post-conflict society in question.

This study will rely on the theories of transitional justice and feminist theories of transitional justice and analyze the stand taken by different scholars in achieving the overall objectives of transitional justice of attaining peace, justice and reconciliation. These theories are reconciliation, retributive and the restorative justice theories. Each proposes a different approach to achieving the goals of transitional justice.

The first theory is reconciliation. It is the ultimate objective in all post-conflict societies and reconstruction process. It has been referred to as acknowledgement and repentance from the perpetrators and forgiveness from the victims,<sup>13</sup> as non-lethal co-existence,<sup>14</sup> as democratic decision-making and reintegration and finally as encompassing four concepts namely truth, mercy, peace and justice.

There are two types of reconciliation, national reconciliation and individual reconciliation. National reconciliation is achieved when societal and political processes function and develop without reverting to previous patterns or the framework of the conflict. Individual reconciliation is the ability of each human being to conduct their lives in a similar manner as prior to the conflict without fear or hate. This distinction is necessary because it is possible to achieve national reconciliation without achieving individual reconciliation. National reconciliation may be achieved at the expense of individual reconciliation leaving the individual to deal with their own traumas.

The ultimate goal of transitional justice is the realization of national and societal reconciliation through justice. In attempting to heal the wounds of conflict, justice and reconciliation are inextricably intertwined. Since reconciliation is a process, it can refer to anything from peaceful co-existence to dialogue, apology and forgiveness and, subsequently, healing.<sup>15</sup> The aim of reconciliation is not to restore the situation to what it once was, but rather to reconstruct societies through achieving the goals such as those listed above.

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<sup>13</sup> Monteville in Avruch K & Vejarano B (2002) "Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography", *The Online Journal of Peace and Conflict Resolution*, Issue 4.2, p. 4.

<sup>14</sup> Crocker D (2002) in J.D. Tepperman, "Truth and Consequences", *Foreign Affairs*, March/ April, p. 7.

<sup>15</sup> Bickford L (2004) 'Transitional justice' in *Genocide and Crimes against Humanity*: Macmillan Reference: Detroit 1045 at 1046.

Reconciliation, therefore, is not an end result, as much as it is a continual process involving both judicial and extra-judicial mechanisms and efforts. How a country chooses to embark on this process depends on the type of conflict from which it is emerging from. Usually, the path chosen takes into account three goals, truth, justice, and reconciliation. The balance struck between these goals is determined to a large extent by the type of transition that the country adopts.<sup>16</sup>

The other theory is retributive justice. They argue in favor of individual prosecutions and punishment. Retributive justice is based on the principle that people who have committed human rights violations, or ordered others to do so, should be punished in courts of law or, at a minimum, must publicly confess and ask forgiveness. It has been said to be the cornerstone of criminal law, and is characterized by the adversarial nature of justice, where there is the prosecution, the people, state and international community verses the accused or defendant on the other hand.

When an offender commits a wrongdoing, they deprive the victim of their benefits while undeservedly gaining their own benefits.<sup>17</sup> Punishment, therefore, removes the undeserved benefit by imposing a penalty that balances the harm inflicted by the offense.<sup>18</sup> It is anticipated that through criminal prosecution, future violations may be deterred and justice will be realized for the victims of these violations. Advocates of the retributive approach

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<sup>16</sup> Lambourne W (2004) *The Pursuit of Justice and Reconciliation - Responding to Genocide in Cambodia and Rwanda* International Studies Association, 40th Annual Convention, Washington DC

<sup>17</sup> Maiese M (2004) *Retributive justice* in Guy Burgess and Heidi Burgess (eds) *Beyond intractability*. Available at [http://www.beyondintractability.org/essay/retributive\\_justice/](http://www.beyondintractability.org/essay/retributive_justice/)

<sup>18</sup> Cragg, W (1992) *The practice of punishment: towards a theory of restorative justice* Routledge, New York.

believe that punishment is necessary to establish accountability, to act as a deterrent to future crimes, to ensure resistance to a culture of impunity, and to enable future co-existence of perpetrators and victims.

A final element of the retributive justice model is restitution, which ensures either recovery of losses or compensation for the victims. This usually takes the form of monetary compensation to the victims either by the offender or on behalf of the State. Proponents of prosecution feel that it is a necessary to ensure social reconciliation, because society cannot forgive what it cannot punish.<sup>19</sup> By singling out and punishing perpetrators of human rights violations, culpability is individualized, thereby preventing the targeting and scapegoating of a particular group. This is particularly significant in post-conflict societies in which one group (ethnic, religious, or otherwise) has been the subject of persecution at the hands of another.

Proponents of the retributive justice model maintain that individual prosecutions serve to demonstrate to the society at large that the legal and political systems in place are indeed functional and efficient, thereby restoring faith in the administrative and judicial systems. Diane Orentlicher maintains that prosecutions are a must in transitional justice because international law imposes an obligation on governments to prosecute a prior regime's human rights violations, arguing that prosecutions are the most effective way with which to address past atrocities.<sup>20</sup>

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<sup>19</sup> Landsman S (1996) 'Alternative responses to serious human rights abuses: of prosecutions and truth commissions' *Law and Contemporary Problems*, 59: 81 at 84.

<sup>20</sup> Orentlicher D (1990) 'Settling Accounts: the duty to prosecute human rights violations of a prior regime, *Yale Law Journal* 100: 2537

Other proponents of retributive justice posit that prosecution makes possible the sort of retribution seen by most societies as an appropriate communal response to criminal conduct. While containing elements of both justice and reconciliation, retributive justice tends to place more emphasis on the former than the latter. In this sense, the retributive model looks less towards the future, and instead, retrospectively examines the crime that was committed and focuses on how that crime should be punished and how victims and society in general benefit from said punishment.

The primary vehicles for the retributive justice model are domestic courts. In the aftermath of mass atrocities, however, domestic courts are often overwhelmed and unable to withstand the caseload due to lack of infrastructure and or human resources. As such, numerous international mechanisms of transitional justice have emerged over the years at the international level, such as the ad-hoc tribunals, the International Criminal Court, and the specialized hybrid courts, like that of Sierra Leone discussed in the chapter 5.

Retributive models of transitional justice suffer from several shortcomings. Firstly, the question arises as to whether the retributive justice model is appropriate for dealing with gross human rights violations on a massive scale. For instance, while criminal trials may be adequate for addressing crimes of homicide or rape, in general, whether this translates to situation wherein the crimes are widespread and systematic and where victims are many.<sup>21</sup>

Secondly, within the judicial process, particularly one involving gross violations of human rights, the chance of re-victimization is increased as those giving testimony are cross

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<sup>21</sup> Auckerman M (2002) 'Extraordinary evil, ordinary crime: a framework for understanding transitional justice' *Harvard Human Rights Journal* 15: 39 at 41.

examined in hostile and humiliating proceedings. The potential for re-victimization and dehumanization of victims is evident not only during the trial process in which victims are witnesses, but also during investigations. In the event gender-based crimes are to be prosecuted, they need to be investigated and prosecuted according to international standards, and the investigators and prosecutors need to be trained in gender crimes and become sensitive to the needs of the victims.<sup>22</sup>

Regher and Allagia's study notes that from a legal point of view the goal of the criminal justice system is to determine whether a crime has been committed whereby the outcome of finding of guilt will result in the loss of liberty of the accused person<sup>23</sup> The focus, therefore, is not on the rights of the victims, but on the rights of the accused to a fair trial. This further reflects on the secondary role played by the victim in the case.

Thirdly, due to the adversarial nature of the criminal trial, Prosecutions focus primarily on the perpetrator and do not give victims the attention or healing they need. A central part of the justice process for victims is getting their stories heard. Particularly in cases of sexual and gender-based violence, where the crimes are usually covered in silence, it is crucial that women and girls are provided with a forum in which to tell their stories.

Another significant limitation to the retributive approach is the rather inhospitable atmosphere victims tend to face, given their tertiary role in the judicial process. For example,

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<sup>22</sup> Rehn, E and Sirleaf, E J (2002) *Women, war, peace: the independent experts' assessment on the impact of armed conflict on women and women's role in peace building* (Progress of the world's women). Available at <http://www.womenwarpeace.org>.

<sup>23</sup> Regher C and Alaggia R (2006) Perspectives of justice for victims of sexual violence' *Victims & offenders* 1 1: 33 at 37.

when a doctor assigned to victims testifying before the International Criminal Tribunal for Yugoslavia (ICTY) proposed that they be provided with psychological support during the testimony, the initial response was that the Tribunal was not engaged in social work, but important legal proceedings. This perspective results in victims being regarded merely as sources of information, rather than as stakeholders in the process.

Finally, the retributive approach can be inherently challenged by the fact that post-conflict societies often find their adjudicatory mechanisms too weak, unskilled, biased, or corrupt to carry out the difficult task of overseeing fair and expeditious trials. This type of atmosphere renders States unable to effectively investigate and prosecute gross violations of human rights and this, therefore, may inevitably result in miscarriage of justice.

Given all of the above, it is difficult to see how justice is realized in the retributive context, particularly for victims. Furthermore, it is even more difficult to identify a path to reconciliation within such a context. In transitional societies, therefore, where the society has been fragmented by gross violations of human rights, and where States face the enormous task of rebuilding judicial systems that have collapsed during conflict, it is imperative to recognize the need to seek an alternative to a retributive approach to that of an integrated approach towards realizing justice and reconciliation.

Restorative justice on the other hand focuses on victims as well as on perpetrators, and seeks to engage the society in truth telling, apology, and forgiveness that ultimately leads to reconciliation. Restorative justice is defined as societal healing of damages resulting from

past crimes.<sup>24</sup> This theory informs mechanisms such as Truth and Reconciliation Commissions and moves towards an understanding that any dealings with the past should focus on impacting the future of the post conflict society constructively. This practical approach aligns transitional justice more closely with its preventative mission.<sup>25</sup> The first instances of the restorative justice model were the Truth Commissions established in Latin America in the aftermath of brutal dictatorial regimes, such as Argentina's National Commission on Disappeared, created in 1983. These transitional justice mechanisms were established as a way to strengthen new democracies and comply with the moral and legal obligations that the human rights.

It can also be said to be a process through which victims, perpetrators and communities collectively deal with the consequences of a conflict. It is a systematic means of addressing wrongdoings that emphasizes the healing of wounds and rebuilding of relationships. Restorative justice does not focus on punishment for crimes, but on repairing the damage done and offering restitution.<sup>26</sup>

The goals of restorative justice include addressing the root causes of the conflict, involving all stakeholders in the restoration process,<sup>27</sup> emphasizing the importance of truth telling, apologizing and seeking forgiveness, and preventing future conflicts through measures

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<sup>24</sup> Weinstein, Harvey M., and Stover, E. (2004) 'Introduction: conflict, justice and reclamation' in Harvey M. Weinstein and Eric Stover (eds) *My neighbor, my enemy: justice and community in the aftermath of mass atrocity* Cambridge University Press, Cambridge.

<sup>25</sup> Wierzyńska *Supra* note 9 at 1946

<sup>26</sup> Ness V., & Crocker C. (2003) "*Restorative Justice: Definition, Principles, Values and Goals*" Washington, DC: PFI Centre for Justice and Reconciliation.

<sup>27</sup> Braithwaite J. (1999) Restorative justice: assessing optimistic and pessimistic accounts' *Crime and Justice: A Review of Research* 25: 1 at 5.



instituted to rebuild the affected societies or communities. This model of justice focuses on bringing perpetrators and victims together and ensuring restitution to the victims. The most important aspect to the victims of sexual and gender-based violence is the fact that truth commissions tend to focus on the victims as opposed the perpetrators. The atmosphere provides victims and survivors with a supportive network in which they can recount their story and may in turn end up being an important healing process.

Despite the fact that restorative justice mechanisms have limited legal powers, their focus on the various multidimensional factors that contribute to conflict makes them more appropriate in terms of reconstructing post-conflict societies. For example, Priscilla Haynes<sup>28</sup> is of the view that since restorative justice mechanisms are not limited to the individuals for prosecution, they can assemble and distribute all the relevant facts about an oppressive regime. The information gathered can end up being a powerful tool to protect the society against a dictator.

The limitations of restorative mechanisms include the use of a non-judicial forum to address violations of international human rights law, the exclusion of such crimes in the mandates and procedural measures of restorative mechanisms, and the lack of privacy and protection due to the public nature of these communal mechanisms. The non-judicial nature is how a State can ensure the eradication of a culture of impunity without imposing sanctions for the crimes that have been committed. The very nature of truth commissions, for example, entails

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<sup>28</sup> Hayner, P (2005) ' Truth commissions' in Dinah L. Shelton and Thomson Gale (eds.) in *Genocide and Crimes Against Humanity* (2005) Macmillan Reference, Detroit.

that they cannot match prosecutions with respect to the fulfillment of the important policy goals regarding punishment.<sup>29</sup>

While the community-based approach does have its merits in the sense that it provides a forum for dialogue between perpetrators and victims it begs the questions as to whether justice can be achieved if those who willfully carried out of torture, murder, mutilation, and slavery are granted amnesty. Aneta Wierzyńska argues that restorative justice mechanisms tie stakeholders into a system of mutual accountability. This issue is of particular significance when it comes to addressing gross violation of human rights that have been committed on a massive scale. Since one of the goals of transitional justice is to ensure the prevention of future violations, it is difficult to see how that can be achieved if emphasis is placed solely on discovery and dissemination of truth, rather than on punitive measures.

Another challenge to the restorative justice model in the context of sexual and gender based violence is the exclusion of such crimes in the process, and the subordinate status accorded to such crimes in comparison to other gross violations of human rights. In order for restorative justice mechanisms to effectively deal with crimes of sexual and gender based violence, these crimes must be included in the specific mandate establishing the mechanism. In addition, they must be treated with equal gravity as other crimes against humanity.

A final challenge facing the restorative model is the lack of participation of women in the process, whether as witnesses or as officials. Many women continue to carry not only the physical scars of rape and sexual violence, but also the psychological burden of being unable

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<sup>29</sup> Landsman *Supra* note 12 at 88

to disclose information on their assaults, lest they are ostracized.<sup>30</sup> Furthermore, all too often, the atmosphere of these mechanisms is not conducive to encouraging or facilitating the testimony of victims.

Despite the common underlying values of justice and reconciliation, the key difference between the retributive and the restorative justice models is the fact that while the former focuses on punitive measures aimed at the individual perpetrator, the latter focuses on collective efforts to deal with the consequences of the crimes committed and to ensure reparations for the crimes. While non-judicial mechanisms such as truth commissions are unable to prosecute crimes of international human rights law, their proponents argue that they serve a crucial complementary role in the transitional justice process.

In the past years, a number of feminist interventions have emerged to re-examine the basic assumptions that underlie transitional justice, their approaches and their role in advancing gender justice and women's rights in post conflict societies. One of the first priorities identified in the struggle to achieve gender justice in times of transition is the need for women's participation in peace negotiations where transitional justice mechanisms are often adopted and its mandates outlined.

Chinkin<sup>31</sup> notes the importance of women's involvement at the negotiation table and argues that not only is the presence of women necessary to ensure balance, but also that their

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<sup>30</sup> Sierra Leone Truth and Reconciliation Commission (2004), 'Women and the armed conflict, Truth and Reconciliation Commission Report Vol. 3B at 69.

<sup>31</sup> Chinkin (2004), *Peace Processes, Post-Conflict Security and Women's Human Rights: The International Context Considered*, 9th Torkel Opsahl Memorial Lecture, Democratic Dialogue, Belfast

representation will be essential for ensuring that their particular security and concerns are featured in the outcomes of the negotiations.<sup>25</sup> The absence of women in peace processes deprives women of the opportunity to advance their needs and increases their marginalization during transitional periods <sup>26</sup>.on the other hand, excluding them in peace processes underscores their relevance to the restructuring of social order making such processes ineffective, and affecting the priorities of reconstruction during the transition phase.<sup>27</sup>

During the early times, feminist scholars challenged the masculinity of international humanitarian law in that it was unable to realize how atrocities committed against women because they are women might amount to a violation of international humanitarian legal norms. This is because traditionally, atrocities such as rape have not been treated as a grave breach or but rather as a crime against dignity and honor.<sup>32</sup>

Indeed, the masculinity of international law has prompted feminist scholars and activists to ask whether women are human. <sup>33</sup> Rhonda Copelon, among others, have argued that rape of women be treated under international humanitarian law not merely as inhumane, but with the same vehemence as are the war crimes which happen routinely to men.<sup>34</sup> They also criticize international law's use of state as the site for solutions to injustices experienced by women. They are of the view that international law has not made states accountable for lack of enforcement of laws or making appropriate laws to help women.

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<sup>32</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art 27, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287

<sup>33</sup> Peach I (2001) Are Women Human? The Promise and Perils of "Women's Rights as Human Rights," in *Negotiating Culture and Human Rights* 153, 153-96 (Lynda Bell et al. eds , 2001)

<sup>34</sup> Copelon R. (1995) Gendered War Crimes: Reconceptualizing Rape in Time of War', in Julie Peters and Andrea Wolper (eds) *Women's Rights Human Rights*, pp. 197- 214. New York: Routledge

Feminist scholarship has also challenged the distinctions that undermine international relations, problematising the concepts of war and peace. Indeed, Grant comments of the gendered nature of these concepts observing that the female gender role, so conspicuously outside the realm of war, was not considered as a basis for analyzing international relations but instead, relegated to the home front.<sup>35</sup>

Where feminists have sought to transgress the defined boundaries of international relations, they have sought to make women's experiences visible, in essence showing that it belongs in the political realm. Through feminist explorations of women's experiences in conflict, it is understood that women have served as actors during conflict, assuming diverse roles that include community leaders, fighters and workers<sup>36</sup>.

Feminist research has also highlighted the unboundedness of war where conflicts have no neat beginnings or endings<sup>37</sup>. Rather, following the official cessation of hostilities, violence often continues with strong continuity with what happened during war, and with the nature of gender relations in society prior to armed conflicts. For example, sexual violence perpetrated by soldiers, policemen and former combatant's before the war may intensify during conflict, and continue unabated in the aftermath.

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<sup>35</sup> Grant, R. (1992) The Quagmire of Gender and International Security. In: Spike Peterson, V, ed Gendered States Feminist (Re) Visions of International Relations Theory. Boulder, Colo; London: Lynne Rienner, pp 83- 98

<sup>36</sup> Pankhurst, D (2003) The sex war and other wars: Towards a feminist approach to peace building *Development in Practice*.13 (2 &3), pp 154-177.

<sup>37</sup> Stearns, J. (2006) *Gender and International Relations: Issues, Debates and Further Directions*. Cambridge: Polity

Another scholar, Cockburn argues that it is gender that links these acts of violence that women experience at various sites, from the personal to the international, in a gendered variety of violence. Pankhurst is particularly critical of existing peace building activities, arguing that in general, they feature a backlash against women, where violence continues at a higher rate than before the conflict, or there is an attack on newly formed women's rights. According to them peace is described as a gendered concept, and peace building a gendered activity where women's insecurities are routinely ignored or subordinated, and any changes to gender roles are constructed as a jeopardizing peace.<sup>38</sup>

Feminists offer an alternative concept of peace that should be pursued in post conflict situations, defined as women's achievement of control over their lives<sup>39</sup> This goes beyond a narrow militarized definition of peace and security, and draws upon Galtung's idea of positive peace, which requires the elimination of factors that cause insecurity, including structural inequalities and poverty.

Two factors help make this alternative a realistic goal. Firstly it has been recognized that where conflict results in major changes to the social fabric and men and women assume roles and responsibilities that challenge traditional gender norms which can provide a window of opportunity to transform gender relations<sup>40</sup>

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<sup>38</sup> Ibid no 8

<sup>39</sup> Enloe, C. (2002). Demilitarization- or more of the same? Feminist questions to ask in the post-war moment. In Zarkov, S, Cockburn C, eds *The post-war Moment: Militaries, Masculinities and Peacekeeping*. London: Lawrence and Wishart, pp. 22- 32.

<sup>40</sup> Meintjes S, Pillay A &, Turshen M. (2001). There is no aftermath for women. In *The Aftermath: Women in Post-conflict Transformation*. London: Zed Books, pp 3- 18

Secondly, this window of opportunity has been bolstered by international resolutions such as The Beijing Platform for action 1995, which calls for bringing a gender perspective to all structures, institutions, policies and programs, United Nations Security Council resolution 1325, which lays out a framework to make a gender perspective relevant to peace processes, including peace building and United Nations Security Council resolution 1820 which calls for effective action to be taken against Gender Based Violence.

Other scholars such as Christine Bell and Catherine O'Rourke<sup>41</sup> advocate that the best intervention that feminism can make to transitional justice is by holding all participants and framers to the larger dream of securing substantial material gains for women in transition. They suggest that feminist theorizing has helped expand the notion of conflict to include domestic violence, question the emphasis on political structures and secure women's involvement in all aspects of the peace process. They envisage a pragmatic role for feminism. They see it as a kind of praxis, which helps those involved in transitional justice to work for the betterment of women's lives in the complicated transitions to something that looks like peace.

Certain groups are also beginning to argue that traditional authorities need to be involved in transitional justice processes. For example, the United Nations Peace building Commission argued that a broad conception of justice and one that involves so-called traditional authorities is necessary to ensure the success of transitional justice. The Liberian Truth

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<sup>41</sup> Bell, C and O'Rourke C (2007). Does feminism need a theory of transitional justice? An introductory essay *International Journal of Transitional Justice*, 1, pp.23-44

Commission, among other such bodies, has also advocated the use of indigenous models of conflict resolution as a way to encourage reconciliation.<sup>42</sup>

However Sally Engle Merry<sup>43</sup> is of the view that human rights advocates tend to see traditional authorities and communities as inherently hostile to women's rights. Engle Merry suggests that part of the problem lies in the transnational human rights community's misunderstanding of culture as rooted in unchanging cultural norms. Transitional Justice Advocates have therefore tended not to regard traditional forms of conflict resolution as places to advance women's human rights.

In conclusion, comparing the above theories with the problem statement to the effect that transitional justice have been ineffective in dealing with gender concerns it is imperative that the process adopted must be multi dimensional in nature comprising both retributive and restorative theories for peace and reconciliation. The systems must also have safeguards to address women's specific needs. This study will therefore adopt a holistic approach to secure gains for women through transitional justice processes.

It is also apparent that there are many divergent views as to how transitional justice can be made effective for women. It is evident through international interventions and scholars that there is need for women to be involved in all aspects of post conflict reconstruction such as

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<sup>42</sup>Huyse, L (2008) Introduction: Tradition-based approaches in peacemaking, transitional justice, and reconciliation policies. In: Huyse, L and M. Salter eds. *Traditional justice and reconciliation after violent conflict: Learning from African experiences*. Stockholm, IDEA. pp 1-22.

<sup>43</sup> Engle Merry, S (2006). *Human rights and gender violence: Translating international law into local justice* Chicago, University of Chicago Press



during peace building reconstruction where transitional justice mechanisms are adopted. This is to ensure that the transitional mechanism adopted is also caters for women's needs.

Transitional justice systems have also transformed over the years to respond to the evolution of international law to include crimes against women as crimes against humanity. Some scholars are of the view that states have the ultimate responsibility of providing solutions for social injustices. This concept can however be a challenge for countries that have a breakdown of institutions for administering justice. In the case of transitional societies, the challenge facing each State is how to incorporate developments made at the international level into domestic law. Conflict situations tend to be characterized by lack of rule of law and a culture of impunity.

This is evident in countries like Rwanda and Sierra Leone, where the crimes committed against women and girls were so rampant, systematic, and widespread. During transitions, States also have to balance between justice for victims and establishing peace. States have to decide which transitional justice system is most effective and suitable for its people.

### Hypotheses.

This study will test the following hypothesis:-

1. Transitional justice systems provide an excellent opportunity to repair social roles that have been shuttered due to conflict.
2. The unequal power relations that existed between men and women prior to conflict render women particularly vulnerable in conflict settings. Failure to consider this

aspect during post conflict reconstruction can lead to escalation of violence against women and the prevalence of unequal gender relations.

### Research Methodology.

This research study will use secondary qualitative data based on information provided by a variety of scholarly works such as literature on feminist traditional justice, restorative and reconciliation and gender analysis of conflict. The literature will include books, scholarly journals, policy documents, reports, conference and briefing papers, articles, newspapers and interviews conducted by other reporters.

Further analysis will be made of official reports of both the Rwandan and Sierra Leonean Transitional justice systems for the purposes of the study. The study will also be based on interviews conducted by other actors and testimonies conducted by other authors of perpetrators and victims of the genocide. The qualitative method among others allows for an effective identification and investigation of the not so apparent role of intangible factors as social norms, gender roles and socio-economic status of women in the processes of transitional justice in general.

The study has faced limitations due to time constraints, expenses and language barriers, in that some documents are in Kinyarwanda and French. These challenges have however not prevented the study from being conclusive.

## CHAPTER OUTLINE:

The study will comprise of five chapters. The first chapter provides an overview of the study. It will examine the scope, objectives, hypothesis theoretical frameworks and research methodology that have been advanced over the study. Chapter 2 will examine the transitional justice systems adopted by Rwanda. It will begin with a gender analysis of the pre conflict period till post conflict reconstruction. The chapter will also examine the approached that Rwanda opted during transition, the limitations and achievements. Chapter 3 will examine the transitional systems adopted by Sierra Leone in pursuit of justice and peace. It will start with the pre existing conditions prior to the conflict till the cessation of violence. The chapter will also examine gender analysis of the transitional justice systems adopted together with the limitations and achievements. Chapter 4 will provide a comparative analysis of the Rwanda and Sierra Leone transitional justice from a gender perspective. The analysis will be based on the justice system in light of the hypotheses and theoretical framework already stated. The chapter will look at the international approach and local approach taken by the two countries and how each approach has contributed towards gender equality. Chapter 6 provides conclusions of the study, gives recommendations and provides suggestions on areas for further study.

## CHAPTER 2.

### A GENDER ANALYSIS OF THE TRANSITIONAL JUSTICE SYSTEMS OF RWANDA .

#### Introduction.

A transitional period includes the reconstruction of institutions, political leadership and society on many levels. Justice and reconciliation movements are often set up during this period by national governments or by international community as a means of justice .violence does not end and becomes prevalent on the domestic front as ex combatants return and resources and employment are scarce.

Transitional justice provides an opportunity for a country to address gender inequalities. To do this effectively there is need look at the prevailing conditions that led to the violence. This chapter will focus on the gender relations prior to the conflict and how the transitional justice systems have been used to address the gender disparities.

#### Gender relations prior to conflict.

Like most African countries, Rwanda is a patriarchal society. This influences not only the direct relationships between men and women, but also the social and cultural positioning of women in society. Gender relations have somewhat changed since the genocide, not only because of its direct consequences, but also because the Government of Rwanda (GoR) has seized the post-conflict period as an opportunity to deal with gender issues. Nevertheless, in many instances women remain in weaker and inferior positions to men. In general, women are not expected to play an important or assertive role in public.<sup>44</sup>

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<sup>44</sup> International Red Cross (2004) *Research report on 'violence against women in Rwanda from 1998 to2003'* Kigali, Ministry of Gender and Family Promotion, 2004), 6.

### Gender relations during conflict.

During the Rwandan genocide, rape and other forms of violence were directed primarily against Tutsi women because of both their gender and ethnicity. This extremist propaganda which exhorted Hutu to commit the genocide specifically identified the sexuality of Tutsi women as a means through which the Tutsi community sought to infiltrate and control the Hutu community. This propaganda fueled the sexual violence perpetrated against Tutsi women as a means of dehumanizing and subjugating all Tutsi.<sup>45</sup>

Margaret Walker has made distinctions in understanding the gender aspects of crimes and harms in the context of the Rwandan genocide.<sup>46</sup> She distinguishes among several categories of violence and harm. First, gender-normative violence and harm is specifically inflicted upon women or men because they are women or men. Second, gender-skewed violence and harm refers to situations where the burden or effects turn out to largely or disproportionately affect women or men. Finally, violence may also precipitate further losses or multiply the vulnerability of women or men specifically. This consequence-related aspect of gender violence is called gender-multiplied violence and harm. This categorization indicates immediately that gender violence and harm is about more than just sexual violence. For example, the heavy burdens left to females to head households resulting from the genocide are equally important in terms of the gender aspects of the genocide and reparation.

Although gender violence is much broader than sexual violence, sexual violence against women and the cruelty with which it occurred was characteristic of the Rwandan genocide.

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<sup>45</sup> Marin R (2006) what happened to the women. gender reparations for human rights violations, Social Research Council, Newyork.

<sup>46</sup> Walker, M U. (2010), Truth telling as reparations Metaphilosophy Volume 41, Issue 4, pages 525–545, July 2010.

Aside from being targeted through gender-based violence, men have also suffered great losses because of the genocide. Both women and men have to face immense human loss and physical impairment in post-genocide Rwanda. Yet, the way they experience the losses and cope with the effects may differ.

During the genocide, women were not only victims of violence but were also aggressors. Many women participated in one way or another as perpetrators. Many are currently imprisoned because of their participation, either through killing or torturing, or through informing the killing militia of the whereabouts or shelters of potential victims. These women were also aware of the sexual abuses committed or they were silent witnesses to these gender-related crimes.<sup>47</sup> The African Rights report illustrates that women, and at times even young girls, hacked people to death .mostly women and children, but also wounded people, intimidated victims with guns, looted the living and the dead, pointed out Tutsi or unreliable Hutu e.g., Hutu who tried to save Tutsi, handed over refugees, and even helped co-organize the genocide at high levels. At times, mothers and daughters were partners in crime.<sup>48</sup> Their participation in the genocide further complicates cohabitation for surviving women.

#### Gender relations after conflict.

The immense death toll of the genocide has been that the majority of those killed are men. This has also led to some specific consequences for women. In many instances, entire families were slaughtered, leaving only a mother or a few orphans. The huge number of casualties means that many women were left to their own devices after the conflict. A 1998

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<sup>47</sup> Mahmood M (2001) *When Victims Become Killers* Princeton Princeton University Press

<sup>48</sup> African Rights, (1995) *Not So Innocent When Women Become Killers* London African Rights

census determined that the vast majority of the survivors were women. The numbers were 169,304 women compared to 113,500 men.

Also, in the aftermath of the genocide, the inheritance rules were still guided by customary law, this is because the new inheritance law only came into existence in 1999 after the genocide. Thus, many women had trouble accessing the property of their husbands or fathers, such as land.

### Transitional justice mechanisms.

There are various approaches to transitional justice however no single approach has worked successfully on its own. To achieve its goals, various approaches need to be combined. These approaches include domestic and international criminal prosecutions, reparations or compensation, truth and reconciliation commissions, public memorials, gender justice, institutional reforms and lustration.<sup>49</sup> Rwanda has chosen a multi faceted path to address the past.

### The International Criminal Tribunal for Rwanda .

On the international level, under Chapter VII of the United Nations Charter, the Security Council, in cases of war, has the right to establish international tribunals and appoint international representatives to run them. The International Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) were the first such courts to be established since the end of World War II.

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<sup>49</sup> Franke, K. M. (2006) Gendered Subjects of Transitional Justice. *Columbia Journal of Gender and Law* 15 (3): Pg 814

After the 1994 genocide, the Rwanda government requested the international community to intervene to restore justice by establishing an international tribunal to fight injustice and restore order. On 8<sup>th</sup> November, 1994, the United Nations through Security Council resolution No 955, established the International Criminal Tribunal for Rwanda (ICTR). It is situated at Arusha, Tanzania and whose powers include prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda, and Rwandan citizens responsible for such violations committed in the territory of neighboring states, between 1 January and 31 December 1994.<sup>50</sup> The aim of international criminal tribunals is to try atrocities that violate universal standards of justice. This is based on the retributive theory of justice meant to act as deterrent to future commission of offences and eliminate impunity.

The first person convicted by the ICTR of crimes was the former mayor of Taba, namely Jean-Paul Akayesu. He was convicted of rape as a crime of genocide. Many women testified during his trial. The Judgment was delivered on 2<sup>nd</sup> September 1998. The case turned out to be a landmark case in that; it marked the first conviction for genocide by an international court. It was also the first time an international court punished sexual violence in an internal conflict and the first time that rape was found to be an act of genocide.<sup>51</sup>

The initial case before the court did not include charges of sexual violence, and it was only as a result of the advocacy of domestic and international women's civil society, and in particular

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<sup>50</sup> Bassiouni M C (2008) *International Criminal Law: International enforcement* Brill, pg 103

<sup>51</sup> Nowrojee B (2005) "Your Justice is Too Slow' Will the ICTR Fail Rwanda's Rape Victims?" United Nations Research Institute for Social Development (UNRISD), Occasional Paper 10,



the efforts of the sole female judge on the bench, that the charge sheet was amended to include these crimes after evidence emerged in testimony. While it cannot be presumed that women judges and staff will necessarily bring to their work a gender perspective that contributes to women's rights, in practice they are more likely to do so. They are also more likely to be accessible to women's organizations, as evidenced in the Akayesu case, making the inclusion of equal representation in all aspects of a court's work a critical element for securing justice for gender based crimes.<sup>52</sup>

Additionally, the tribunal established a broad legal definition of rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive and noted that these acts of violence need not include penetration or even physical contact.<sup>53</sup> The other conviction that is of significance is that of Jean Kambanda who was the prime minister of Rwanda who was convicted of Genocide. Kambanda was the first head of state to be convicted of genocide and the first to acknowledged responsibility for the genocide.<sup>54</sup>

Disappointingly, the Akayesu case quickly became an exception, till 2<sup>nd</sup> November, 2000 when Pauline Nyiramasuhuko, former Minister for Family and Women's Affairs, was indicted on charges of genocide and rape as a crime against humanity.<sup>55</sup> In the testimony given at her trial, witnesses allege that she instructed members of the *Interahmwe* to select the nicest Tutsi women to rape and murder and to consider the rapes as a reward for their

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<sup>52</sup> Valji N supra note 1

<sup>53</sup> Paul Magnarella (2001) *Justice in Africa Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal* Aldershot Ashgate

<sup>54</sup> Snyder, Jack L. and Vinjamuri L. (2003) *Trials and errors principle and pragmatism in strategies of international justice international security*, international security 28, No 3 (2003/04,) 5-44

<sup>55</sup> Jones A (2002) 'Gender and genocide in Rwanda' *Journal of Genocide Research* 4,1: 65 at 83

involvement in the killings. She was charged with conspiracy to commit genocide, genocide or complicity in genocide in the alternative, direct and public incitement to commit genocide, as well as multiple crimes against humanity.<sup>56</sup>

The indictment charges were that Nyiramasuhuko participated in a plan to exterminate Tutsis supervised and ordered attacks whilst also encouraging and assisting atrocities committed by the Interahamwe militia. On 24<sup>th</sup> June, 2011, Pauline and her son, Arsene Shalom Ntahobali, were each sentenced to life imprisonment after being found guilty of genocide, crimes against humanity and war crimes. Nyiramasuhuko was in addition convicted of conspiracy to commit genocide. She was convicted. Nyiramasuhuko is the first woman in the history of international law to be charged, specifically, with rape as a crime against humanity for her active encouragement of the rape of Tutsi women at the hand of the *Interahamwe* militia. This is one of the cases that show that women were also perpetrators of the violence.

#### Limitations.

The ICTR has been criticised in that despite having its large budget and staff, it has dealt with a small number of cases and cannot award reparation or compensation to genocide victims. One observer of the court noted that on the tenth anniversary of the 1994 genocide, the ICTR had handed down 21 sentences, 18 convictions and 3 acquittals. An overwhelming 90 per cent of those judgments contained no rape convictions. More disturbingly, there were double numbers of acquittals for rape than there were of rape convictions. No rape charges were even brought by the Prosecutor's Office in 70 per cent of those adjudicated cases.<sup>57</sup> The

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<sup>56</sup> *Prosecutor v Pauline Nyiramasuhuko et al.* (1997) (Trial Chamber) Case No. ICTR-97-21-T. Available at [www.ictj.org](http://www.ictj.org)

<sup>57</sup> Nowrojee, B supra note 52

handful of prosecutions seems in to contrast the 250,000–500,000 incidents of sexual violence estimated to have taken place during the Rwandan genocide.

The other notable shortcoming of the ICTR is that, in addition to witnesses feeling alienated and mistreated, they also felt demeaned and disrespected by the tribunal and were therefore reluctant to cooperate and give testimony. The most infamous incident occurred during the cross-examination of a witness who had been subjected to rape and sexual torture. During the witness' testimony, all three judges on the panel were laughing, apparently at an inappropriate and absurd line of questioning from the defense council, and the unexplained laughter was perceived as intimidation and mockery of the witness.<sup>58</sup>

The fact that the investigators went to collect evidence of sexual violence in public glare discouraged many women from giving their evidence.<sup>59</sup> In some instances charges of rape were added as an afterthought further undermining the fact that rape was used as a form of violence. Many women also feared to come forward due to security concerns or social stigma associated with rape.

The distance between the ICTR and the people of Rwanda also became a significant obstacle to the tribunal's contribution to executing justice and to ensuring peace and reconciliation in the country. In a study conducted by Alison Des Forges and Timothy Longman<sup>60</sup> regarding the impact of the tribunal on the people of Rwanda, 'respondents complained that the trials

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<sup>58</sup> Crawford, J(2000) Rwanda tribunal witnesses unhappy with their treatment' *Hirondelle News Agency* 29 May.

<sup>59</sup> Neuffer E, (2002) *The key to my neighbors' house. Seeking justice in Bosnia and Rwanda* Newyork, Picador

<sup>60</sup> Des Forges A and Longman T 'Legal responses to genocide in Rwanda' in Weinstein and Stover *Supra* note 17 at 59

were held far away from Rwanda and were organized using western-style judicial practices that place a heavy emphasis on procedure and have little concern for community interests.

The tribunal decided to do something for women in particular because of the way in which women were targeted during the genocide. The tribunal's registrar, Agwu Okali, tried to some extent, to respond to the lack of compensation with a social service program, launched in September 2000, to provide funding to Rwandan women's civil society organizations, that is Avega, Haguruka, Pro-Femmes, Rwandan Women's Network, and Asoferwa. However, since this program was mostly symbolic in character, it further reinforced the perception among the organizations involved that the ICTR largely ignores the fate of the victims. In fact, many individual victims were not even aware that the ICTR ever launched this type of program.<sup>61</sup>

Institutionally, the ICTR has been accused of being insensitive to the needs of women survivors and witnesses in its processes. The Tribunal has made an effort in recent years to learn from past weaknesses, and a gender adviser was brought on board in 2003. This was, however eight years after the ICTR was established. Issues remain, however, regarding witness protection, outreach, treatment of the accused versus treatment of victims, as well as broader credibility issues, and there has been little trust among Rwandan women that the ICTR process will deliver justice for sexual violence. Even as Rwandan rape survivors continue to recognize the value and potential of an international court set up to deliver justice to them, the overwhelming sentiments expressed by them are a burning anger, deep frustration, dashed hopes, indignation and even resignation.

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<sup>61</sup> Rombouts H, (2004) *Victim Organizations and the Politics of Reparation. A Case Study on Rwanda* Antwerp Intersentia

Finally, women complain of not having received the necessary witness protection as required by the Rules of the Tribunal.<sup>62</sup> The lack of anonymity and confidentiality regarding court transcripts has left many women vulnerable and susceptible to retaliation attacks upon returning to their communities. In fact, numerous women who have testified at the ICTR have lost their lives as a result of the lack of safeguards in place to ensure their identities are protected.<sup>63</sup> As a result of occurrences such as these over the years, numerous survivors' organizations have chosen to forego all cooperation with the ICTR.<sup>64</sup>

One of the goals of retributive justice, as outlined in Chapter 1, is to establish adherence to rule of law and to restore society's faith in the country's administrative and judicial systems. If the society is unable to relate to a mechanism of transitional justice, however, and continues to perceive it as a foreign apparatus, it is highly unlikely that it can contribute in any way to the reconciliation process. The maltreatment of witnesses highlights the fact that retributive mechanisms of transitional justice such as tribunals need to incorporate further safeguards in order to ensure the protection of victims and witnesses.

### The National Level.

The Rwanda patriotic front took office in 1994 and sought to establish the rule of law and justice for the victims of genocide. At the national level, the government opted for a strictly legal approach through individual retributive criminal justice, modifying the regular court system somewhat in order to try genocide suspects. The national judicial system became the

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<sup>62</sup> The Statute of the International Tribunal for Rwanda (1994) at Articles 21 Available at [www.ictj.org](http://www.ictj.org)

<sup>63</sup> Rehn and Johnson-Sirleaf Supra note 12 at 96.

<sup>64</sup> Crawford Supra note 59

primary avenue for prosecuting those lower-level actors who were not among the organizers, but who actively participated in the genocide. In the immediate aftermath of the genocide the judicial system was more or less nonexistent. In terms of human resources, almost all members of the judiciary had either been massacred or had fled into exile, to the extent that by the end of the genocide, Rwanda had only twenty judicial personnel responsible for criminal investigations and only nineteen lawyers.<sup>65</sup>

In addition, the physical destruction that took place during the genocide left the infrastructure significantly weakened. Moreover, existing laws at the time of the genocide were grossly insufficient to contend with the nature, scale, and intensity of the crimes committed particularly crimes of sexual and gender-based violence, which were so widespread and ubiquitous throughout the conflict.<sup>66</sup>

When the transitional government took power, 120,000 people were detained for various crimes of genocide, including rape and sexual torture and mutilation. Inevitably, the judiciary was severely overwhelmed and increasingly incapable of bearing the burden imposed by the large number of individuals awaiting prosecution for genocide, and it was evident that the existing penal code would not suffice. To this end, the State enacted the Organic Law No.08/96 of 30<sup>th</sup> August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990 (hereafter, Genocide Law). The Genocide Law was passed, therefore, in recognition of the

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<sup>65</sup> International Crisis Group 'Five years after the genocide: justice in question' (1999) at 34 Available at <http://www.crisisgroup.org/home/index.cfm?id=1412&l=1>

<sup>66</sup> Mohammed M (2007) *Accountability for international humanitarian law violations: the case of Rwanda and East Timor* .Birkhauser.

fact that 'the exceptional situation in the country requires the adoption of specially adapted measures to satisfy the need for justice of the people of Rwanda.<sup>67</sup>

The organic law separated crimes related to the genocide into four categories in order to fast-track prosecutions and encourage the release of prisoners. The categories of perpetrators were divided according to their varying degrees of responsibility. First, the masterminds of genocide and those responsible for sexual violence. second, individuals who intentionally or unintentionally killed or who injured people with the intention of killing them third, individuals who committed serious physical assaults without the intention to kill and, fourth, those guilty of property crimes committed in the context of the genocide. Those who confessed could receive reduced sentences. Much effort and international community support have been directed towards reforming and rebuilding the Rwandan judicial system.

#### Limitations.

Like the ICTR, the transitional justice process through Rwanda's national courts is plagued by substantial and procedural obstacles both in terms of investigation, and prosecution of crimes. As already stated, in the aftermath of the genocide, the primary avenue for addressing crimes of sexual violence is through prosecution in the national courts. From December 1996 to December 2003, in both the civil courts (Tribunals of First Instance) and military courts, 9,728 persons accused of genocide, and of crimes against humanity or of related crimes were brought to trial. Out of the 1000 cases filed, only thirty-two included charges of rape or sexual torture. Furthermore, the review of genocide judgments reveals the paucity of

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<sup>67</sup> Preamble, Organic Law No 08/96 of 30th August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990 (1996)

genocide sexual violence prosecutions and an onerous caseload that has delayed genocide trials and subjected those accused of genocide including rape to extended pre-trial detention.

The success level of prosecution varied based on geography and other circumstances. However, genocide trials involving rape fall far short of the estimated tens of thousands of acts of sexual violence during the genocide. Prosecutors attribute the low rate of prosecutions of crimes of sexual violence primarily to the failure of victims to report the crimes committed against them. There are numerous factors contributing to why women and girls are reluctant to come forward and why those who do continue to meet with obstacles to justice.<sup>68</sup>

These complications have all been compounded by an untransformed judicial system that is not equipped to deal with the specific needs of these cases. A significant contributing factor to underreporting of sexual violence cases is the fact that there are some instances in which women are unable to report sexual violence, even if they are willing. For instance, there are cases in which women simply do not know or remember the identities of their attackers,<sup>69</sup> particularly in instances of gang rape, or sexual assault that took place outside the region in which they lived.

In addition there is the ever-present fear of stigmatization which, combined with shame and self-blame, leads many victims to internalize their grief and trauma in order to protect themselves. One victim refused to tell even her husband about her rape because for a very long time, she has despised the sin of adultery. The reluctance to report crimes of sexual

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<sup>68</sup> Amnesty International "Marked for death" Rape survivors living with HIV/AIDS in Rwanda' (2004) at 8 Available at <http://web.amnesty.org/library/print/ENGAFR470072004>

<sup>69</sup> *Ibid*



violence stems not only from fear and shame, however, but also from a general distrust of the legal system.

As with the ICTR, several key issues stand between the victims of sexual and gender-based violence and the justice they seek. The first is the lack of a clear definition of rape and sexual torture in the Penal Code, which ultimately leads to inconsistency in verdicts. An examination of judgments in genocide trials reveals that the failure to define rape in the Penal Code had contributed to considerable confusion among witnesses, accused, prosecutors, and judges. The reliance on judicial discretion to characterize an act of sexual violence has produced inconsistent guilty verdicts and punishments.

The lack of clarity leads to confusion, therefore, at several stages, including the pre-trial stages in which prosecutors are determining what charges to include in an indictment. The absence of a clear and concise definition of rape and other forms of sexual violence is imperative at this stage because, as demonstrated earlier in the context of the ICTR, whether or not such crimes are included in an indictment depends on how the individual prosecutor interprets their respective definitions.

The second obstacle hindering the investigation process is the fact that some rape charges are never filed or followed through, even when a case has been reported to authorities: 'the women who complained of authorities' failure to record the charges of sexual violence reported that their alleged rapists were imprisoned for crimes other than sexual violence and had since been granted provisional release' as per the Presidential Order.

As such, women who have risked stigma, ostracisation, and threats on their life have had to contend with the return of their attackers to their community upon provisional release, without having been punished for the torture they inflicted. As has been illustrated by the situation in the ICTR, reliance on an individual's interpretation of the law or prioritisation of crimes leads to inconsistency, and ultimately to a miscarriage of justice. A clear strategy and mandate is therefore necessary, at all stages of investigation and prosecution, in order to ensure crimes of sexual and gender-based violence are a priority and are accorded the same treatment as other Category One crimes.

The lack of women in positions of authority within the Rwandan legal system presents yet another obstacle to justice. As was demonstrated in the ICTR's *Akayesu* case, the importance of female judges and court personnel is essential in ensuring access to justice for crimes of sexual and gender-based violence. In Rwanda, women continue to be underrepresented within the national police force, the Prosecutor General's office, and within the courts.<sup>70</sup> Human Rights Watch maintains that persons who have suffered sexual violence continue to experience trauma for a long period after the assault, and female victims are more willing to confide in other women.<sup>71</sup> The under representation of women in positions of authority combined with insufficient resources and inadequate training of judicial personnel present further obstacles to justice for victims of rape and sexual violence.

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<sup>70</sup> Human Rights Watch *Struggling to survive: barriers to justice for rape victims in Rwanda* (2004) Binaifer Nowrojee 'Your justice is too slow': will the ICTR fail Rwanda's rape victims?' (2004) Available at [www.womensrightscoalition.org/pdf/binaifer\\_paper.pdf](http://www.womensrightscoalition.org/pdf/binaifer_paper.pdf)

<sup>71</sup> Ibid

The final substantial obstacle, which is inherent in the widespread nature of sexual violence during the genocide, is lack of evidence. There have been numerous instances in civil and military courts in which the court dismissed rape charges due to lack of direct testimony from the victims, who had died following the rape. In other cases, the court held that the testimony of the victim and other witnesses alone did not adequately prove that the accused committed rape.

Among the many other thorny obstacles is the lack of protection for witnesses during and after the trial process. As it stands, the Code of Criminal Procedure does not require court judgments to redact the names and identifying information of rape complainants.<sup>72</sup> This lack of privacy and confidentiality leaves victims and witnesses vulnerable and reluctant to be forthcoming in terms of reporting crimes of sexual and gender-based violence. It is also further evidence that the role of the witness in the retributive justice system is secondary, at best, and that justice is focused more on the punishment of the individual, rather than on the impact on the victim.<sup>73</sup>

### Gacaca

Although the Genocide Law laid the foundation for addressing genocide crimes and crimes against humanity, the legal system faced overwhelming obstacles in the subsequent attempt to implement the law. After attempting to try genocide suspects using the classic legal system, the slow pace of prosecutions and of rendering justice resulted in only 6,000 cases being tried out of over 120,000 in a period of five years. At the rate at which the trials were

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<sup>72</sup> Ibid

<sup>73</sup> Human Rights Report (2008), Law and Reality: Progress and Judicial Reform In Rwanda, section V paragraph 9

going, it was estimated that it would take possibly sixty years to try all detained suspects.<sup>74</sup> Given this backlog of cases, Rwandan government in 1998 sought an alternative to the classic legal system and turned to the traditional *Gacaca* courts.

It is important to note, however, that *gacaca* as practiced in post independence, Rwanda was not fully informal, because it involved the intervention of local authorities to whom the State assigned the responsibility of resolving conflicts that occur at the local level. Largely, however, the *gacaca* courts are a community-based mechanism generally classified as restorative.<sup>75</sup>

<sup>76</sup>Gacaca is the Kinyarwanda word for justice on the grass. These courts were mandated to handle the less serious crimes in categories two through four, cases that would try killers, accomplices of intentional homicide and individuals who had committed property crimes. Aware of the significant obstacles facing restorative mechanisms, and taking into account the need to impose punitive measures, as well as the need to ensure national and societal reconciliation and reconstruction, a compromise was reached that established a modernized adaptation of the traditional courts, as enshrined in the Organic Law on Gacaca (hereafter, Gacaca Law), which was adopted in January 2001.<sup>77</sup>

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<sup>74</sup> Official Website of the Inkiko Gacaca, "Overview " Available at <http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm>

<sup>75</sup> See Sarkin *Supra* note 5

<sup>76</sup> Waldorf L (2006) *Rwanda's failing experiment in restorative justice. In Handbook of restorative justice, a global perspective*, edited by Dennis Sullivan and Larry Tuft 422-434, London/New York Routledge.

<sup>77</sup> The full title of the law is Organic Law No 40/2000 of 26/01/2001 Setting up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994 (hereafter, Gacaca Law)

The Gacaca Law retained the principles enshrined in the 1996 Genocide Law regarding the categorization of suspects, and the provisions for confession and guilty pleas. It established approximately 11,000 *gacaca* courts at different administrative levels the cell, sector, district, and province levels and most significantly it expanded Category One to include, not only sexual torture, but the crime of rape as well.<sup>78</sup> A subsequent Organic Law on the organization and functioning of the *gacaca* courts was passed in 2004 which, in line with the provisions within the Rome Statute and the Statute of the Special Court of Sierra Leone, provides for the establishment of new safeguards for rape victims. Under the 2004 Gacaca Law, rape victims now have three options for private testimony in *gacaca* courts and are also prohibited from publicly confessing to rape, ostensibly in order to protect the victim's identity.

The *gacaca* tribunals provide a forum within which the accused is given the opportunity either to confess or to answer to the charges against him or her and to provide his or her own account; the members of the panel of judges are given the opportunity to question both the accused and the general assembly and the members of community are given the opportunity to provide testimony and to seek answers from the accused. This system, therefore, seeks to individualize responsibility for the genocide, in the spirit of retributive justice, as well as to use an existing mechanism of conflict resolution in order to encourage dialogue and promote reconciliation, in the spirit of restorative justice.

### Limitations.

The very nature of *gacaca* courts, therefore, requires a fusion of elements of retributive justice (individual criminal accountability) and restorative justice. Striking a balance between

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<sup>78</sup> Ibid Title II, Chapter I.

the two is precarious and the *gacaca* system has come under criticism for attempting to use a distinctly non-legal mechanism to address legal matters.<sup>79</sup> As with other mechanisms of restorative justice, however, the *gacaca* system is intended to work with the formal legal system, particularly when dealing with Category One crimes, such as sexual violence.

The central difference between Rwanda's retributive mechanisms and this particularly mechanism is the role of women in positions of authority. As opposed to Rwanda's retributive mechanisms, women are better represented in *gacaca* courts where they constitute 36 percent of *gacaca* judges in pilot courts at the cell level.<sup>80</sup> This is of particular significance because, presently, the *gacaca* system represents the main avenue for legal redress of genocide and related crimes. Even victims of Category One crimes, like sexual violence, face the pre-trial *gacaca* process before their cases are transferred to and adjudicated in the classic courts.

Following the pilot phase, the State and *gacaca* officials recognized the deficiencies inherent in the *gacaca* process with respect to protection of sexual violence victims and witnesses, which led to the reforms in the 2004 Gacaca Law. As it stands, a rape victim has three options, testimony before a single *gacaca* judge of her choosing, testimony to a judicial police officer or prosecutorial personnel, to be followed by complete processing of the rape case by the prosecutor's office. The primacy accorded to crimes of sexual violence, the engendering of the bench, and the safeguards put in place by the *gacaca* courts provide a more enabling atmosphere for dealing with crimes of sexual and gender-based violence.

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<sup>79</sup> See Sarkin *Supra* note 5

<sup>80</sup> *Ibid* at 50

There remain however, some limitations of the restorative nature of this mechanism. This involves the very nature of *gacaca* courts, witness testimony before the public. In Rwanda, where few of the actual witnesses to the crimes committed during the genocide have survived, the system of accusations and of giving testimony is fragile. The general assembly of *gacaca* courts is composed of all members of the community, including the accused and their families and peers. Consequently, according to a study of the *gacaca* pilot phase, limitations arise from the small population of survivors who are available to testify and psychosocial factors related to distrust and division. The study maintains that when it comes to providing testimony, in one of the communities in which the *gacaca* process was first tested, it seemed that the sentiment of not wanting to attract enemies prevailed within the general population.<sup>81</sup> This tension-filled atmosphere is even more so for victims of sexual and gender-based violence.

Since the launch of the pilot program in June 2002, 581 *gacaca* courts in ten provinces had registered approximately, 134 cases of rape or sexual torture, as compared to approximately 3,308 cases of non-sexual violence crimes, such as murder, assault, or looting were brought before the same courts.<sup>82</sup> It is evident from the numbers that women were not coming forward to report crimes of sexual violence primarily due to the very public nature of the *gacaca* process. Notwithstanding the protections provided for in the *gacaca* law, the small population of local communities gives rise to the fear that even when testifying in camera, victims' privacy will be compromised.

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<sup>81</sup> Ibid at 78.

<sup>82</sup> Human Rights Watch *Supra* note 70 at 22.

The *gacaca* court, therefore, is largely a restorative justice mechanism that has been adapted to deal with gross violations of human rights, in accordance with international human rights law, but it also incorporates elements of retributive justice.

#### Disarmament, demobilization and reintegration

A government body referred to as the Rwanda Demobilization and Reintegration Commission was established in 1997 to demobilize and reintegrate ex-combatants from armed groups, the *Forces armées rwandaises*, and the Rwandan Defense Forces. One of the key goals of Rwandan Demobilization and Reintegration Commission is to facilitate the reallocation of Government expenditure from military to social and economic sectors. DDR and transitional justice were deliberately kept separate in Rwanda due to a combination of logistical and policy concerns.

This goal has particular importance for gender justice as militarization of society has been linked to higher levels of violence against women in other settings, and decreased social spending places an increased burden on women who are expected to take on additional responsibilities and roles in their community and families. Less than 1 per cent of demobilized ex-combatants were women and little is known about their reintegration as there has been limited research. This absence of information means that it is difficult to assess how these women have reintegrated. There has also been a concern that women's participation is being underreported by combatant groups at the front end of the process, and that more needs to be done to encourage women combatants to present themselves, and to properly identify and incorporate women into national DDR programs. There is an inherent tension between DDR and the *gacaca* court system considering that, in most cases, DDR programs aim to



reassure ex-combatants they will not be punished if they agree to lay down their arms. In contrast, Rwandan ex-combatants must pass through *gacaca*, where they risk being accused of genocide.<sup>83</sup>

### Conclusion.

From the above discussion, it is clear that Rwanda's experience with transitional justice mechanisms both at the international level and at the national level reinforces the fact that, in any transitional society, the path to justice and reconciliation must also address society's specific needs. Rwanda recognized the limitations of employing either a strictly retributive or a strictly restorative mechanism by adopting its hybrid *gacaca* system. However, this mechanism itself still faces significant limitations. The approach to addressing such mass violations of women's rights therefore must be multidimensional in nature, in order for the process to be truly effective and to create sustainable peace and reconciliation.

The following chapter will look at the transitional justice system adopted by Sierra Leone.

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<sup>83</sup> Waldorf L (2009) DDR and transitional justice: The case of Rwanda. Research brief accessed through [www.ictj.org](http://www.ictj.org)

## CHAPTER 3.

### A GENDER ANALYSIS OF THE TRANSITIONAL JUSTICE SYSTEMS OF SIERRA LEONE.

#### Introduction.

Sierra Leone, like other African states, is a patriarchal and paternalistic society. The socio-economic as well as political systems and structures of the society show grave cases of gender inequality and social injustices that are themselves deeply rooted in paternalistic socio-cultural and structural systems and practices. Discriminatory customs and laws, especially regarding marriage, property rights and sexual offenses, all aggravate these institutionalised gender inequalities and makes gender-based violations possible and prevalent in Sierra Leone.

Domestic and sexual violence is rife in Sierra Leone and is on the increase even todate. The constitution provides for gender equality but gives priority to customary law in matters of marriage, divorce, inheritance and property. Unfortunately, these are the very sites of gender in equalities and violence and these customary laws are essentially deeply rooted in paternalistic socio-cultural and structural systems and practices. These patriarchal values ensure male domination in all societal relations effectively subjugating women's rights and undermining their real and potential agency. Gender inequalities are prevalent throughout these societies. The majority of women are illiterate and extremely poor with little access to and control over valuable resources not protects women in such cases.<sup>44</sup> Women are economically insecure, as poverty is marked among women in Sierra Leone

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<sup>44</sup> African Human Security Initiative (2009), 'Sierra Leone: A Country Review of Crime and Criminal Justice', *Institute of Security Studies Monograph*, No.160.

### Gender relations prior to the conflict.

In Sierra Leone, stark gendered inequalities existed even prior to the conflict. The country's truth commission was the first of its kind to explicitly make the link in its findings between gender inequality before the conflict and the gendered nature of the violations during the conflict. Violence against women, particularly wife beating, was accepted practice and was perpetrated with near total impunity. Although sexual violence was legally recognized as a crime, only the rape of a virgin was seen as a violation. As in many other countries, rape was generally regarded as implying the woman's consent.<sup>85</sup>

### Gender relations during the conflict.

Throughout the 10-year armed conflict, thousands of women and girls of all ages, ethnic groups and socio-economic classes were subjected to widespread and systematic sexual violence. As a woman civil society activist noted that women became prey, no matter what their social standing was before the conflict.

With regard to gender-specific violations, women and girls were not only raped, by individuals and by gangs, but were also subjected to miscarriage as a result of rape, forced pregnancy, forced abortion forced labour, abduction; and mutilation. Forced marriages, which included sexual slavery, was widely committed against women and girls, who were given as wives to commanders and combatants. The rape of women and girls in front of family members was used as a form of torture and a deliberate strategy to break family and community bonds.<sup>86</sup>

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<sup>85</sup> Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (Freetown: Graphic Packaging Limited GCL, 2004), vol. 3b, 87, Para 14, hereafter TRC. Report.

<sup>86</sup> NRC Report (2004), pp.92,129-30

Women were not simply victims in the conflict. There are reports of women who participated as voluntary fighters, collaborators and rebel supporters; though here were those that claimed they did this to avoid being gang raped. They were said to have mediated the violence against themselves by displaying extreme aggression or attaching themselves to one male combatant or becoming wives of the combatants.

#### Gender relations after the conflict.

The decade-long war in Sierra Leone occasioned massive atrocities, especially against women. It is widely estimated that up to about 275,000 women were victims of gender-based violence.<sup>87</sup> Particularly, the vulnerable position of women in Sierra Leone made them deliberate targets of the malice of various factions but most especially the RUF.<sup>88</sup> The TRC found that all of the armed forces in particular the RUF and the AFRC, embarked on a systematic and deliberate strategy to rape women and girls, especially those between 10-18 years of age, with the intention of sowing terror amongst the population, violating women and girls and breaking down every norm and custom of traditional society. Tens of thousands of women were abducted and forced to join factions as bush wives and child soldiers, whilst others were killed, mutilated and had their limbs amputated. Many more were also subjected to rape, forced marriages, detention, torture, enforced sterilization and sexual slavery and many more became internally displaced people (IDP) and others went into exile.

At the conclusion of the civil war, huge political and moral challenges faced the country, including questions of justice for past atrocities given the complexity of a conflict in which many of the perpetrators of gross human rights violations were themselves also victims.

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<sup>87</sup> TRC Report (2005), vol.3b, c.3, p.86

<sup>88</sup> TRC Report (2005), vol.2, c.2, p.100

Accounts of women's experiences during the war clearly demonstrate that while both men and women endured violence and hardship, the ensuing harms suffered are different.

Women's experiences of sexual violence and the need for justice, acknowledgement and assistance are a crucial element of post-conflict rehabilitation, but the gendered impact of the conflict is much broader. In addition to ongoing insecurity for women, a lack of basic services, the devastation of physical and social infrastructure and the tensions related to reintegration, land access and property rights, many women have also had to deal with being forced to take on the roles of missing male family members in a context of ongoing and systematic discrimination. These inequities include laws that still prohibit women from inheriting land and property or prevent them from accessing services from the State without a male intermediary.

#### Transitional justice mechanisms .

Like Rwanda, Sierra Leone has chosen to pursue more than one approach towards transitional justice institutions. These are the Truth and Reconciliation Commission (TRC) and the Special Court for Sierra Leone. It also adopted related policies and programmes for reparations to victims, follow-up on the recommendations of the TRC and implementation of institutional and legislative reforms. The establishment of the TRC and Special Court was a two-track process wherein truth-seeking and reconciliation coexisted with criminal accountability efforts. This was the first time that a truth commission had run simultaneously with an international or hybrid court.

### Special Court for Sierra Leone.

The Special Court for Sierra Leone was created in January 2002 through an agreement between the UN and the Government of Sierra Leone to try those most responsible for violations of international humanitarian law and Sierra Leonean law during the country's civil war.<sup>89</sup> It is situated in Freetown and is a unique institution employing both international and domestic capacity. It is anticipated that the infrastructure and capacity built during the Court's lifetime will go some way to rebuilding the devastated domestic justice system in Sierra Leone. The Special Court has to date indicted 13 war criminals. The case against Charles Taylor, former President of Liberia was the last of these cases to be brought to trial. The case is currently being heard in The Hague due to security concerns regarding holding the proceedings at the Freetown court.

### Limitations

There have been numerous critiques of the Special Court during its time of operation, some of which include the tensions in its relationship with the TRC, the strength of its outreach initiatives, the extent to which there will be a legacy and impact left on the domestic justice system in Sierra Leone, the small number of cases it has heard, and the narrowness of its mandate. Additionally, some feel that the slow implementation of reparations has had a negative impact on how victims perceive justice secured through the Court.

The Court has, however, made significant strides in furthering justice for sexual and gender-based crimes. In February 2009, in *Prosecutor v. Issa Sesay, Morris Kallon and Augustine*

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<sup>89</sup> Special Court for Sierra Leone (2003) Sierra Leone, Special Court , Geoffrey Robertson .Special Court

Gbao (Case No. SCSL-04-15-T), also referred to as the 'RUF case,'<sup>90</sup> three of the top commanders of the RUF were convicted for gender-based crimes against humanity rape, sexual slavery and inhumane acts (forced marriage) as well as for the war crime of outrages upon personal dignity. The forced marriage convictions were the first of their kind and followed an earlier ruling by the Appeals Chamber of the Special Court, which concluded that forced marriage could be considered a separate crime against humanity under the category of 'other inhumane acts.' In responding to the conviction, the Prosecutor of the Special Court noted that the Court had for first time in world history convicted each individuals of 'forced marriage' as a separate crime against humanity. In doing so, the court recognized the long lasting suffering inflicted upon women through recruitment as bush wives' during the Sierra Leone conflict.

While the Special Court has clearly made a significant contribution to advancing accountability for gender-based crimes through the institutions of international justice, there were also critical setbacks. In particular in relation to the case of Prosecutor v. Moinina Fofana and Allieu Kondewa,<sup>91</sup> also known as the Civil Defence Forces (CDF) case, where the judges ruled to exclude all evidence related to sexual violence crimes even though this was the insult to the violations experienced by the women who took the stand as witnesses. The case involved charges against senior leaders of the Civil Defence Forces, a pro-government militia group. The accused were charged individually and as part of a joint criminal enterprise with murder, inhumane acts, violence, acts of terror, collective punishments, pillaging and enlisting children.

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<sup>90</sup> Arriaza N R and Maricurrena J (2006) *Transitional Justice in the 21<sup>st</sup> Century*. Beyond Truth and Justice, Cambridge University Press.

<sup>91</sup> United Nations Juridical Year Book 2007, (2010) United Nations Publications United Nations. Pg 522

Approximately four months prior to the trial, the Prosecution sought to add four new counts alleging sexual violence including forced marriage under the existing counts of inhumane acts and violence to life and health in violation of the Geneva Conventions. The Trial Chamber denied this motion on the basis that it would offend the rights of the accused to be prosecuted without undue delay. The Prosecution sought and was denied leave to appeal this decision.

The implications of the judgment were widespread. In several instances the Prosecution was prevented from leading evidence that may have eventually led to testimony on sexual violence, often to the point of seriously fragmenting and hindering witnesses' and victim's testimony. In the words of one of the women she said she felt so bad, because they raped her very brutally, and that was her main reason for going to court to testify. But as soon as she got there, her lawyer told her that she should not talk about that anymore.<sup>92</sup>

The Appeal Chamber did eventually find that the Trial Chamber erred in excluding evidence of sexual violence from going to prove other existing charges, but concluded that this ruling should only act as guidance to the Trial Chamber in future. The particularities of this case highlight the ongoing need for reforms to international law and international justice systems to make them sufficiently gender sensitive and victim-centered.

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<sup>92</sup> Kelsall M S and Stepakoff, S (2007) 'When we wanted to talk about rape': Silencing Sexual Violence at the Special Court for Sierra Leone,' *International Journal of Transitional Justice* 1, No. 3, pg 355-374



### The Sierra Leone Truth and Reconciliation Commission.

The creation of the truth and reconciliation commission (herein after referred to as TRC) in Sierra Leone was provided for in the Lomé Agreement that ended the conflict in 1999. It was established by an act of Parliament in 2000, which gave the Commission a one-year mandate to create an impartial record of the violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone.<sup>93</sup> Key objectives for the TRC were to address the issue of impunity, respond to the needs of victims, promote healing and reconciliation, and prevent a repetition of the violations and abuses suffered.<sup>94</sup>

A unique feature of the Commission's work was its special focus to the experiences of women during the conflict. In this regard, the Commission ensured that three of the seven Commissioners were women, one of whom had direct experience in tackling issues of gender-based violence during armed conflict in the context of an earlier truth commission in South Africa. This was Yasmin Sooka who had been a commissioner with the South African Truth and reconciliation commission.

Based on lessons learned from gaps in the South African TRC process, the Sierra Leone TRC consulted local and international women's activists early and formulated special rules of procedure that were designed to address the particular needs of female witnesses. Special hearings were held for women, and these had considerable success in placing the issue of sexual violence front and centre on the TRC's agenda. Additionally, the Commission provided food, transport, water and medical assistance where necessary to facilitate women's participation in Commission hearings. Within civil society, women's groups formed the

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<sup>93</sup> Brown B S (2011) *Research Handbook on International Criminal Law*, Edward Elgar Publishing, 2011

<sup>94</sup> World Bank (2006) *Gender, Justice and Truth Commissions*, Washington, DC World Bank, 2006.

Women's Task Force, a coalition of representatives of civil society groups, women's groups and international and local NGOs to ensure a coordinated response to the work of the TRC and the Special Court, and to ensure that crimes suffered by women were adequately identified and addressed.<sup>95</sup> Women's organizations also played a central role in bringing the experiences of women, particularly their experience of sexual violence, to international attention.

The final report of the TRC was released on 5 October 2004. One chapter of the report is entitled 'Women and the Armed Conflict' and details the violations suffered by women during the war, as well as the post-conflict status of women in Sierra Leone. The report offers a complex account of the ways overlapping social, legal, political and cultural forces made women more vulnerable to a range of wartime offences. The analysis went far beyond merely listing violations. The TRC concluded, moreover, that all parties to the conflict were responsible for perpetrating abuses, including abduction and sexual exploitation, against women and girls.

The TRC also made strong recommendations with respect to legal, political, educational and economic reforms that would strengthen the status of women in Sierra Leonean society and would make them less vulnerable to future victimization. It urged the repeal or reform of all statutory and customary laws that discriminated against women, the passage of new laws requiring all political parties to ensure that at least 30 per cent of their candidates for national and local elections be women and ratification of the Protocol to the African Charter on the Rights of Women.

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<sup>95</sup> King, J (2006) Gender and Reparations in Sierra Leone: The Wounds of War Remain Open, in Ruth Rubio-Marín, ed., *What Happened to the Women: Gender and Reparations for Human Rights Violations*, New York: Social Science Research Council.

The TRC further recommended that the Government launch a campaign to address customary norms that compelled a victim of rape to marry her rapist. These recommendations for reform were more gender-specific than the reports of earlier truth commissions and thus provide an important rallying point for civil society advocacy on issues of gender justice worldwide. Civil society and human rights organizations in Sierra Leone have been vocal about the serious delays in the Government's implementation of the TRC recommendations, which are still largely unfulfilled six years on.

The full implementation of the recommendations is seen as a vital step towards addressing the conditions that contributed to the outbreak of war and which persist in Sierra Leonean society today. One positive step in this regard, however, has been the enactment in 2007 of three 'Gender Acts' covering domestic violence, inheritance and customary marriage.

#### Reparations.

The Sierra Leone TRC did not consider reparations until there was pressure from international and local women's groups .even this was much late in its work, and after it had faced both resource and time limitations. As a result, consultation was limited to Government departments and local based NGOs. Nevertheless, the Commission's recommendations include progressive measures for women victims of the conflict. In particular, the Commission recommended prioritizing reparations for amputees, women who suffered sexual abuse, children and war widows, because these individuals suffered multiple violations and were deemed to urgently require a particular type of assistance to address their current needs. The TRC also recommended that the definitions of 'victim' and 'beneficiary' not impose

limits based on who had participated in and cooperated with the Commission, as had been the practice of some earlier truth commissions. Had the TRC proceeded in that way it would have excluded a large number of victims; particularly women, many of whom did not participate for fear of the stigma attached to their experiences during the conflict.<sup>96</sup>

Similarly, the TRC suggested that in determining the size of pensions (recommended to be set up for amputees, children and women affected by the conflict), the Government must take into account not just the cost of living, but also the amount given in DDR packages and ex-soldiers' pensions.<sup>97</sup> This recommendation reflects the gendered roles that men and women play during armed conflict: DDR packages primarily benefit men, who are more likely to have been combatants women, meanwhile, are disproportionately represented among victims and thus among those to whom reparations are owed. Linking DDR packages and reparations is one way to ensure more gender-sensitive distribution of post-conflict resources, and thus of creating a more equitable reintegration programme. Despite these positive recommendations, however the actual implementation of Sierra Leone's reparations programme has been characterized by severe delays.

The first steps to roll out the programme were not taken until 2008, when the UN and the Government of Sierra Leone embarked on the 'Year 1 Project,' which itself aimed only to build the institutional capacity needed to implement the TRC recommendations on reparations. This project received funding of \$3 million from the UN Peacebuilding Fund and

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<sup>96</sup> De Greiff P (2006) *The handbook of reparations*. Oxford University Press.pg 636

<sup>97</sup> Feyter K(2005) *Out of ashes reparation for victims of gross and systematic human rights violations*. Intersentia, Nv pg 300.

has been implemented by the National Commission for Social Action (NaCSA), a governmental organization charged with overseeing reparations.

During the first year, Project made progress in conducting victim registration, with close to 30,000 victims registered during this period. The initial registration period, however, did not yield the numbers anticipated, and time-frames for registering were extended. This happened again during the second registration period, which led to the adoption of a 'restricted open-door policy' whereby the time restrictions for victim registration were made more flexible.<sup>98</sup> This is an important reform, particularly for sexual violence cases where women may not come forward initially due to lack of information, fear, stigma, insecurity or lack of strong confidentiality measures or trust in institutions.

The TRC also recommended that a Special Fund for War Victims, intended to take care of amputees, children and women affected by the war, be established within three months of the publication of the Final Report in October 2004. This too was delayed. The Fund was launched five years later, in December 2009. It is intended to serve as a basket fund to receive national and international contributions to support victims of the conflict. One symbolic, but nonetheless important, step that has been taken on the basis of the TRC recommendations was the apology by the President to the women of Sierra Leone. During the international women's day on 27 March 2010, President Ernest Bai Koroma said that the State fell in their obligation to adequately protect women from the brutalities of armed conflict. He apologized for the wrongs done to Sierra Leonean women, asked for forgiveness in the name of the armed forces, and pledged to protect women's rights going forward. He

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<sup>98</sup> Suma M & Correa C (2009) Report and Proposals for the Implementation of Reparations in Sierra Leone. Center for Transitional Justice, available online: [http://www.ictj.org/static/Africa/SierraLeone/ICTJ\\_SL\\_ReparationsRpt\\_Dec2009.pdf](http://www.ictj.org/static/Africa/SierraLeone/ICTJ_SL_ReparationsRpt_Dec2009.pdf).

also acknowledged that traditional and cultural practices in Sierra Leone have grossly violated women's human rights. This acknowledgement of the State's responsibility for protection of women is an important step in laying the foundation for a country based on the rule of law and a culture of respect for human rights.

#### Disarmament, Demobilization and Reintegration.

The DDR programme in Sierra Leone, took place from 2001 to 2002 and has generally been described as a success. It has, however, been criticized for its failure to account for the needs of women and girls in the fighting forces. Women and girls played many roles in the conflict, particularly in the CDF and rebel forces, where they were commanders, cooks, frontline fighters and spies. Yet the more than 75,000 combatants demobilized during the official process, the UN Department of Peacekeeping Operations reports that only 6.5 per cent were women. This is partly a result of the criteria used by the DDR programme, which was initially based on a cash for weapons exchange.

This approach excluded women and girls who had their weapons taken from them by male commanders prior to reaching the exchange sites, never received weapons because they served in support roles, or were abductees who had already fled their captors and as such received no reintegration support. There has also been inadequate support for women in the communities who have played a vital role in the reintegration of ex-combatants, particularly those who were excluded from official programmes.<sup>99</sup>

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<sup>99</sup> Mazurana D and Carlson, K (2004) *From Combat to Community: Women and Girls of Sierra Leone*. Women Waging Peace Policy Briefing.

### Reconciliation and social reconstruction.

The TRC made an important starting contribution towards community reconciliation through its broader mandate and by hosting community events for reconciliation and healing. These efforts ceased, however, when the TRC concluded its work. Since then, some civil society groups have tried to step into the space, recognizing the ongoing and critical need for intra- and intercommunity social reconstruction and reconciliation. An example of one such civil-society-based effort is *Fambul Tok* (Krio for 'Family Talk'). This is a process that brings together all actors of the post-war society, offenders and witnesses to a 'family circle' to discuss and resolve issues. The community healing process is designed to address the roots of conflict at the local level and to restore the dignity of those who suffered from violence.

### Conclusion.

For many women in Sierra Leone, the post conflict period of rebuilding and reconstruction is focused on survival on a daily basis. In this context, a term like justice takes on a different meaning. It entails the transformation of social relations, national justice systems, legal reform, access to education and literacy, and effective policing.

## CHAPTER 4

### A COMPARATIVE ANALYSIS OF TRANSITIONAL SYSTEMS OF RWANDA AND SIERRA LEONE.

#### Introduction.

Whole societies suffer generally under repressive regimes and in conflict situations, but women suffer most severely under such conditions. In patriarchal societies like Rwanda and Sierra Leone, women suffer directly from specific types of harm, both because they are female and due to their socio-economic status in society. As noted earlier, the particular privileging of patriarchal values of male domination and female subservience in socioeconomic, cultural and political relations in these societies underlies the gender inequalities and social injustices perpetrated against women in peacetime and their intensification in times of repression and war.

This Chapter will be compare the transitional justice systems of Rwanda and Sierra Leone and how they sought to address themselves to the particular justice claims of women and examines whether transitional justice has delivered justice for women in Rwanda and Sierra Leone. To this end the concept of retributive and restorative justice advanced by these systems and their capacity to address gender inequalities will be examined and critiqued. It concludes that in order to achieve gender justice the aim of transitional justice, particularly delivering justice for women, should be secured through distributive justice.

To begin with both countries opted to pursue transitional justice systems that are applicable to their respective countries depending on their own conflict. There is no system that can be said to be tailor made for particular country. After war, a country has to balance between offering



justice to victims and maintain peace and which will more often determine what kind of transitional justice system to adopt. This analysis will look at the international approach and national or traditional approach of each country.

Rwanda adopted a three pronged approach towards its transitional justice mechanism, there was the establishment of the international criminal tribunal for Rwanda through the assistance of the international community, the establishment of the national court through enactment of organic law and the establishment of traditional courts also known as the *gacaca*.

### International approach.

At the international level, Rwanda requested assistance through the United Nations which in turn established the international criminal tribunal for Rwanda based in Arusha Tanzania. One of the landmark cases that was delivered in the court is that of Akayesu<sup>100</sup>, which marked the first conviction for genocide by an international court. It was also the first time an international court punished sexual violence in an internal conflict and the first time that rape was found to be an act of genocide.

This was to be followed by the conviction of Pauline Nyiramasuruko<sup>101</sup> in 2011. She was the first women in the history of international law to be convicted of genocide and crimes against humanity. The court has been criticised for being too slow and ineffective especially for women. By the time the tribunal was celebrating its tenth anniversary after the 1994 genocide, the court had handed down 21 sentences, 18 convictions and 3 acquittals. An overwhelming 90 per cent of those judgments did not include rape convictions. More

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<sup>100</sup> Binarjee supra note 52

<sup>101</sup> Nyiramasuruko note 57

disturbingly, there were double numbers of acquittals for rape than there were of rape convictions.

The distance between the ICTR and the people of Rwanda also became an obstacle to the tribunal's contribution to executing justice and to ensuring peace and reconciliation in the country. The fact that women had to travel far to give their evidence further disillusioned them. The people felt they didn't own the process.

When it came to investigations and prosecution, there has been criticism that investigators were insensitive and inhuman. They are said to have collected evidence in full glare of the public. When it comes to ensuring effective participation of women in the court process, there is need to ensure the investigators use a different approach in collecting evidence on gender based violence.

Sierra Leone on the other hand adopted a different style. It adopted a two track process which operated simultaneously. These are the Truth and Reconciliation Commission (TRC) and the Special Court for Sierra Leone.<sup>102</sup> It also adopted related policies and programmes for reparations to victims, follow-up on the recommendations of the TRC and implementation of institutional and legislative reforms. The establishment of the TRC and Special Court run simultaneously wherein truth-seeking and reconciliation coexisted together. This was the first time that a truth commission had run simultaneously with an international or hybrid court.

At the international level, the special court of Sierra Leone was established in January 2002 through an agreement between the United Nation and the Government of Sierra Leone to try

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<sup>102</sup> Special court for Sierra Leone supra note 89

those most responsible for violations of international humanitarian law and Sierra Leonean law during the country's civil war. It is based in the capital Freetown and has to date indicted 13 war criminals.

In terms of convictions, the Court made some significant strides in furthering justice for sexual and gender-based crimes. In February 2009, three of the top commanders of the RUF Issa Sesay, Morris Kallon and Augustine Gbao were convicted for gender-based crimes against humanity rape, sexual slavery and inhumane acts such as forced marriage as well as for the war crime of outrages upon personal dignity. Their convictions were the first of their kind and followed an earlier ruling by the Appeals Chamber of the Special Court, which concluded that forced marriage could be considered a separate crime against humanity under the category of 'other inhumane acts. This was the first time in history that individuals were convicted of forced marriage as a separate crime against humanity.

In terms of establishment of international institutions, it is evident that the approach undertaken by Sierra Leone seem to have secured more gains for women this could be attributed that the special court for Sierra Leone was a creation of the government as opposed to the an agreement imposed by the international community. The people therefore felt that they owned the process as compared to the situation in Rwanda who felt the court was being imposed on them. The fact that the court was also situated within the country became an added advantage as compared to the one established by Rwanda which was established in another country. This in turn affects the women's participation in the court process.

In terms of shortcomings, the Rwanda system seems to have more than the Sierra Leone process. Limitations range from prosecution and investigation of case on sexual and gender based violence, the distance and convictions by the court. Overall, the court was deemed as being overstaffed and having huge budgets, it is said to have been of little assistance to women.

National approach.

At the national level, Rwanda established the Rwandan organic law which was passed in 1996, by the transitional national assembly.<sup>103</sup> This was to pave way for domestic prosecution of cases related to genocide. The national courts are also plagued by substantial and procedural obstacles both in terms of investigation, and prosecution of crimes in Rwanda's national courts. Prosecutions of sexual crimes before domestic courts have been few in number. There is lack of evidence as victims are reluctant to speak for fear of community members finding out.

The other shortcoming is the lack of a clear definition of rape and sexual torture in the Rwanda Penal Code, which ultimately leads to inconsistency in verdicts and contributed to confusion among witnesses, accused, prosecutors, and judges. The lack of women in positions of authority within the Rwandan legal system presents yet another obstacle to justice. As was demonstrated in the ICTR's *Akayesu* case, the importance of female judges and court personnel is essential in ensuring access to justice for crimes of sexual and gender-based violence.

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<sup>103</sup> Organic Law No 40/2000 of 26/01/2001 Supra 77

At the national level in Sierra Leone, there was the creation of the truth and reconciliation commission which was part of the Lomé Agreement that ended the conflict in 1999. The Commission was given a one-year mandate to create an impartial record of the violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone.

A notable feature of the Commission's work was its special focus to the experiences of women during the conflict. This was reflected in its composition, whereby the commission ensured that three of the seven Commissioners were women, one of whom had direct experience in tackling issues of gender-based violence during armed conflict in the context of an earlier truth commission in South Africa. The Sierra Leone TRC also incorporated local and international women's activists early and formulated special rules of procedure that were designed to address the particular needs of female witnesses. Special hearings were held for women which had considerable success in placing the issue of sexual violence front and centre on the TRC's agenda. Additionally, the Commission provided food, transport, water and medical assistance where necessary to facilitate women's participation in Commission hearings. Women's participation in the design of the truth commission ensured the existence of a special unit to investigate war crimes from a gender perspective.

A Women's Task Force was also established. It was made up of members from women's associations, UN agencies, the police force, the media and the legal profession, that works to create an atmosphere in which women can participate in both institutions. The Task Force is credited with addressing the need for gender balance and sensitivity within the truth commission.

Another landmark of the Sierra Leone TRC was that when the final report was released on 5 October 2004, one chapter of the report contained details the violations suffered by women during the war, as well as the post-conflict status of women in Sierra Leone. The report provided recommendations on how social, legal, political and cultural forces made women more vulnerable to wartime offences. The TRC also concluded, moreover, that all parties to the conflict were responsible for perpetrating abuses, including abduction and sexual exploitation, against women and girls. The report also made recommendations with respect to legal, political, educational and economic reforms that would strengthen the status of women in Sierra Leonean society and would make them less vulnerable to future victimization. The challenge would ultimately be how fast the government can implement its recommendations.

At the national level, the Rwanda government established the traditional courts or local courts referred as the Gacaca in 1998. This was an informal mechanism for conflict resolution at the local level that exists at the margins of the State and was used to handle affairs of little or no legal consequence. It is important to note, however, that *gacaca* as practiced in post independence Rwanda was not fully informal, because it involved the intervention of local authorities to whom the State assigned the responsibility of resolving conflicts that occur at the local level.

The use of the community courts to gather evidence raised concerns for survivors of sexual gender based violence crimes about the risks of public disclosure. In essence this diluted efforts of women's organizations to ensure that Sexual Gender Based Violence cases were classified among the most serious crimes. An advantage of the courts is their ability to offer

familiarity and legitimacy to the population thereby contributing to reconciliation and reconstruction. As is the case with truth commissions, the role of local or traditional courts is complementary and is meant to work in cooperation with other mechanisms within the transitional justice sphere.

Disarmament, Demobilization and Reintegration (DDR) Programs, worked well in Rwanda despite the fact that it was kept separate with transitional justice mechanisms. The programme also succeeded despite a policy against amnesty. This programme however benefited ex-combatants who were men and not women who were ex combatants. There were also no funds available for reparations to their victims.

Sierra Leone pursued a different approach for Disarmament, Demobilization and Reintegration which was initially based on cash for weapons exchange. This approach excluded women who had their weapons taken from them by male commanders prior to reaching the exchange sites, never received weapons because they served in support roles, or were abductees who had already fled their captors and as such received no reintegration support. There has also been inadequate support for women in the communities who have played a vital role in the reintegration of ex-combatants, particularly those who were excluded from official programmes. From the above, it is therefore evident that the Disarmament, Demobilization and Reintegration in both countries largely benefited ex combatants who were male excluding women.

## Conclusion.

It is evident that no particular approach can be said to work exclusively for women. Judging from the experiences of the transitional justice mechanisms discussed above there exists a lacuna in the law between international statutory and the situation on the ground within post-conflict societies themselves. As such, there remains much to be done within the context of transitional justice to bridge this gap and to ensure that systems adopted end up being effective for sustainable social reconstruction and for women. It is also imperative for post-conflict societies to take an objective, holistic approach that takes into consideration all of the factors contributing to and arising out of acts of sexual and gender based violence and that makes gender justice a genuine prior.



## CHAPTER 5.

### RECOMMENDATIONS AND CONCLUSION.

For any State emerging out of conflict, transitional systems requires a multidimensional, holistic approach in order to achieve reconciliation and to prevent the recurrence of conflict. As such, these countries must employ a comprehensive model of transitional justice that combines their transitional justice mechanisms with other judicial and non-judicial processes aimed at addressing the factors that could lead to future conflict.

This model should involve both retributive as well as restorative mechanisms, instituting legal and institutional reform, encouraging national dialogue and promoting reconciliation. In addition, it is crucial that an effective transitional justice framework includes the participation of women, from the outset, not just in terms of legislation, but also throughout the implementation process. This in itself, ensures that crimes of sexual and gender based violence are brought to the forefront and are no longer considered subordinate to other violations of international human rights law.

A another key element of a comprehensive model of transitional justice is establishing individual criminal responsibility through prosecutions at the national and or international level through national courts, ad-hoc tribunals, the International Criminal Court, or hybrid internationalized courts As is evident from the discussion in the previous chapters, this is not merely enough to institute retributive mechanisms of transitional justice without ensuring clear definitions of sexual and gender based violence in their applicable law and without taking steps to engender the investigation and prosecution processes.

Restorative mechanisms must also include crimes of sexual and gender based violence in their mandates, and institute specialized mechanisms in order to ensure the participation and protection of women. In Rwanda, for example, as mentioned in the previous chapter, the Gacaca Law has undergone reform that provides for specialized measures to deal specifically with crimes of sexual and gender based violence.

In addition to establishing the transitional justice mechanisms discussed above, it is imperative that every transitional society emerging from conflict undertakes the reform of archaic institutions and legislation that may have contributed to a culture of impunity and lack of respect for human rights and rule of law. In terms of legislation, laws must be reformed in order to ensure the harmonization of international and domestic law. In addition to legislative reform, it is crucial that transitional States also undertake reform of other non-judicial institutions or national bodies in order to eradicate impunity, promote adherence to rule of law, and ultimately pave the road towards reconciliation.

A fourth element of a comprehensive model of transitional justice is encouraging reconciliation through preservation of memory and initiation and promotion of national dialogue, thereby discouraging a conspiracy of silence and eliminating the stigma surrounding sexual and gender based violence.

Finally, it must be recognized that the economic situation of survivors of conflict is drastically affected by conflict, and in most cases women are left behind to take on the role of sole providers. The pursuit of justice must therefore include measures that ensure not only that the perpetrators are held accountable for their actions, but that adequate redress is

provided for the victims of these gross violations of human rights, and that provide a solid foundation for the rebuilding of fragmented societies.

Finally, in order to ensure the consistent application of the law concerning international crimes especially crimes against women, criminal tribunals and courts must have equal representation of women on the bench and in the office of the prosecutor. Equally as important, is the need to ensure that all judges and officers of the court are experienced or trained in gender issues. The presence of women on the bench and as officers of the court, while important, does not necessarily guarantee prosecution of gender crimes. Engendering the Tribunal's bench and prosecutor's office, however, is of virtually no use if the prosecutorial strategy does not include the prioritisations of crimes of sexual and gender-based violence.

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