Handling of survivors of rape as a crime against humanity, the gender perspective in the Rwandan genocide tribunal : Some lessons from the Muhimana case

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Abstract

This essay finds its departure in the preparatory work in the Muhimana case[1] zeroing on the interaction with respective witnesses who subsequently testified in the case. The accused, Muhimana committed exclusive and disproportionate crimes against women and girls in Kibuye during the 1994 Rwandan genocide. As the prosecutor rightly put it, his 'hallmark' was rape and sexual violation of women.[2] Some of the observations made in this essay in relation to handling survivors are derived from my experience as a regional magistrate[3] in Zimbabwe and when I worked for a non-governmental organization focusing on gender violence in Zimbabwe, the Musasa Project.[4]

The following are some of the inherent problems associated with being a victim of rape:

- Being ostracised;
- Deep social stigmatization;
- Severe economic hardships;
- Being left more socially and economically vulnerable;
- Double discrimination on the basis of gender and rape status, as a rape victim.

The essay will conclude by exploring a gender sensitive way to:

I. Close the dichotonomy between rhetoric and practice in interviewing witnesses and investigating rape as a crime against humanity;

II. Reinforce any identified strengths; and

III. Handle rape survivors to minimize re-traumatizing them as they interact with the international justice system. Briefly comment on the Muhimana case, its significance from a human rights, gender perspective and in the African context. How it can be used to minimize trauma for survivors of rape in conflicts and restore their dignity.

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[1] *The Accused*

Mikaeli Muhimana, also known as Mika Muhimana, was born on 24 October 1961 in Kagano Cellule, Gishyita Secteur, Gishyita Commune, and Kibuye Préfecture, Rwanda. He became *conseiller* of Gishyita Secteur in 1990. The accused was arrested on 8 November 1999 in Dar es Salaam, Tanzania, and transferred on the same day to the United Nations Detention Facility in Arusha, Tanzania. Initially Muhimana was not indicted for rape.

The Indictment

The original Indictment, issued on 22 November 1995 in Case No. ICTR-95-1-I, confirmed by Judge Navanethem Pillay on 28 November 1995, charged the Accused jointly with seven others, namely, Clement Kayishema; Ignace Bagilishema; Charles Sikubwabo; Aloys Ndimbati; Vincent Rutaganira; and Obed Ruzindana.

The accused was charged with seven counts, namely: conspiracy to commit genocide; genocide; murder as a crime against humanity; extermination as a crime against humanity; other inhumane acts as a crime against humanity; serious violations of article 3 common to the Geneva Conventions, and serious violations of Additional Protocol II thereto.

The Indictment, as amended on 21 January 2004, charges the accused with four counts: genocide; or alternatively, complicity in genocide; murder as a crime against humanity; and *rape as a crime against humanity*. All of the alleged events, on which these charges are based, occurred between April and June 1994, in the Bisesero area and in many locations in Gishyita Commune, Kibuye Préfecture, in Rwanda

ICTR has previously been accused of not adequately investigating sexual violence prior to indicting and resorting to amending indictments to charge defendants of rape at the eve of the trial date. The ICTR statute has jurisdiction to prosecute, among other crimes, rape. Article 2 of the ICTR statute relating to genocide specifies that genocide can include, among other things, causing serious bodily and mental harm to members of the group. For this reason the Akayesu Trial Judgment, Para 731 states 'With regard to rape and sexual offence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they are committed with an intent to destroy, in whole or in part, a particular group, targeted as such.'

[2] Refer to opening statement in the case of Muhimana, Trial Chamber 111, on 29 March, 2004.

[3] When I started my duties as a regional magistrate I had not received adequate training in the area of gender. The work of a regional magistrate in Zimbabwe among other key result areas is to preside over rape cases. Although I had always had an inherent interest in women's rights it was after I had an opportunity to pursue a Diploma in Women's Law that I started dealing with rape from a gender perspective. That experience helps me understand some of the actors in the justice system who bring in the stereotypical baggage I once carried along the corridors of power at Rotten Row magistrate's court.

[4] At Musasa Project I had the opportunity to interact with survivors of gender violence in general and domestic violence in particular. It was most disillusioning to see how survivors had very little if any faith in the justice system I had served for more than 12 years. In my capacity as director of Musasa Project I was able to fully explore the effects of the interaction between survivors of

Introduction

The International Criminal Tribunal for Rwanda, (ICTR), Judge Davis remarked, is at the cutting-edge of very progressive legislation regarding rape and sexual assault but many of the problems in prosecuting and adjudicating rape, she underscored, did not find their resolution in legislation but rather in how the process of taking testimonies from the witnesses were conducted.[5]

It is clear that when women survivors of rape interact with the justice system their suffering is downplayed and their voices are silenced thus making witnesses feel invisible and disempowered.[6]

International norms and conventions exist on paper purportedly to protect women against gender-based violence in armed conflict.[7] Prominent women's rights activists have shown concern about how it is clear that human rights have not been extended to women, especially those who have suffered multiple violations:

'Human rights have not been women's rights – not in theory or reality, not legally or socially, not domestically or internationally.'[8]

The Muhimana case: a step towards making a difference

Catherine A. MacKinnon[9] rightly observed that the Muhimana case has chartered 'the beginning of the International Criminal Tribunal for Rwanda recovery from the *Semanza*[10] detour…….and the International Criminal Tribunal for Rwanda return to the course Akayesu began.'

The Akayesu judgment which characterized rape as an instrument of genocide also carries a significant legal contribution for concluding that rape formed part of a widespread and systematic attack directed against civilians, constituting crimes against humanity.[11] Rape was defined as: 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.[12]

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gender violence and actors within the justice delivery system. The previous experience as an actor in the justice delivery system added a dynamic and process-orientated dimension to my work in the area of eradication of gender violence. Yet on coming to the tribunal I found survivors of gender-based violence are not homogenous. I was now dealing with women who had received multi-violations and were now most reluctant to risk being re-traumatized by the international justice delivery system.

[5] See remarks by Judge Davies when she addressed participants to the first gender-sensitivity workshop held at Ngurdoto Lodge, Arusha, Tanzania on 14 May 2004. Refer to the seminar report on page 4.

[6] For a full discussion of how too often the survivors of rape remain silent about their experience when they interact with the justice system, see Renifa Madenga, (1999).

See also Rape Counselling and research Project, 1998) for comments relating to how damaging myths influence actors within the justice system treat rape witnesses unjustly.

[7] See main global human rights instruments including : Convention on the Elimination of all forms of Discrimination against Women, 1979; Declaration on the Elimination of Violence Against Women, 1993; Geneva Conventions (ICRC, 1949), Declaration on the Protection of Women and Children in Armed Conflict,1974; Protocol 1 to the Geneva Conventions (ICRC,1977); Protocol 11 to the Geneva Conventions (IGRC, 1977).

[8] See Catherine MacKinnon (1994).

[9] Catherine MacKinnon (2004:10) for a further and very interesting discussion on rape as fundamentally a crime of inequality as well as MacKinnon (1989).

For another excellent analysis of rape as a deprivation of autonomy, see Schulhoefer (1998).

[10] The Semanza definition of rape has been highly criticized for cantering on 'non- consent' The Semanza ICTR judgment, Case No. ICTR-97-20-T, Para. 344, 15 May, 2003, held that '… the mental element for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim'. Evidence on record shows that at one stage, the accused, Semanza, a military commander asked his subordinates: 'Are you sure you are not killing women and girls before sleeping with them? You should do that and even if they have some illness you should do it with sticks' [see para 253] given the coercive circumstances it is difficult to see why the trial chamber would centre a definition on consent.

[11] For a further analysis on the significance of the ICTR Akayesu case see Askin (2003: 14-15).

[12] Akayesu Trial Judgment at para. 598. It is most encouraging to note how some progressive national jurisdictions are taking hint of legal developments at international level. See Women's Legal Centre (2003:3) commenting on the definition of rape: 'The Women's Legal Centre specifically endorses the approach of the International Tribunal for Rwanda and The Former Yugoslavia (ICTR) and (ICTY) for the acknowledgment that rape is a form of aggression and that the central elements of rape cannot be captured in mechanical description of objects and body parts'.

The Muhimana case applied the Akayesu conceptual approach to resolve the issue relating to definition of rape, holding that 'coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape'.[13] And that most international crimes will be almost universally coercive, thus vitiating true consent.[14]

Comments relating to the Muhimana case reflect a material difference in the way witnesses were handled:

> 'The courtroom proceedings of the ongoing Muhimana trial mirrored improved cooperation and sensitivity by all parties regarding the protection of the rights of the accused and those of the victims. The management of the witnesses' examination, both during direct examination and cross-examination by the court, the prosecution and defence counsel did set an admirable precedent.'[15]

One of the trial attorneys in the Muhimana case, Wallace Kapaya, specifically commented on 'how a prosecution Attorney, Renifa Madenga was able to prepare witnesses of rape in the Muhimana case to open up despite the emotional trauma.'[16]

The Muhimana case obviously is a success story. A lot of team work went into it. It is pertinent to carefully analyze what brought about the difference. It is equally important to re-visit previous problems to see how these obstacles and challenges were turned into opportunities during the Muhimana trial.

Previous problems

The final report of the Commission of Experts for Rwanda noted 'disturbing reports on 'the abduction and rape of women and girls in Rwanda', resulting in the Special Rapporteur on Rwanda concluding that 'rape was the rule and its absence the exception'[17] during the 1994 genocide.

Previous problems have been encountered in indicting and prosecuting gender-based violence at the International Criminal Tribunal for Rwanda. These problems are briefly discussed with the objective of drawing lessons to map out the way forward after the Muhimana case.

As Stephanie K. Wood[18] rightly points out, there are three specific areas which need improvement:

- Failure to adequately indict perpetrators for commission of gender-based violence;
- A widening gap between the need for legal justice and survivor's interest;
- Excessive delays that are diluting the credibility of legal justice as a deterrent.

- **'Failure to adequately indict for gender–based crimes'**

The International Criminal Tribunal for Rwanda has been criticized for inadequately investigating sexual violence prior to indicting and resorting to amending indictments to charge defendants with rape and other crimes of a sexual violence during trial.[19]

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[13] See *Prosecutor v Muhimana* case No. ICTR-95-1B-T Judgment, on para 546 delivered on 25 April,2005
See Catherine MacKinnon (2004:10).

[14] Muhimana TC judgment on page 550.

[15] See 'Gender-sensitive seminar report (ICTR, 2004:6) summarizing presentation of Melanie Werret, former Chief of Prosecutions, highlighting contents of two papers prepared by Roberta Baldini, then Assistant Trial Attorney in the Prosecutor's Office and Charity Karwi, Trial Attorney, OTP.

[16] See ICTR and Wallace Kapaya (2004:4). The paper also provides details of some of the problems encountered during the pre-trial and trial preparation of witnesses and victims of rape and how some of these were resolved.

[17] See United Nations (1994) and United Nations (1994).

[18] See Wood (2004:301-302).

[19] See critique by Wood (2004:301).

Even in the famous Akayesu case, Jean-Paul Akayesu, the bourgmestre of Taba (what would be referred in Zimbabwe as a mayor), was charged in the original Indictment with twelve counts of genocide, crimes against humanity and war crimes. No charges for gender-related crimes were initially levelled against Akayesu. This was despite extensive documentation[20] of rape incidents.

Observers even attributed the amendment of the indictment to external pressure.[21] In its recommendation of 1996, Human Rights Watch advised that tribunal must 'fully and fairly investigate and prosecute rape. Existing indictments should be amended, where appropriate, to ensure that rape, sexual slavery and sexual mutilation charges are brought.'[22]

Binafer Nowrojee made pertinent observations on some of the stereotypical reasons why prosecutors at international tribunals do not charge genocidaires with rape.[23] I had noted at national jurisdiction level that it was often problematic for survivors to get quality and timely justice from the justice system. As I worked as a case manager and later as an assistant trial attorney, I constantly noted the huge gap between the theoretical notions of the international justice delivery system and the reality of delivering a system that deals with the needs of women survivors of rape as a crime against humanity.[24]

Tribunal investigators and prosecutors come from a variety of backgrounds. Few have skills and experience on how to handle traumatized witnesses. Even those who have worked in related areas have not interacted with a category of witnesses who are so hyper-traumatized. It is necessary to have a standard for training.

- **'It has been noted that prosecutors at the tribunal fail to investigate rape in a timely manner'**
- **'A widening gap between the need for legal justice and survivor's interest'**

At one stage the tribunal encountered difficulties in securing witnesses attendances:

> 'Part of the failure to indict perpetrators adequately may stem from the deficiencies in handling witnesses during prosecutorial process, which alienates the survivor witnesses, re-traumatizes them and discourages other witnesses from testifying.'[25]

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[20] See documentation by Binafer Nowrojee (Human Rights Watch, 1996); Radhika Coromaraswamy (1998); Wood (2004: 301-2); Askin (2003: 14-15).

Re-Akayesu amendment

It was only during the course the trial when a witness on the stand spontaneously referred to the gang-rape of her six-year old daughter by three interrahamwe soldiers and the next witness referred to herself and others as victims of rape that proceedings were adjourned and the Prosecutor was ordered to investigate the rapes so as to include individual and superior responsibility for the gender-related crimes perpetrated in Taba. 'Crucial to this inclusion was the presence of judge Pillay of South Africa on the bench, a judge with extensive expertise in international human rights law and gender-related crimes'. The investigation by the Prosecutor revealed extensive evidence of rape and sexual violence in Taba. Akayesu's indictment was amended to reflect counts 13-15 rape as genocide, crimes against humanity, war crimes and other inhumane acts. As a result of the amendedment Akayesu was subsequently found guilty of committing sexual assault with a specific genocidal intent and individually responsible for genocide committed in the police bureau, becoming the first international criminal to be convicted of genocide by using rape as a tool of genocide.

[21] See Barbra Crossette (1998) explaining that pressure from women's organisations: 'These tribunals were literally forced to pay attention to a series of petitions and pressures from women's organization demanding that rape be recognized', quoting Felice Gaer, an expert on human rights and international organizations for American Jewish Committee.

[22] See Recommendations to ICTR (Human Rights Watch, 1996).

[23] 'African women will not talk about rape.'; 'We haven't received any real complaint [about rape].'; 'We don't have the evidence.'

'Criminal prosecutors are here to get convictions not make political statements.'; 'Women's rights activists are trying to make rape more important than it should be.'; 'Of course we are committed to prosecuting rape, but you are barking up the wrong tree with this guy[Akayesu].'; 'The rapes were a case of libido, not genocide crimes.'; 'We need to cut the unnecessary charges, like rape.'

'They [the accused] are going to be convicted of genocide anyway, so why do we need to bring rape [charges].'

[24] For an interesting discussion on women and justice delivery, focusing on Zimbabwe, see Stewart *et al*. (200:149-151). The authors liken the prevailing situation to a patchwork quilt where the general design is missing leaving the individual quilters to fill in the gaps with their own patches.

[25] See Wood (2004: 307); also Patricia Wald (2002: 206-254), especially discussion on frustrations witnesses have with ICTR which decreases their willingness to testify.

Relations between the tribunal and survivor witnesses in 2002 became so strained that two main survivor organizations boycotted testifying at the tribunal thus affecting some pending trials. This was followed by a protest against the International Criminal Tribunal for Rwanda on 27 June 2002, highlighting lack of faith in the tribunal.[26] Generally witnesses were reported to have described the process of testifying before the tribunal as 'dehumanizing and re-traumatizing'.[27]

Women victims of rape have their own sense of what constitutes justice.[28] It is necessary to consult them to find out or determine the most appropriate remedies they want and even how they prefer to be handled in court. Dragging them to court without them identifying with the process literally disempowers them.

- **Excessive delays that are diluting the credibility of legal justice as a deterrent**

The tribunal itself has conceded that the process of bringing justice is perceived as 'slow'.[29] Talking to witnesses in Muhimana the general consensus was that they feel the delays minimize significantly the importance of the genocide, indicating that people are forgetting the horror.[30] The tribunal has mapped out a way forward to resolve the inordinate delays:

> 'Our main task is to deliver justice, which means to ensure fair trial without undue delay.'[31]

The tribunal could improve its effectiveness in rendering justice for survivors of sexual violence by adequately indicting more perpetrators for gender-based crimes, reconciling the needs of legal justice with the interests of survivors, and reducing delays in prosecuting the alleged perpetrators.[32]

Lessons from the Muhimana case

Treatment of witnesses in the Muhimana case

Generally as prosecuting attorneys we do not receive systematic training focused on our substantive responsibilities in handling survivors of rape.[33] The prosecution section has no standard training aimed at developing skills in rape investigation or how to interact with hyper-traumatized witnesses. I had to depend on the experience I gained when I worked as a regional magistrate in victim friendly courts and knowledge on survivors of gender violence gained at Musasa Project. The gender-sensitive approach I acquired during the course of my Diploma in Woman's Law assisted in this regard. I started on the premise that inequalities exist regarding handling of women who are sexual assault and rape victims. It became pertinent for me to try and implement a

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[26] One of the survivor organizations, Ibuka, released a very strong statement accusing the tribunal, among other things, of incompetence. See Ibuka at www.ibuka.org

[27] See Julie A. Mertus (2000: 3) describing the deficiency of international trials as a healing process for survivors of sexual violence and women's abilities it exercise their agency during the adversarial process.

[28] Generally some of the victims I handled shared with me what they perceive as 'justice'. Witness BC wanted to get an opportunity to ask Mika Muhimana why he cut off her arm with a machete after killing her children. She also wanted to ask Muhimana how he thinks she manages house-chores. Most of the witnesses wanted to know whether they could be compensated for pain and suffering. (See on compensation the Hague Convention on Land Warfare & Geneva conventions and protocols on avenues for civil proceedings for compensation.) Some were curious to know why the vocal Muhimana would pretend to be unable to speak and 'hire' someone who was not there to say he did not rape. See also Indai Lourdes Sajor (1998: 7) for comments of victims from other jurisdiction.

[29] See United Nations (2002), admitting the proceedings may be seen as slow but judges must be scrupulous in ensuring a fair trial.

[30] The presentation of the prosecution case in Muhimana coincided with the ten year anniversary and many witnesses waiting to give evidence were visibly traumatized. The team had to liaise with counsellors from WVSS to intervene.

[31] Comments by the President of the Tribunal, Judge Mose, emphasizing the need for timely justice. See United Nations (2003).

[32] See Wood (2004: 317).

[33] The first seminar on Gender Sensitivity was held by ICTR on 24 May 2004 after close of prosecution case. It helped sensitize the international justice system actors, especially judges.

carefully thought out gender-sensitive approach in handling rape survivors in the Muhimana case. Before discussing the approach it is important to briefly comment on the interpreter.

The interpreter

All witness assigned to me spoke Kinya-rwanda. Inevitably I needed an interpreter.

I had a humble female interpreter who started by apologizing that her English was not 'perfect' (Her humility had a salutary effect on me, English being my fourth language). Contrary to her fears, when we spoke, she communicated effectively. She was friendly and professional. In addition she attentively listened to witnesses and empathized[34] with them. Above all, her attitude was very positive. I identified to her our target witnesses and what I expected to achieve and how. The rapport with the interpreter made a difference. She was relieved in between by a male interpreter who was extremely competent and friendly and well liked by the victims.[35] This rapport assisted during and after the interviews. The interpreters continued talking to the survivors after the interviews, especially when they exhibited traumatic reactions. (Ideally, interview sessions should be followed by a de-briefing but we did not have counsellors, the sexual assault team members filled in the gap but they are not trained counsellors.)

The interviews with victims

I set out below some of the practical methods that I used to try to build mutually beneficial relationships with the victim witnesses.

Demonstration of care and concern

For example I found myself saying, 'I am trying to imagine the pain, how you felt, you are very distressed, should we take a break?' This refers to the interview with AX.[36]

Encouragement

'You are a woman of strength; that was very courageous of you.' [37]

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[34] 'Remember the difference between empathy and sympathy: it is mere sympathy to think that they are so traumatized that you cannot say no to them. Yet empathy means respect, and if you respect them you will tell them the truth' See New York City/Balkan Rape Crisis Response Team (1993: 105).

[35] The female interpreter was Olga Gatimbro, based in Kigali; the male interpreter was the late Michel Munyangaju, a friendly and warm person who made witnesses feel at ease. His untimely death robbed us of a formidable member who treated witnesses with compassion.

[36] AX suffers from a terrible headache and backaches. She associates these with the rape perpetrated on her during the genocide.

What could I say or do but empathised? AX was raped by Mika Muhimana, after her husband, mother and four children were killed. Her last child was born two days before the genocide so one can imagine the state of her health when the baby was brutally killed and she was raped. One can only begin to imagine her trauma and how she has tried to forget and move on with life before I came to take her back on a mental journey to the darkest part of her life.

After establishing a relationship of care and concern AX opened up to relate in detail what she went through. AX who had started by telling me that what Mika did to her was worse than death (she repeated this in court). 'I felt so humiliated. I had lost my family, now I was losing my dignity. I felt like I was being killed twice.'

I spoke to AX after her testimony and she assured me that slowly she felt she was gaining her dignity, she had told it as it was, for Mika did evil things to her. Commenting on her demeanour and circumstances during judgment the Trial Chamber noted:

'Witness AX was visibly traumatized whilst recalling before the Chamber what had happened to her family and her. She lost her mother, her four children, and her husband during the events of 1994. Despite this tragedy, her testimony was clear, straightforward and convincing.'

[37] These were some of the comments I made in relation to witness BG who escaped after being held as a sexual slave by Mugonero an *Interahamwe*. Mugonero was authorized by Muhimana to go and 'smell the body of a Tutsi woman', had visible health problems. BG described the day she was taken as a sex slave as 'the darkest day in my whole life'. Prior to this killing she testified she had witnessed an attack on almost 50,000 people who had gathered at Mugonero Adventist Complex, only a few people, including the witness and her fiancé, survived this attack on the 16 April 1994. She sought refuge at Bisesero Hills were she witnessed brutal rapes and mass murder of Tutsi.

Witness BG was concerned that the court might mistakenly think she had agreed to 'marry' Mugonero. She was also worried that in court the defence would refer to her past sexual life since the accused knew her very well before the genocide. I took time to explain the law in relation to the issues she had raised.[38]

In addition to the explanations relating to 'consent', 'corroboration' and 'previous sexual history', I explained to the witness that what happened to her, which she related in detail, constituted what we term in international law 'coercive circumstances'[39] which vitiates consent. Hence even if she had verbally invited the *Interahamwe* to take her as a wife in the midst of the massacres, a reasonable court would infer there was no genuine consent.

The thorough preparation of BG paid dividends.[40]

- **Privacy**

Interviews of respective witnesses were held in a relatively private room.[41] Depending on the needs of the witness I arranged the room accordingly. I also gave AX tissues since it was so obvious she wanted to cry.[42]

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[38] Rules 90 and 96 of the ICTR Rules of Procedure and Evidence addresses the issues raised by witness BG. Rule 90 governs examination of witnesses and those evidential issues relating to corroboration of evidence of children testifying before the Tribunal and so on.

Rule 90 (F) makes provision for a Trial Chamber to exercise control over mode and interrogation of witnesses, this includes cross-examination of witnesses. Rule 90 (G) governs matters that may be subject of cross-examination. Cross examinations limited to subject matter of the evidence in chief and those matters affecting the witness's credibility. Though the court can allow cross-examination on other matters at the court's discretion, the same discretionary powers allow the Trial Chamber to afford some measure of protection for witnesses who are victims of sexual violence, from being harrassed or questioned inappropriately.

Most importantly rule 90 allows the court to apply rule 96. Rule 96 deals specifically with cases of sexual assaults and rape. Rule 96(i) specifically provides that no corroboration is required of a victim's testimony and the victim's prior sexual conduct is off the limits of counsel examining the witness. The Trial Chamber in Akayesu Judgment on page 135 similarly confirmed that '... the Chamber can rule on the basis of a single testimony provided such testimony is in its opinion, relevant and credible' (rule 96 should guide those domestic systems which still insist on corroboration). At international level in conflicts, rape can occur after a massacre, who can courts expect to resurrect to corroborate the survivor? At national level rape can occur in isolated places, who is supposed to prophecy and appear at the scene?

The core to rule 96 relates to consent. Consent according to rule 96 (ii) cannot be a defence where the victim had reasons to fear – among other things to fear violence, detention or psychological oppression. Even before the accused can rely on consent he has to, in a technical sense, assume the burden of showing that such evidence is relevant and credible and this has to be done in a closed session. This shows how the law at international level has gone all out to protect survivors.

[40] See Muhimana Judgment pages 57-58, the Chamber had this to say:

'In the light of the evidence submitted by the parties the Chamber finds credible Witness BG's testimony that the Accused allowed an Interahamwe, Mugonero, to abduct and rape her.…The Chamber notes the defence contention that the witness 'voluntarily', married Mugonero, who gave her protection …the Chamber finds Witness BG's account of her abduction and rape credible and reliable. In the light of coercive circumstances prevailing in the Bisesero area at this time, the Chamber is not persuaded by the testimonies of defence witnesses DAB and DAC that Witness BG consented to 'marry' or cohabit with Mugonero, an Interahamwe, who had participated in the killing of other refugees who had been hiding with the witness … Accordingly, the Chamber finds the accused permitted Mugonero to take away Witness BG, knowing that he wanted to rape her. The Chamber further finds that Mugonero raped witness BG several times in the house, as alleged in Paragraph 6 (d) of the Indictment.'

[41] AX's girl child became car-sick after boarding a motor vehicle for the first time, but the interview room had a bathroom and other necessary facilities. For AX, in addition to making provision for food since she really looked very hungry, we provided a comfortable couch for her to sit on.

[42] The 'tissue paper' therapy as it were I had learnt at The Musasa Project. Before the Diploma in Law course as I presided over cases as a regional magistrate I had seen so many women cry. Tears move me but then I did not have the gender sensitive approach. I would just encourage the victims to be strong and move on since 'time was of the essence'. The regional court was under-staffed and we had targets to meet!

At Musasa Project after the Diploma in Woman's Law my approach completely changed. There were trained counsellors and personnel to handle clients but the majority always insisted that they wanted to see the director and they were entitled to do so. Every one of our offices was also a designated 'crying room' and had tissues. By extending tissues to the women we were sending a message they all understood as indicated by their words as they leave the office, 'Thank you for allowing me not only to cry but to cry for as long as I wanted to. I feel much better.' If I had tissues at the regional court (we were so under-paid that we did not afford that luxury) I would have at least had the wisdom to extend them to the women but the message would be different, 'Wipe away those tears and let's get cracking, I have a job to do and targets to meet, I am a regional magistrate and you better give me the respect I deserve and we get the work done!'

- **Introductions were very personal and genuine**

The introductions touched on general topics like acknowledging that Kibuye was very beautiful, which is true. I spoke with passion when I greeted the witnesses and I had learnt a few words in their language. 'Amakuru', 'Bite', 'Ni'meza', 'Mirakoze', and so on, as a smattering of their language spoken by a foreigner reassured them that one was fully interested in them, helping build trust. I also explained who I was, my multi-roles, background, our team, and reassured them that we had all the time for them.

Once trust was established, I moved on to hear their testimony by inviting them to give an uninterrupted story and also reconfirming their statements. Here I deliberately let them tell their lived realities even though the prosecution had not even charged half of what the witnesses were alleging happened to them. Most of the details were missing in their original statements and most stated they were not ready then to tell their stories to strangers.

I noted from the previously recorded statements that the investigators who had taken the statements were male. Although in the majority of the cases the translator would be female I concluded that women victims of rape were reluctant to tell their lived realties to male investigators.

I prepared open-ended questions so that they could elaborate and clarify their narrations. There are no standard questions; each attorney comes up with what in their discretion can save the day.

Witness AU was a real challenge. Witness AU[43] had extreme difficulties in communicating; I started by focusing on her using the 'grounded approach' that I then vaguely remembered from the women's law diploma course. The witness became my focus. I started with her and ended with her. For example I did not bother her with my background and so on. I asked questions related to her current health situation: 'You seem to be holding your head frequently, do you feel ill?' She opened up and said during the genocide when she was raped, Mika hit her head against the wall. I empathized with her. That became a door opener for me. I then invited her to say more about the incident. Then it flowed. The focus then remained on her.

Witness AU refused eye contact. She cried but did not shed any tears, it was not even crying, she was literally groaning. She was very depressed. This was in sharp contrast with BJ[44] who was over excited and talked continuously. She even laughed later in court when she saw Mika, exclaiming, 'God help me, Mika Muhimana is now a Moslem!' Yet on a personal level when she referred to her concern that her husband, another witness, might discover that she was raped, she sounded upset.

The majority of witnesses ultimately 'opened up', expressing their fears and concerns to me, for example, BJ, moved from being excited to being a bit quiet, calm and very concerned and I had to find out the problem by asking her if the interview made her insecure in her marriage? She replied 'I am now nervous; in Arusha can I talk to someone?' I with emphasis told her that there were counsellors in Kigali and Arusha to provide emotional support. Indeed there were and WVSS did a sterling job.

I realized during the course of our discussion that she was a bit unsure about whether or not witness AT, her husband, might discover what happened to her during the genocide. In court when AT gave evidence it was clear he heard about the rape of BJ and was 'not amused at all'. He denied she was his wife despite that they live together and have five children, explaining that he just wanted someone to look after the house and do

[43] AU is a young lady who was raped under very coercive circumstances. The rape came after the killing of her parents and two children aged 5 and 3 years. During the rape Muhimana constantly bashed her head against the ground. In its summary judgment on page 12 the Trail Chamber noted: 'the particularly cruel nature of Muhimana's conduct', citing how he repeatedly banged AU's head against the ground during the rapes.

[44] BJ a 15 year old Hutu girl was mistaken as a Tutsi. Mika Muhimana threatened to pierce her genitals with sharp objects. After the rape when an *Interahamwe* identified her as Hutu, Mika apologized and freed her. On page 12 of Muhimana's summary judgment, BJ's age was taken as a very aggravating factor.

house chores. This development made me very concerned. Maybe I could have done more to explore her fears and address them strategically to ensure that her testifying did not interfere with her relationship with AT. This moment of truth was a major lesson to me. We should and can always do more to explore and give women spaces to make informed choices about their private lives.

In addition to the basic rights which include that witnesses must be treated in a caring and sensitive manner, 'victims should be treated with compassion and respect for their dignity'.[45] BJ had every right to respect for her private and family life.[46]

It is a constant reminder that when conducting interviews in a gender-sensitive way [47] it is important to:

1. Consider the status of women in society and specific cultural or social issues which may affect women;

2. Understand the 'social, cultural, moral and political environment' victims endure as a result of sexual torture and the extraordinary pressures and ostracism;

3. Be patient. Spend quality time listening. Understanding the cycle of violence and assessing what stage the victim is on the cycle. Constantly re-strategizing.

4. Adopt and promote gender-sensitive language by use of non-sexist language which brings out principles of equality between men and women and empowers the women to pick up the shattered pieces of their lives, take control of their lives and forge ahead.

5. Respect the victim. Inform them of all the choices they have and respect those choices.

The majority of witnesses were concerned about their security. That inherent fear is made real by some of the developments in the justice system. The witnesses are not paranoid. Hutu extremists have murdered some witnesses, including a woman and her children, after the woman appeared before the tribunal court to give evidence.[48]

It is the duty of the prosecutor to advise potential witnesses of the justice system. When dealing with female rape victims it is important to address issues of gender justice in order to 'market', as it were, the whole justice system so that the women know and participate in it. As prosecutors interacting with witnesses they expect to come up with a 'legal testimony' that will sustain a conviction in court.

Gender justice as an analytical tool must enable the exploration of the gendered or sexed neutral laws or policies that in real life situations have sex or gender discriminatory outcomes.[49] Barriers created by gendered perceptions of the lived experiences of men as opposed to women and the respective treatment the witnesses receive from official actors clearly show the process favours men.

Recommendations

Training – although the prosecution focus has shifted from investigation to prosecution in view of the completion strategy, training is still an important component of mapping out the way forward.

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[45] See Principle 4 of The United Nations Declaration of Basic Principles of Justice for Victims and Abuse of Power.

[46] The only other thing I did was to refer BJ for counselling before she left the Tribunal. I do not know what eventually became of her marriage with AT. I have to follow up.

[47] Part 2 of 'Principles of Research on Human Rights Violations' by Amnesty International.

[48] See Nasser Ega-Musa (1997), also Human Rights Watch, (1996: 96-97) emphasizing the need for better witness protection.

[49] See Prof Julie Stewart (2005).

During the Muhimana case I identified the following areas:

a) Sensitivity – this remains the key issue. Issues relating to witness security and safety should be taken very seriously. Lack of security, physical or emotional, results in witnesses refusing to testify in court. Sensitivity must be exhibited starting with the official who contacts the witness first to the last encounter with the witness.

b) Court room logistics – victims should be informed about what is happening so that they can willingly decide to come forward and participate meaningfully in the judicial process. This includes security assurances.

c) Court room environment – guaranteed a 'safe' and comfortable atmosphere before trial, during trial and after trial:

- There should be in place a witness support assistant from the Witness and Victim Support section and a counsellor to give support and assurance to witnesses. All the supporting staff should be gender sensitized and trained.
- Tissues and water should be available during pre-trial interviews and in court in witness rooms, even before witnesses ask, they have every right to cry before and after testimonies.
- Frequent recesses should be allowed giving a chance for witness to recompose themselves and dictate the right pace for interviews.
- On its part, the trial chamber needs to be constantly monitored so that it controls proceedings sensitively.
- It is equally important for the trial attorney to set the proper tone. Command respect, object on repetition, mis-stating or misguiding witnesses and any improper questioning. Guarding on privacy and safety issues like issues of complaints prior to sexual history.

Institutionalizing gender justice is an option which should be given consideration. Investigators, prosecutors and interpreters, regardless of sex, should be gender aware and sensitive when handling survivors of rape.

Mapping the way forward

What can we do better? What lessons can be drawn?

Pre-trial stage

a. Timely amending of indictments with due diligence.

b. Timely selection of witnesses.

c. Adequate and effective preparatory meetings with witnesses.

d. Effective dissemination of information to victims to keep them well informed at every critical stage of the case, from initial appearance, throughout the trial to judgment stage.

e. Effective collaboration within the office of the prosecutor teams and sections.

f. Identifying and liaising with critical tribunal sections like WVSS, security and witness management to ensure victims' needs are met.

g. Holding inter–sectional briefings and ensuring rapport with all stakeholders. This is critical. The office of the prosecutor has the witness management section and the sexual assault team which can move the agenda further. These two teams form critical pillars in supporting trial teams in the handling of witnesses.

h. Synthesizing the office of the prosecutor strategy and mainstreaming it into team targets. Improved cooperation within teams dealing with the same victims.

i. Prosecution staff to be well trained in effective and gender-sensitive ways of handling of victims.

j. Actively engaging non-governmental organizations in Rwanda who will take over the agenda after the completion strategy.

During trial

a. Ensuring a friendly court environment for victims by ensuring that all actors are gender sensitive in dealing with survivors.

b. Exercising due diligence in court when presenting victims' testimonies to ensure confidentiality, security and victim safety and integrity are maintained throughout the judicial process. Using all legal frameworks provided for victims protection.

c. Ensuring increased cooperation between defence and prosecution to avoid unnecessary consumption of time on issues relating to disclosure and so on, thus unnecessarily delaying proceedings and making victims sit in court for long durations.

d. Monitoring that cross-examination is done in a sensitive way which takes into account the victim's cultural values.

e. Provision of systematic counselling facilities throughout the trial. Formulating a gender sensitive standard of prosecuting rape and coming up with a clear strategy which reflects the will to prosecute rape.

Conclusion

Rape survivors in the Muhimana case were empowered to speak and to ensure that the door to silence, impunity and grave injustice was shut. Victims of rape should not bear the shame and stigma that society and the justice system impose on them. Rape is serious. The injurious consequences of rape require that those who perpetrate it at any level must not be allowed to do it with impunity and get away with it. The aim is to create international standards that move away from perceived defects in domestic jurisdictions and bring international standards back to the domestic courtrooms. With a gender sensitive approach to handling survivors of rape, the international justice system can assist in restoring dignity.

With political will, a gender-sensitive approach, the right skills and training, the international justice delivery system through its actors can restore lost dignity and humanity to survivors of rape and sexual violence. I believe we can make a difference in the lives of survivors of gender-specific crimes.

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