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BARE JUSTICE: A FEMINIST THEORY OF JUSTICE AND ITS POTENTIAL APPLICATION TO CRIMES OF SEXUAL VIOLENCE IN POST- GENOCIDE RWANDA

MEGAN M. CARPENTER[†]

I. INTRODUCTION	599
II. A FEMINIST RECONCEPTUALIZATION OF JUSTICE	600
A. Justice Reconsidered	600
B. The history of feminist legal theory illuminates a progression from a liberal emphasis on equality of opportunity to an increasing contextualization of legal subjects.....	602
1. Liberal Feminism sought to achieve equality of opportunity as enshrined in the law.....	603
2. Difference feminism involves the dissection of legal form and structure to uncover ways in which law situates its subjects according to sex	605
C. Law, at its peril, marks its subjects with distinct sexual characteristics.....	606
1. Civil procedure excludes feminine legal subjects by decontextualizing injury and failing to take into account existing inequalities and the situated subject	608
2. Rules of evidence exclude female subjects by failing to address situated subjects in their contexts, by basing judgments on rationality and autonomy, and by failing to acknowledge existent inequalities	609
3. Criminal procedure excludes a feminine legal subject by failing to acknowledge existent inequalities and collective societal	

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values, and by instead enshrining its subject with those very inequalities	611
4. International law excludes a feminine legal subject by creating an autonomous, individualized masculine model of the state as its subject	612
D. Breaking the conceptual holds: Current feminist theories demonstrate methods of dismantling the assumptions law makes about its legal subjects and present alternative ways of conceiving a feminist approach to justice	613
1. Deconstruction breaks conceptual holds by demonstrating that law is necessarily dependent upon, and reflective of, values	614
2. Postmodernism breaks conceptual holds by dismantling notions of universality and objectivity	616
a. Reconstructive postmodernism breaks conceptual holds by recognizing the importance of maintaining a contextualized theory of knowledge or understanding, while sustaining a commitment to regulative legal principles	618
3. Communitarianism breaks conceptual holds by recognizing human identity as being socially constituted, by emphasizing interdependence and supporting the underlying values of collective life	619
4. Theories of care break conceptual holds by emphasizing the importance of mutual interdependence, consideration of relationships, responsibilities to society, and collective values in the law	621
E. A Feminist Theory of Justice – A Summary	624
III. APPLICATION OF THESE PRINCIPLES TO VICTIMS OF SEXUAL VIOLENCE IN POST-CONFLICT RWANDA	625
A. The Rwandan Genocide	625
1. Propaganda was instrumental in encouraging sexual violence against Tutsi women in so far as it was used extensively to incite hatred of Tutsi women and fear of their sexuality	629

- B. International law governing sexual violence in armed conflict has a piecemeal history and has only recently begun to be recognized as a crime in its own right 631
- C. The principles of a feminist theory of justice identified in Part II can be applied in Rwanda to empower women victims of sexual violence 636
 - 1. Women victims of sexual violence in Rwanda will be empowered by legal operatives that maintain a strong contextualized understanding while sustaining a commitment to regulative legal principles 637
 - a. Legal protections for victims of sexual violence in post-conflict Rwanda exist at multiple levels and overlap in both form and substance, creating a tension that may compromise the commitment to regulative legal principles 637
 - i. The ICTR is an *ad hoc* international tribunal that has jurisdiction over crimes of sexual violence committed during the genocide 639
 - ii. National courts in Rwanda share jurisdiction with the ICTR over crimes of sexual violence, with laws that differ in substance and procedure 641
 - iii. The *gacaca* is a form of traditional justice that also has jurisdiction over some crimes of sexual violence and has a distinct penalty structure .. 643
 - b. A lack of sensitivity to cultural context makes the *gacaca* courts an inappropriate forum for crimes of sexual violence and may result in an overall lack of justice for victims 645
 - c. The *Akayesu* Judgment of the ICTR was a watershed event for victims of sexual violence because it used the context of the Rwandan genocide to hold that rape could be a form of genocide under international law 647

2. Justice for women victims of sexual violence will be enhanced where it is premised on an acknowledgement of existent inequalities 650
 - a. Domestic violence is deeply entrenched in the fabric of Rwandan society 651
 - b. Victims of sexual violence may be unable to obtain necessary medical care .. 651
 - c. While women make up a majority of Rwandan citizenry, they enjoy very little political power 652
 - i. A lack of consideration for these existent inequalities could hamper the success of the *gacaca* tribunals ... 652
 - d. Reforms in laws governing land ownership in Rwanda are demonstrative of legal efforts to recognize existent inequalities and remedy them in the interest of achieving justice for women survivors 653
3. Post-conflict solutions will empower women victims of sexual violence in Rwanda where they incorporate consideration of unchosen relationships 654
 - a. Reforms in laws governing land ownership in Rwanda are inadequate where they discriminate against women victims of sexual violence 655
4. Women victims of sexual violence in Rwanda will be empowered by legal frameworks that emphasize mutual interdependence over autonomy or independence 656
 - a. *Gacaca* demonstrates a commitment to justice by effectively codifying the mutual interdependence of Rwandan people 657
5. Justice in Rwanda must have at its basis collective values and societal responsibilities 658
 - a. Meaningful victim and witness protection mechanisms can help to achieve justice for women victims of sexual violence by reducing social

stigma and assuming responsibility for harm within the fabric of Rwandan society	659
IV. CONCLUSION	660

When the government asked itself how to rebuild the country, it looked for foundations, but found only sand. It decided that the only solution was justice. Bare justice, to suit all Rwandans.¹

I. INTRODUCTION

Within this Article I seek to develop a feminist legal theory of justice, by questioning the ability of traditional legal strategies to facilitate justice and identifying underlying principles that contribute to a more inclusive and holistic form of justice. Secondly, I apply this theory to the situation of women victims of sexual violence in post-genocide Rwanda, in an effort to explore how these principles can contribute to a realization of justice that empowers women.

In Part II of this Article, I seek to develop a set of principles underlying a feminist reconceptualization of justice. This endeavour is a three-step process: First, I seek to provide an historical context and perspective on the ideological and organizational tenets of feminist legal theory as such can contribute to the (re)construction of an inclusive, diverse, vital form of justice. Secondly, I hold current legal operatives, particularly criminal procedure and rules of evidence, to the light of scrutiny for masculine universals and feminine specificities, as those laws are embodied as such in substance and form. Thirdly, using a variety of branches of feminist theory, I discuss alternative ways of thinking about legal regimes in the interest of seeking a more feminist, inclusive, diversified, and vital conceptualization of justice. I conclude this Part with the identification of five principles that serve as the foundation for a feminist theory of justice.

In Part III of this Article, I apply these principles to the situation of women victims of sexual violence committed during the genocide in Rwanda. The analysis begins with a discussion of what is, in fact, the situation of women victims of sexual violence in Rwanda. Such discussion includes a brief history of genocidal events, particularly those related to the commission of crimes of systematic sexual violence, and an abbreviated discussion of the development of crimes of sexual violence in international law. In the third section of Part III, I apply the five foundational principles to specific legal structures and operatives

1. GACACA: LIVING TOGETHER AGAIN IN RWANDA? (Dominant 7/Gacaca Productions 2002) [hereinafter GACACA].

in post-conflict Rwanda. This application seeks to engage a critical analysis of how these structures and operatives do or do not contribute to justice for women victims of sexual violence.

II. A FEMINIST RECONCEPTUALIZATION OF JUSTICE

We need theory that can analyze the workings of patriarchy in all its manifestations – ideological, institutional, organizational, subjective – accounting not only for continuities but also for change over time. We need theory that will let us think in terms of pluralities and diversities rather than of unities and universals. We need theory that will break the conceptual hold, at least, of those long traditions of (Western) philosophy that have systematically and repeatedly construed the world hierarchically in terms of masculine universals and feminine specificities. We need theory that will enable us to articulate alternative ways of thinking about (and thus acting upon) gender without either simply reversing the old hierarchies or confirming them. And we need theory that will be useful and relevant for political practice.²

What do feminist theories have to contribute to a reconceptualization of justice? This title, this endeavour, is one fraught with peril, as I try not only to recapitulate a variety of feminist theories, modern and historical, in ways that are inevitably less nuanced than the theories themselves, (and make necessary omissions), but also as I attempt to identify some basic tenets of justice as it must be reconceptualized in a holistic manner and glean, from the body of feminist legal theory as a whole, a perspective on the concept of justice and the law which provides its supporting framework. In this Article, I posit—in light of history, in light of the methods in which law is based on a masculine subject, and in light of several branches of contemporary feminist theory—that a feminist reconceptualization of justice includes the following characteristics: (1) an emphasis on context while sustaining a commitment to regulative legal principles; (2) an acknowledgment of existent inequalities; (3) consideration of unchosen relationships; (4) an emphasis on mutual interdependence; and (5) a recognition of collective values and societal responsibilities.

A. JUSTICE RECONSIDERED

Certainly, a thorough explication of the definition and application of the term “justice” is crucial for an article that seeks to reconceptual-

2. Joan W. Scott, *Deconstructing Equality-versus-Difference: Or, the uses of Post-structuralist Theory for Feminism*, 14 FEMINIST STUDIES 33 (1988), reprinted in FEMINIST LEGAL THEORY I: FOUNDATIONS AND OUTLOOKS 261 (Frances E. Olsen ed., 1995) [hereinafter FEMINIST LEGAL THEORY I].

ize justice according to feminist theory. In this regard, it is most helpful to call upon deconstruction for this task. Justice, according to Merriam-Webster's dictionary, is defined as:

the maintenance or administration of what is just especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments; the administration of law; *especially*: the establishment or determination of rights according to the rules of law or equity; the quality of being just, impartial, or fair; the principle or ideal of just dealing or right action; conformity to this principle or ideal; . . . conformity to truth, fact, or reason.³

As pointed out by Samuel Weber, a professor at Northwestern University and one of the leading scholars in philosophy and critical theory, what is just is thus defined in terms of right, rightfulness and righteousness, but also as the implementation of this right, including realization, application, enforcement, and sanction; justice is both an ethical principle and a legal institution.⁴

Conceptions of justice and law have historically been viewed as being necessarily removed from the particulars of context. Law is abstract, law is universal, law is "this celestial voice that dictates to each citizen the precepts of public reason, and teaches him to follow the maxims of his own judgment and not to be incessantly in contradiction with himself. The laws are the driving force . . . of the body politic."⁵ Law has historically been considered to be representative of a general will which is radically distinct from all particularity and individuality, as reflected by Jean-Jacques Rousseau in his work *Social Contract*:

. . . [T]he general will, to be true to itself, must be general in its object as well as in its essence; that it should have its point of departure in the whole in order to return to the whole, and that it loses its natural rectitude once it stoops to (*tombe sur*) an individual and determinate subject.⁶

Rousseau fails to consider that justice, however, at its heart is natural and organic, both constituted by and constitutive of its subjects. While he addresses the relationship between the public and the private, he views this relationship as a social pact that gives the body

3. Merriam-Webster Online, <http://www.m-w.com/cgi-bin/dictionary> (last visited May 28, 2008).

4. Samuel Weber, *In the Name of the Law*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 232, 233 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., 1992).

5. JEAN-JACQUES ROUSSEAU, OEUVRES COMPLÈTES 310 (Bernard Gagnebin & Marcel Raymond eds., 1959).

6. *Id.* at 309-10.

politic absolute power over its members,⁷ and betrays, in this analysis, a hierarchical and dualistic approach to law, a "radical heterogeneity" between the individual and general in society that cannot be construed in natural, organic terms.⁸ Weber notes a concession made by Rousseau in this formulation, as he explains the inability of the general will to judge particular cases as a result of the lack of a *tertium comparationis*: "[i]n judging of what is not us, we have no true principle of equity to guide us."⁹

Weber notes that "it is this essential but enigmatic mediation between public and private spheres that the law is designed to establish."¹⁰ Rousseau emphasizes that law must simultaneously be general and allow for a certain particularization to be applied to individual cases. Paul de Man, noted deconstructionist theorist and literary critic, comments that "no law is a law unless it also applies to particular individuals. It cannot be left hanging in the air, in the abstraction of its generality."¹¹ It is that space I wish to explore within Part II of this Article—the interdependency of general and particular at the crossroads of justice, including both right and the laws that implement that right, in an effort to seek a feminist reconceptualization of the same. In this effort, I enlist history, law, and theory. First, we turn to history.

B. THE HISTORY OF FEMINIST LEGAL THEORY ILLUMINATES A PROGRESSION FROM A LIBERAL EMPHASIS ON EQUALITY OF OPPORTUNITY TO AN INCREASING CONTEXTUALIZATION OF LEGAL SUBJECTS.

As a vital movement comprised, notably, of a wide variation in not only objective but also method, feminism has a colourful history. I offer this history for discussion for two reasons: First, in order to comprehend fully the issues at stake with a sense of perspective, it is crucial to understand the theoretical and epistemological context within which feminist legal theory has developed. Secondly, as one historian has noted, "there is an almost religious faith in the ability of history to make everything coherent."¹² As such, a review of history

7. See *id.* at 305-06 (discussing the relationship between the public and private spheres).

8. Weber, *supra* note 4, at 239.

9. *Id.* at 240 (quoting ROUSSEAU, *supra* note 5, at 306).

10. *Id.* at 243.

11. PAUL DE MAN, ALLEGORIES OF READING 269 (1979); see also *id.* at 238-45 (noting the necessary particularity of law).

12. Ellen C. Dubois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon & Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 64 (1985), reprinted in FEMINIST LEGAL THEORY I, *supra* note 2, at 143, 196.

can illuminate patterns and (re)emerging issues that may have taken on different forms in the past.¹³

In the late eighteenth century, feminists premised legal reform efforts on two distinct channels of thought; Ellen DuBois, historian and professor at Northwestern University, terms these positions the "egalitarian-feminist" and the "domestic-feminist" positions.¹⁴ The egalitarian-feminist argument was based on the belief that men and women share a common humanity, and that the denial of this common humanity to women resulted in an unfair apportionment of rights, privileges, duties, and resources in favour of men. The domestic-feminist position, instead, was based on the idea that women are different from men, arguing that, by insisting that women are the same as men, women will therefore be regarded as inferior versions of men.¹⁵

These two positions interact in ways that maintain relevance today. Egalitarian feminism gave rise to fights for equality of education, political participation, and suffrage, and dominated the feminist movement until approximately 1860 or 1870, at which time domestic feminism gained a stronghold and, eventually, led to suffragist victories based on the premise that women had something different to contribute to the political arena—contributions which were both valuable and distinct from those of men.¹⁶ Today, these positions have evolved into what are often regarded as liberal feminism and difference feminism.

1. *Liberal Feminism sought to achieve equality of opportunity as enshrined in the law.*

The liberal feminist movement resulted from a recognition, after the political movements of the nineteenth century, that women were excluded from the community of legal subjects in subtler and more indirect ways, ways in which the constitution of legal rules and categories excluded or disadvantaged women.¹⁷ Liberal feminism gave birth, furthermore, to an explication of the differences and distinctions between categories of sex and gender.¹⁸ In this way, liberal feminists

13. See *id.* at 65 (noting the relevance of history to contemporary analysis).

14. *Id.*

15. *Id.*

16. *Id.* at 66.

17. See Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1, 4 (1987), reprinted in FEMINIST LEGAL THEORY I, *supra* note 2, at 3, 6 (placing liberal feminism in context); NICOLA LACEY, *Feminist Legal Theory beyond Neutrality*, in UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY 188, 189 (1998) (discussing liberal feminism).

18. Dalton, *supra* note 17; LACEY, *supra* note 17. See also Stevi Jackson, *Theorising Gender and Sexuality*, in CONTEMPORARY FEMINIST THEORIES 131 (Stevi Jackson & Jackie Jones eds., 1998).

sought to undermine perceived "natural" differences between men and women, arguing from a position of social constructionism: If the social meanings of gender are contingent, then those meanings could no longer justify differential treatment.¹⁹ Furthermore, and more importantly, liberal feminists argued by extension that social meanings themselves could be changed by changing powerful social practices such as law.²⁰

The central problem for liberal feminism was that liberal feminism was essentially "a strategy of assimilation of women to a standard set by and for men."²¹ As feminist legal theorist Katherine

19. LACEY, *supra* note 17, at 190. Liberal feminism was instrumental in addressing legal reform efforts in rape laws, child custody laws, part-time work provisions, and marital property. *Id.* As Lacey notes, the politics themselves were easy; they were the same politics that informed the ideological self-conception of the liberal and democratic legal order that took itself to be criticizing:

[I]f as a liberal society, you profess to accord women the full rights of citizenship, then you are logically committed to attending to the various ways in which your legal framework in fact falls short of this universalist ideal. Give women the same rights and entitlements as you give to men; treat women equally; dispense your justice even-handedly.

Id.

20. *Id.* at 189. See also Dalton, *supra* note 17, at 4. Legal reform efforts during this time were reflective of this liberal position and focused on non-discrimination efforts. See Sex Discrimination Act (SDA), 1975, c. 65 (Eng.). Feminists challenged discriminatory laws and made efforts to abolish discrimination on the basis of sex. See *id.* Legal reforms took place in many domestic systems in both the public and private sectors. See *id.* Britain's Sex Discrimination Act is a good example of the fruits of liberal feminism, which was passed in 1975 and prohibits not discrimination against women but discrimination based on grounds of sex. See *id.* Both the U.S. Constitution and Title VII of the Civil Rights Act were interpreted by the U.S. Supreme Court for the first time in the 1970s to apply to distinctions on the basis of sex, enabling women (and men) to gain access to rights and privileges theretofore accorded only to men (or women). See U.S. CONST. amend. XIV; see also Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (2000). In *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), the U.S. Supreme Court applied Title VII to sex discrimination cases as a matter of first impression, and in *Reed v. Reed*, 404 U.S. 71 (1971), the Court first invalidated a sex-based classification on constitutional grounds. During this time, the U.S. Supreme Court also decided *Roe v. Wade*, 410 U.S. 113 (1973), a landmark decision on abortion which sparked a legal and political controversy that continues today. For a comprehensive discussion, see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, William T. Joyner Lecture on Constitutional Law at the University of North Carolina School of Law (April 6, 1984), reprinted in FEMINIST LEGAL THEORY I, *supra* note 2, at 281.

21. LACEY, *supra* note 17, at 191. Often, liberal feminism is viewed, in retrospect, as a movement that sought formal as opposed to substantive equality. *Id.* However, this claim loses sight of the fact that liberalism, even in its early stages, went far beyond simple demands for formal equality. *Id.* Lacey notes that liberal feminism was concerned not simply with the formal surfaces of law but with its impact; for example, in deciding what would count as equal treatment, the present effects of past discrimination were taken into account. *Id.* Liberalism is also criticized as being a movement that is premised on "sameness," a mischaracterization that glosses over the fact that liberal theorists, including "mainstream" liberal theorists such as Ronald Dworkin, have been concerned to emphasize equality as 'treatment as equal' rather than "equal treatment." *Id.*

O'Donovan has stated, within liberal feminism was a general tendency to assume that a woman could be (and should be?) more like a man.²² As such, the legal subjecthood to which women were assimilated under liberal feminism was implicitly male and the very methods of legal practice, masculine. Difference feminism shifted this focus, from the instrumental aspect of law to the symbolic, "beyond a concern with the differential impact of laws on subjects pre-formed as women and men to the recognition and explication of a more dynamic role for law in constructing and underpinning gender hierarchies."²³ Difference feminism examined the role of law as a discursive practice, examining the messages about women and men that are transmitted by law. It looked at the underlying conceptualizations of subjecthood that are constructed as truths by the law, and into which the material realities of women's and men's lives are inserted. It focuses on the subtle role of law in categorizing and distinguishing its subjects, "thinking beyond a law whose dominant mode is to fix its subjects' sexual or other identities within rigid categories."²⁴

2. *Difference feminism involves the dissection of legal form and structure to uncover ways in which law situates its subjects according to sex.*

Within the rhetoric of difference feminism, feminist theorists began to examine the very maleness of the legal subject itself, arguing that the paradigm legal subject was itself constructed in such a way as to equate rational subjectivity with masculinity.²⁵ This legal subject, it is argued, has been construed as an individual abstracted from social context, from the context of its own body, from its affective ties with others, and its dependence on others for its own identity.²⁶ These qualities, combined with an emphasis on rationality and self-control, make up a baseline masculine legal subject, where the feminine subject is viewed as "other," and therefore, consequently, lesser.²⁷

This argument has at its base an assertion of the power of certain binary oppositions within Western thought: reason/emotion; self/other; public/private; individual/community; mind/body; and male/female.²⁸ According to this theory, each member of a given pair is de-

22. *Id.* at 192.

23. *Id.*

24. *Id.* at 193.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 193-94.

fined—hierarchically—in opposition to the other.²⁹ Therefore, “to the extent . . . that the conceptualization of subjects within legal doctrine, and the insertion of embodied women and men into those frameworks via legal discourse, are genuinely marked by the features of reason and individuality and by the repression or forgetting of the body and affectivity, and to the extent that these hallmarks of subjecthood are elevated to the status of objectivity or universality, women will find themselves constructed as non-standard, as other”³⁰ in both form and substance under the law.

Liberal feminism’s successes had drawn women into a politics whereby the positioning of gender neutrality was supposed to lead to sexual equality. Difference feminism complicated matters immeasurably, as law and liberal politics began to be viewed as not a solution, but rather part of the problem.³¹ While liberal feminism could draw on a wide range of normative and conceptual resources, difference feminism saw those resources as marked by masculinity. Now, the language of rights, justice, and equality was not nearly as straightforward, or even useful.³² Feminists have had to draw upon a broad range of theories to explore the methods and forms by which law is sexed, and to develop complex and sophisticated mechanisms to recast the debate. In the next section of this Article, I examine this issue in detail, looking at various ways in which law itself is sexed in structure and method, including general characteristics that inhere within civil, criminal, and international law concepts of the state. I will then discuss some of the theories that contribute to an understanding of, and recasting of, this legal framework.

C. LAW, AT ITS PERIL, MARKS ITS SUBJECTS WITH DISTINCT SEXUAL CHARACTERISTICS.

Legal frameworks have not only illuminated “the restrictive and sexist views of our society,” but also “legitimized and contributed to them.”³³ This principle is particularly evident relative to laws on crimes of sexual violence, as discussed below. Laws certainly do not

29. *Id.* at 194.

30. *Id.*

31. See, e.g., Dalton, *supra* note 17; see generally Elizabeth Frazer, *Feminist Political Theory*, in CONTEMPORARY FEMINIST THEORIES 50 (Stevi Jackson & Jackie Jones eds., 1998) (discussing distinctions between difference feminism and liberal feminism).

32. Frazer, *supra* note 31, at 53; Jane Scoular, *Feminist Jurisprudence*, in CONTEMPORARY FEMINIST THEORIES 62 (Stevi Jackson & Jackie Jones eds., 1998). For an argument illuminating some of the problems with this approach with regard to human rights and international law, see Anthony D’Amato, *Human Rights of Women: National and International Perspectives*, 89 AM. J. INT’L L. 840, 843 (1995).

33. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1093 (1986) [hereinafter Estrich, *Rape*].

reflect the position that rape is "a crime worse than death,"³⁴ and the fear and reluctance many women experience in identifying these most personal violations of their bodily integrity and human dignity. In fact, these laws often make it more difficult to prosecute than other crimes.³⁵ In fact, legal reforms regarding rape victims often themselves perpetuate male domination within a dichotomous gender hierarchy.³⁶

Following a method of analysis developed by renown feminist legal theorists Rosemary Hunter and Kathy Mack, this section will examine the sexing of the subject of formal adjudication by considering among the following criteria: (1) the attributes of the subjects constructed by the legal rules; (2) the operation of assumptions about the natural division of sex into two opposed categories; (3) elements of autonomous masculine subject of Western liberal typology; (4) the relationship between assumed qualities of legal subjects and the material lives of embodied women and men; and (5) the systematic differential impact on male and female litigants.³⁷

Procedural and evidentiary rules rely on archetypical cultural categories of masculine and feminine in formal adjudication. The subject of formal adjudication has typically been characterized by self-possession, self-knowledge, autonomy, abstraction, self-determining status, and public action.³⁸ He is a creature of reason, self-interested and instrumental, and the possessor of rights.³⁹ The constructed legal subject, through efforts at neutrality and objectivity, necessarily sacrifices a degree of truth and justice in the process. By failing to acknowledge context, failing to relate the general to the particular,

34. HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* 24 (1996), available at <http://www.hrw.org/reports/1996/Rwanda.htm> [hereinafter HUMAN RIGHTS WATCH, *SHATTERED LIVES*]:

Josepha was 38 years old and living in Shyanda commune, Butare prefecture, in 1994. Her family was attacked by the militia in April, 1994 and many were killed. She hid in the sorghum fields, but was caught by the militia. They hit her over the head, and took her by the arms and legs and threw her in the air. She fell on the ground on top of some broken bottles. Then two of the militia raped her. One of them has not been arrested and continues to live in Butare. Josepha said, "rape is a crime worse than death." She has not returned to her land or her house, but stays in a camp for widows with her one surviving daughter.

Id.

35. See *infra* Part II.C.

36. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

37. Rosemary Hunter & Kathy Mack, *Exclusion and Silence: Procedure and Evidence*, in *SEXING THE SUBJECT OF LAW* 171, 174 (Ngaire Naffine & Rosemary J. Owens eds., 1997).

38. *Id.* at 173; Ngaire Naffine, *Sexing the Subject of Law*, in *PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES* 23-25 (Margaret Thornton ed., 1996).

39. Hunter et al., *supra* note 37, at 173.

failing to support the mutual interdependence of human beings, and by failing to emphasize collective values, the subject of formal adjudication becomes very narrow. In the following section, we can see these operatives at play, as we turn attention to the ways in which law excludes feminine legal subjects.

1. *Civil procedure excludes feminine legal subjects by decontextualizing injury and failing to take into account existing inequalities and the situated subject.*

Civil procedure excludes feminine legal subjects in a couple of distinct ways. The first condition, in fact, for being a legal subject is to experience a certain kind of harm, defined in terms of a decontextualized, individualized injury.⁴⁰ Adjudication in the adversarial system is suited best for a discrete injury or series of injuries.⁴¹ Often, the types of injuries women experience, whether as part of a pattern of sexual violence or discrimination, do not lend themselves to adjudication under this procedural requirement. Harms such as sexual harassment, sexual assault, domestic violence, and discrimination often occur as part of a pattern of behaviour and/or a cumulative series of events.⁴² Specific incidents, stripped of an overall context, may lose their force or even their legal cognizability in this realm. Equal opportunity law, for example, maintains the requirement that the injury be personal and not social—that there be one plaintiff claiming an injury from one identifiable discriminator with regard to a particular instance of conduct.

This emphasis on decontextualized, individualized injury can obscure social context and the systemic nature of a given harm. Suzanne Levitt, Professor of Law at Drake University, argues that sexed injuries are largely invisible to the nearsighted eye of formal adjudication because legal harm “must be different from what is normal . . . the more pervasive or persistent an experience is . . . the more likely the experience will be incorporated into the background level of non-harm . . . [H]arm is not harm when it occurs frequently. Pervasive harm is not harm because it is pervasive.”⁴³

Civil procedure also requires a prompt, self-assertive, consistent complaint. Because many of the sexed harms women suffer are not the types of harms that have been historically legally cognizable, women may be less likely to view a claim as of right, and may, because of

40. *Id.* at 175-77.

41. *Id.*

42. *Id.* at 176.

43. Suzanne J. Levitt, *Rethinking Harm: A Feminist Essay*, 34 WASHBURN L.J. 531, 532 (1995). See also Hunter et al., *supra* note 37, at 177.

delay or lack of assertiveness, be precluded from seeking a remedy. As Hunter and Mack note, in a sexual violence context, this requirement can create a catch-22 for the victim:

If a woman does make a claim, she presents herself as an autonomous public actor. Immediately, the argument that she can and should leave is raised, because leaving is what an autonomous actor would do. If she does leave, however, she knows she may suffer serious material and personal consequences (loss of property, loss of employment, the possibility of increased violence and loss of custody of children). Yet if she accepts the legal construction of the good Woman of the private sphere and stays . . . this may count against her as contributory behaviour if she later decides to seek tort remedies or criminal injuries compensation.⁴⁴

Because of the nature of the procedural requirement that legal subjects be autonomous and assertive, combined with the traditional construction of woman as dependent, women victims may experience, quite literally, insult to injury—the experience of the injury itself, combined with the insult of being unable to seek redress for that injury in court.

2. *Rules of evidence exclude female subjects by failing to address situated subjects in their contexts, by basing judgments on rationality and autonomy, and by failing to acknowledge existent inequalities.*

Like the rules of civil procedure, the rules of evidence also exclude a feminine legal subject. As an example, we will look at two areas: (1) rules relating to truth and immediacy; and (2) the emphasis on universality. First, as Hunter and Mack note, the rules of evidence rely heavily on the premise that “there is one truth about an event which is most likely to be elicited at or close to the time of the event [assuming] a subject who is able to observe and describe their (*sic*) experience accurately and without fear or shame.”⁴⁵ The emphasis on experience untainted by emotion is archetypically masculine in nature, ignores the presence of inequalities within the context of relationships, and may prevent women from making successful claims, particularly in the context of sexual violence.

According to the rules of evidence, a prompt complaint is evidence of credibility, and a lapse of time may indicate fabrication.⁴⁶ In *M. v.*

44. Hunter et al., *supra* note 37, at 179.

45. *Id.*

46. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 347 (1975) (acknowledging a persistent view that women who fail to come forward immediately in public are suspected of fabricating their stories); Estrich, *supra* note 33 (discussing the

R.,⁴⁷ for example, the High Court of Australia overturned a conviction of a stepfather for sexual and indecent assault of his daughter, in part because the daughter did not complain promptly to her mother and/or stepmother.⁴⁸ Despite the fact that the jury had deemed her testimony credible, and the fact that the victim had confided in a school friend at her earliest opportunity, the High Court invoked the prompt complaint doctrine, adding a requirement that the victim complain promptly to *an authority*.⁴⁹

The prompt complaint doctrine also fails to account for victims' fear of a "likelihood of disbelief by police, retaliation by the rapist, hostility of family and support network, and the stress caused by the judicial proceedings and stigma of being a public rape 'victim.'"⁵⁰ Additionally, traditional defense doctrines often require that a woman actively fight against the attack; if she does not, she may lose legal protection against the rape.⁵¹

A second way the rules of evidence are marked by sex is in the idea of universal, cognitive competence—that normal, ordinary, unbiased people will assess the information presented and come to the same conclusion.⁵² Part of the problem in this area is that this assessment of information involves both a project of logical deduction as well as an application of common sense. The common sense, applied both by judges and juries, reflect certain assumptions about legal subjects and "privileges the understanding of the world of the group that has dominated legal and public life: white, middle-class, heterosexual

"fresh complaint rule" and resultant difficulties for rape victims); Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. REV. 441, 443-46 (1996) (providing an historical analysis of the "fresh complaint rule" and legal support for the notion that "silence after rape. . . impeaches the credibility of the complainant").

47. (1994) 181 C.L.R. 487.

48. *M. v. R.* (1994) 181 C.L.R. 487, 499.

49. *Id.* (emphasis added).

50. Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1333 (1994). For a detailed discussion on the reasons behind rape victims' reluctance to report or prosecute these crimes, see CHARLES W. DEAN & MARY DEBRUYN-KOPS, *THE CRIME AND CONSEQUENCES OF RAPE* 63-66 (1982). These evidentiary requirements result in fewer victims coming forward, resulting in an even greater lack of judicial efficacy. See, e.g., THE LAW SOCIETY OF BRITISH COLUMBIA, *GENDER EQUALITY IN THE JUSTICE SYSTEM* 69 (1992) ("Many sexual assaults are not reported. This is due, in part, to the victim's lack of confidence that the justice system will support them.").

51. BROWNMILLER, *supra* note 46, at 360-61 (analyzing the argument that women must forcefully resist an act of rape, and that cooperation may result in a loss of legal protection); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 815 (1991) (remarking that it is only in the context of a rape case that the law requires proof of actual resistance); Estrich, *Rape*, *supra* note 33, at 1139 (discussing the ideas that corroboration of rape requires proof of forceful resistance).

52. Hunter et al., *supra* note 37, at 181.

males.”⁵³ When, in court, a judge states that “in the common experience, ‘no’ often subsequently means ‘yes,’” that “common sense” is drawn from myths about rape, not from the experiences of rape survivors.⁵⁴

3. *Criminal procedure excludes a feminine legal subject by failing to acknowledge existent inequalities and collective societal values, and by instead enshrining its subject with those very inequalities.*

Criminal procedure excludes a feminine legal subject by legitimizing existent inequalities under the law. Criminal procedure prioritizes the masculine legal subject in so far as it contains rules that overwhelmingly privilege criminal defendants, particularly with regard to special evidentiary rules for rape and sexual assault cases.⁵⁵ Such laws appear to have an underlying assumption that women have the tendency to lie about rape.⁵⁶ First, the laws of evidence and procedure often presume that the female provoked the assault.⁵⁷ For example, where character and propensity evidence is generally inadmissible, a woman’s prior sexual history and reputation can be admitted to both prove consent and to attack her credibility.⁵⁸ Also, information such as a prior history of abuse is often not relevant to establishing a recognized defense for battered women who kill their partners.⁵⁹

53. *Id.* at 182.

54. *R v. J.* (SA Sup. Ct., Aug. 24, 1992). *See also* Hunter et al., *supra* note 37, at 182.

55. *See* Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1049-51 (1992) (noting characteristics of criminal procedure as exclusive of feminine legal subjects); LACEY, *supra* note 17, at 197-200 (discussing the importance of laws of procedure and evidence regarding rape); SUSAN S. M. EDWARDS, *FEMALE SEXUALITY AND THE LAW: A STUDY OF CONSTRUCTS OF FEMALE SEXUALITY AS THEY INFORM STATUTE AND LEGAL PROCEDURE* (1981) (stating “procedural rules have evolved with the protection of the defendant in mind.”).

56. BROWNMILLER, *supra* note 46, at 369-74 (discussing how evidentiary assumptions that women have the tendency to lie about rape preclude many convictions).

57. EDWARDS, *supra* note 55 (positing that the laws of procedure and evidence persist in presuming that the woman provoked the assault).

58. *See* DPP v. Boardman (1975) A.C. 421 (concerning admission of evidence within the context of allegation of crimes); *see generally* LACEY, *supra* note 17, at 197-200 (discussing admissibility of character and propensity evidence in sex cases).

59. Ian Leader-Elliot, *Passion and Insurrection in the Law of Sexual Provocation*, in *SEXING THE SUBJECT OF LAW* 149 (Ngaire Naffine & Rosemary J. Owens eds., 1997). *See also* Naffine, *supra* note 38, at 18-39 (discussing battered women’s defense); Hunter et al., *supra* note 37, at 186 (examining laws of procedure and evidence); *see generally* LACEY, *supra* note 17, at 197-200 (noting the “sexed” nature of law).

4. *International law excludes a feminine legal subject by creating an autonomous, individualized masculine model of the state as its subject.*

International law has traditionally operated on the basis of the sovereign state as its subject. This operating principle can be seen in treaties, in diplomatic issues, in humanitarian law, and in membership in intergovernmental organizations. Charlesworth argues that the character of the central subject of international law, the nation state, is based upon a masculine model, making it difficult to represent women's interests in international legal discourse.

According to the Montevideo Convention, a state "as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."⁶⁰ With regard to population, international law is selective in the criteria it applies to determine whether that population is sufficient for statehood. First, traditional notions of citizenship had to do with property and military service, and thus excluded women.⁶¹ Secondly, while statehood has been refused on the basis of racial discrimination,⁶² the population requirement of a state can nonetheless be satisfied where the population is comprised nearly exclusively of men, and where that population is reproduced asexually, via recruitment—such as the Vatican.

The second requirement for statehood, that there be a defined territory, presents the state as a unified and bounded entity. This concept of boundary, it has been argued, skews perceptions because it envisions the individual as detached from the collective.⁶³ It has further been argued that the state is embodied physically with male characteristics: it has no "natural" points of entry, and its bounded nature makes forced entry a breach of international law.⁶⁴ Entities that are not bounded in this way, such as many indigenous minority

60. MONTEVIDEO CONVENTION ON RIGHTS AND DUTIES OF STATES, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (1933).

61. Hilary Charlesworth, *The Sex of the State in International Law*, in *SEXING THE SUBJECT OF LAW* 258 (Ngairé Naffine & Rosemary J. Owens eds., 1997) (citing V. Spike Peterson, *Security and Sovereign States*, in *GENDERED STATES: FEMINIST (RE)VISIONS OF INTERNATIONAL RELATIONS THEORY* 34 (V. Spike Peterson ed., 1992)).

62. The United Nations General Assembly, for example, refused to acknowledge the statehood of the Bantustans of South Africa based on the idea that those "homelands" were created "to consolidate the inhuman policies of apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights." G.A. Res. 31/6A, U.N. GAOR, 31st Sess., Supp. No. 39, at 10, U.N. Doc. A/31/22 (Oct. 26, 1976).

63. For a thorough discussion of these meanings of "boundary," see Jennifer Nedel-sky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162 (1990).

64. Charlesworth, *supra* note 61, at 259.

groups, are not considered to be subjects of international law and maintain fewer rights under an international legal regime.⁶⁵

In the same way that the above two criteria are based on Western liberal typology of masculinity, the final two criteria, that there is an organized and effective government and that a state must have the capacity to enter into relations with other states, depend heavily upon a notion of state autonomy built upon isolation and separation and speaking with one voice, obscuring diversity and notions of interdependence.⁶⁶ It has been argued further that the idea of security in international relations depends upon notions of self-help, autonomy, and the seeking of power.⁶⁷ The state, as depicted in international law, with clear boundaries, a strong government and autonomy, embodies a masculine legal subject and excludes the feminine.⁶⁸

D. BREAKING THE CONCEPTUAL HOLDS: CURRENT FEMINIST THEORIES DEMONSTRATE METHODS OF DISMANTLING THE ASSUMPTIONS LAW MAKES ABOUT ITS LEGAL SUBJECTS AND PRESENT ALTERNATIVE WAYS OF CONCEIVING A FEMINIST APPROACH TO JUSTICE.

We can see that, in both form and substance, law makes many assumptions about its legal subjects. Traditionally, law has had as its subject those individuals who have maintained economic, social, and political power. As we seek to transform those power structures, and in the interest of developing a holistic approach to justice, how can we transform the framework of law to accommodate diverse (and sometimes divergent) interests? How can we, as gender historian Joan Scott asked, "break the conceptual hold[s] . . . that have systematically and repeatedly construed the world hierarchically in terms of masculine universals and feminine specificities" such that we can articulate alternative ways of thinking about (and thus acting upon) gender without either simply reversing the old hierarchies or confirming

65. *Id.*

66. *Id.*

67. J. Ann Tickner, *Inadequate Providers? A Gendered Analysis of States and Security*, in *THE STATE IN TRANSITION: REIMAGINING POLITICAL SPACE* 125 (Joseph A. Camilleri, Anthony P. Jarvis & Albert J. Paolini eds., 1995). When states are in need of assistance or protection from other states, Tickner argues that the sexual identity shifts and a state becomes imbued with feminine characteristics. For a discussion on this issue, see *id.* at 129-31.

68. In addition to the four criteria considered here, under the Montevideo Convention, it is interesting to consider the other criteria that have developed for determinations of statehood, such as those found in James Crawford's *The Creation of States in International Law*, in which he argues that violations of norms of *jus cogens* will affect considerations of statehood. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (1979). Notably, race discrimination, as mentioned in *supra* note 62 and accompanying text, is one such norm. Sex discrimination, however, is not. Charlesworth, *supra* note 61, at 264.

them?⁶⁹ There are several theories that make significant contributions to this issue, four of which I discuss below: deconstruction; postmodernism; communitarianism; and care.

1. *Deconstruction breaks conceptual holds by demonstrating that law is necessarily dependent upon, and reflective of, values.*

Some theories have emphasized that it is only through a thorough explication of how the gender hierarchy is perpetuated and intersects with the law that one can understand fully women's demands for justice. Deconstruction meets law at the intersection between legal rules, doctrine, and interpretation, in an explication of the conflicts, contradictions, and indeterminacies that result. While many authors tend to disagree about the scope and application of deconstruction, the theory appears generally to proceed from the starting point that writing precedes speech, that every text refers to other texts, and that discontinuities between logic and rhetoric create disparities between the intent of an author and the external constraints on meaning:

[i]n the context of deconstruction, all texts (whether oral or written) are writings that refer to other writings. A text is not a pure presence that immediately and transparently reveals a distinct . . . construction, every writing embodies a failed attempt at reconciling identity and difference, unity and diversity and self and other. A writing may give the impression of having achieved the desired reconciliation, but such impression can only be the product of ideological distortion, suppression of difference or subordination of the other.⁷⁰

Ronald Dworkin refers to a theory of law as integrity in his book, *Law's Empire*.⁷¹ Under this theory, legal interpretation is an historically situated practice, necessarily connected to the past and creating the chain of continuity for the future.⁷² Legal interpretation, according to Dworkin, is like authoring a chain novel, a work of collective authorship with each chapter being written by a different author; each of the authors must write within the constraints of the previously written chapters and make sure that the chapter fits in with the others, as part of the integrity of the novel as a whole.⁷³ Applying this theory to acts of legal interpretation and application, a judge must

69. Scott, *supra* note 2, at 33.

70. Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 152, 153 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., 1992).

71. RONALD DWORKIN, *LAW'S EMPIRE* (1986). See also *id.* at 155 (discussing the relationship between context and law).

72. *Id.*

73. *Id.*

take decisions compatible with relevant historical judicial precedents in the interest of preserving the integrity of law over time.

In my view, there is a gap in the chain of logic of Dworkin's theory. While some theorists, including Alan Brudner and Michel Rosenfeld, have asserted that Dworkin's theory fails because the criterion of fit is too indeterminate to endow Dworkin's principle of integrity with a sufficiently concrete meaning, I do not agree that it is the indeterminacy that is Dworkin's failing.⁷⁴ Rosenfeld argues that "[e]ither the measure of fit and integrity is based on some set of substantive values such as those embedded in certain relevant judicial precedents, or it is reducible to a purely formal and abstract notion that cannot be given any non-arbitrary concrete instantiation."⁷⁵ Rosenfeld premises this assertion on the idea that "[i]f fit and integrity depend upon particular substantive values—even if these values have been filtered through the interpretive process involved in the attempted reconciliation of judicial precedents—then Dworkin's theory is ultimately subject to the same criticisms as those theories which select one set of contested substantive extra-legal values over others or which posit some such values as dominant and the remainder as subordinate."⁷⁶ While Rosenfeld's conclusion is a logical one—that is, the principle of integrity is either based on precedent substantive values or reducible to a formal and abstract concept, and if it is based on precedent substantive values it is dependent upon that which it attempts to avoid—I submit that it is not the subjectivity of law, as a whole, which is objectionable; for is not law, as a whole, unable to extricate itself from values? Is not our notion of justice a reflection of what is hopefully a collective set of values, and a legal regime an operative framework within which we can apply those values? Rather, it is precisely this misconception, that it is possible to separate law from "extra-legal" values, that is so crucial to the operation of a feminist theory of justice.

Law itself is necessarily reflective of, and dependent upon, values. Those values, historically, have been values of a very particular demographic. Gaining a holistic perspective on justice and its operating (and operative) principles, necessarily requires an illumination of what those values are, not in an attempt to extricate them, but rather to explicate their origins, their meanings, and how they intersect with all that has been excluded. It is crucial that we recognize that those "extra-legal" values are not extra-legal at all, but pervasive in law's

74. But see Rosenfeld, *supra* note 70, at 154-56 (asserting that the criterion is too indeterminate); Alan Brudner, *The Ideality of Difference: Toward Objectivity in Legal Interpretation*, 11 CARDOZO L. REV. 1133, 1156-57 (1990).

75. Rosenfeld, *supra* note 70, at 155.

76. *Id.* at 155-56.

form and structure. Once we have recognized this connection and dissected it for an exploration of all its parts, only then can we understand how those parts fit together, and function, and how those parts can be reformulated to be more representative and inclusive of collective interests.

Under Dworkin's theory of law as integrity, substantive values of the community of legal actors are not removed from this process of interpretation and application, but rather are imbedded in legal precedents creating the parameters of the constraints within which the interpreters must take decisions. Recognition of this phenomenon is crucial to a feminist theory of justice. In fact, substantive values, like it or not, have been enshrined in the foundations of law throughout its history; the reason those values have not been recognized as such is that those values have been particular to a very specific demographic, a demographic of power that has been, by extension, exclusionary. We must recognize the (omni)presence of substantive values in the law, the inevitability of that presence, and, in fact, the very importance of it, and then we must work to make those values in form and substance reflective of a inclusionary whole.

2. *Postmodernism breaks conceptual holds by dismantling notions of universality and objectivity.*

Within a context of substantial economic and social change in the recent history of post-industrial countries, postmodernism is often characterized by alienation, uncertainty, disenchantment, fragmentation, a loss of community, and, with it, a loss of stable identity.⁷⁷ Postmodernism, like deconstruction, locates human experience as inescapably within language.⁷⁸ Within the realm of feminist legal theory, postmodernism serves as a launching pad for the analysis of legal language as a *situs* for gender and sex hierarchies as they are entrenched in the foundations of society. Interpretive struggles over the meaning of sex differences, thus, can "impact on patriarchal legal power."⁷⁹ As Mary Joe Frug explains, "Because sex differences are semiotic—that is, constituted by a system of signs that we produce and interpret—each of us inescapably produces herself within the gender meaning system, although the meaning of gender is indeterminate or undecidable. The dilemma of difference, which the liberal

77. LACEY, *Community in Legal Theory*, in UNSPEAKABLE SUBJECTS, *supra* note 17, at 130.

78. Frug, *supra* note 55, at 1046. See also Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., 1992).

79. Frug, *supra* note 55, at 1046; Naffine & Owens, *Sexing Law*, in SEXING THE SUBJECT OF LAW, *supra* note 37, at 3.

equality guarantee seeks to avoid through neutrality, is unavoidable.”⁸⁰

Postmodernism, unlike feminism, is not an activist movement whose goals are ultimately emancipatory. However, postmodernism has been invaluable in rejecting the notion of an “objective” law reflecting an independently existing reality, repudiating the pursuit of universal, rational ethical principles.⁸¹ Just as feminism has argued against a universalist notion, claiming that a universal, rational subject is inherently masculine, many feminist theorists have begun looking for a feminine “space” outside of rationality and patriarchal hierarchies, which follows well in line with postmodern thinking.⁸²

As nineteenth century German philosopher Friedrich Nietzsche stated in *The Genealogy of Morals*, “there is only a perspectival knowing,” a philosophy that has direct application to the critique at hand.⁸³ French philosopher and literary theorist Jean-Francois Lyotard, in his treatise on postmodernism, *The Postmodern Condition*,⁸⁴ claims that rationalism is destined to fail because its “truths” only make sense in terms of their own internal constructs, and therefore, it cannot ground its own rational procedures and, as such, requires another kind of discourse—customary knowledge—in order to achieve this goal. Because customary knowledge is dependent and transitory, dependent in part on issues of gender, race, or class, there can be no universal rationalism. Instead, as literary theorist Patricia Waugh comments, we see a “conflation of the organic and the inorganic, of science with art and of fictionality with fact,” “explod[ing] concepts of subjectivity and truth which [sic] have functioned within the paradigms of modernity to oppress women.”⁸⁵

Postmodernism at its strongest is helpful for feminist legal theory in that it aids an understanding of the underpinnings of law itself and its claims of rationality, objectivity, and universality. However, without the ability to distance oneself and gain some perspective, it becomes impossible to develop any overarching principles or underlying

80. Frug, *supra* note 55, at 1046-47.

81. Patricia Waugh, *Postmodernism and Feminism*, in CONTEMPORARY FEMINIST THEORIES 177 (Stevi Jackson & Jackie Jones eds., 1998). See also Hunter et al., *supra* note 37; Barbara Stark, *After/word(s): 'Violations of Human Dignity' and Postmodern International Law*, 27 YALE J. INT'L L. 315, 320 (2002) (stating that postmodern international law “is both inevitable and inevitably transient.”).

82. Waugh, *supra* note 81, at 178.

83. FRIEDRICH NIETZSCHE, *THE GENEALOGY OF MORALS* (Walter Kaufmann trans., 1967).

84. JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984).

85. Waugh, *supra* note 81, at 186, 187 (referring in part to Donna Haraway, *A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980s*, in LINDA J. NICHOLSON, *FEMINISM/POSTMODERNISM* (1990)).

values by which to structure a society. If postmodernism absolutely precludes discrimination between points of view, between multiple positions and discourses, it becomes incapable, in its most radical form, of serving as the basis for a politics or epistemology.⁸⁶ As such, I posit that it is helpful to take from radical postmodernism an understanding of the operatives at play, and then to see how that plays out with regard to the need for collective agency and responsibility. Toward this end, it is helpful to examine postmodernism in a weaker form, one that is reconstructive in nature and communitarian in bent. Under this branch of postmodernism, "understanding arises through the practices, customs, traditions and textures of a particular culture and we may arrive at a shared structure of values, a sense of personal significance, and the possibility of belief in historical progress through collective engagements which do not require foundations of truth or value."⁸⁷

- a. Reconstructive postmodernism breaks conceptual holds by recognizing the importance of maintaining a contextualized theory of knowledge or understanding, while sustaining a commitment to regulative legal principles.

A reconstructive form of postmodernism, epitomized by the hermeneutic theory of Martin Heidegger,⁸⁸ and, to some extent, Hans-Georg Gadamer,⁸⁹ recognizes that all knowledge is situated in particular cultures and traditions, but that through an understanding of these operatives it is possible to arrive at a shared value structure. Feminist, postmodern theorists assert that it is possible, and advisable, to maintain a contextualist theory of knowledge or understanding, while sustaining a commitment to regulative legal principles: that "we need both a contextual sense of our perspective from the place in the world where we find ourselves, but also the discipline of imagining that world from outside but with ourselves inside it."⁹⁰ Under this theory, regulative legal principles should be developed that incorporate context, the situated subject, and the mutual interdependence of human beings in society.

86. See Waugh, *supra* note 81, at 188 (arguing against the viability of universal rationality).

87. *Id.* at 188.

88. MARTIN HEIDEGGER, *BEING AND TIME* (1962).

89. HANS-GEORG GADAMER, *TRUTH AND METHOD* (Garrett Barden & John Cumming eds., Sheed & Ward Ltd. trans., Seabury Press 1975) (1960).

90. See, e.g., SEYLA BENHABIB, *SITUATING THE SELF* (1992) (noting the importance of integrating legal principles with contextual particularities); see also Waugh, *supra* note 81, at 190 (emphasizing the essential context).

This argument touches on what is a crucial issue for a feminist reconceptualization of justice—specifically, the issue of contextualization and particularization. Within a political, economic, and social environment in which women have suffered discrimination that is both superficial and embedded, where women have suffered precisely at the hands of their context, it is a very dangerous thing to argue for a greater contextualization of laws in the interest of a more holistic and inclusive form of justice. Whose context will be enshrined into law, whose context will be considered in the weighing of evidence, and if it is a context of discrimination, then where are we left? Decontextualization is impossible. The more law attempts to decontextualize its situated subjects, the more embedded and harmful contexts are enshrined into law. What postmodernism offers us here is this: what is required is an understanding of the cultural and dependent operatives at play, and a simultaneous detachment from that context—to stand back, reflect, compare, analyze, and make decisions based on all the knowledge and understanding the process has brought to bear. It is simply impossible to remove context from law; therefore, the context that must be integrated into the process must be an inclusive one, one that takes into account the situated subject.

3. *Communitarianism breaks conceptual holds by recognizing human identity as being socially constituted, by emphasizing interdependence and supporting the underlying values of collective life.*

Postmodernism is in part borne of, at least in the United States and Britain, a period where central political power was held by right wing governments that effectively centralized state control in the name of individualism and decentralization—introducing, for example, market-based economic policies and “community-based” criminal justice policies, that concentrated power in state hands while espousing principles of removing state control and reinvesting that control in its citizens.⁹¹ These governments used the rhetoric of community to garner support for their policies, in “community policing,” for example, or “community care,” while somehow losing sight of what the concept of community actually was. As Lacey notes:

[W]hat gave the language of community such rhetorical force in these areas, notwithstanding the ease with which it could be exposed as disingenuous or as downright hypocritical window-dressing, was that it spoke to our fears at the same moment as it whispered to our fantasies. We—or perhaps parts of us—like to think that we live in real, identity-fostering,

91. LACEY, *supra* note 17, at 131.

caring communities, yet part of the postmodern experience is precisely the fear—indeed the knowledge—that we do not. In this context, the rhetoric of community assumes a particular power in the hands of government and other purveyors of influential social discourses.⁹²

It is argued that concepts such as “community,” therefore, exist in the fantasies of their subjects, as “the signifiers construct rather than describe the entities to which they refer.”⁹³

Communitarianism, as a political theory, has emerged in part as a responsive theory, a critique of liberal individualism.⁹⁴ Feminist legal theorist Nicola Lacey outlines three distinct positions typically espoused with regard to communitarianism in her article, *Community in Legal Theory*.⁹⁵ First, communitarians are typically social constructionist in their viewpoints, both in relationship to values and issues of identity.⁹⁶ Social constructionism has consistently been found within the development of feminist theories, for entrenched within the concept of artifice is the possibility of subversion. The recognition, therefore, of human identity as being socially constituted brings with it the possibility of a world where that identity is constructed differently. Secondly, communitarians seek to develop values such as community, solidarity, and reciprocity—values which support the underlying tenets of collective life.⁹⁷ In feminist theory, we can see these values manifest in issues such as childcare and public safety.⁹⁸ Finally, communitarians adopt an interpretist viewpoint, seeing the subject as situated within its context. These “embodied” aspects of human subjectivity, as Lacey terms them, have been intrinsic to feminist legal theories: While male bodies have been constructed as “normal,” female bodies have been constructed in opposition to the standard, an idea which has been enshrined in law.

While there exist these similarities between feminist legal theory and communitarianism, it is vital to maintain perspective. One must be careful, for example, not to allow the notion of community to be considered incontrovertible and to go unexamined. Political critique must always be built into any form of association, particularly where those forms of association have historically subordinated or excluded women.⁹⁹ Thus, it is important to keep in perspective the potential conservatism of communitarian thought, and the importance of pro-

92. *Id.*

93. *Id.* at 133.

94. *Id.* at 129.

95. *Id.* at 125.

96. *Id.* at 129.

97. *Id.*

98. *Id.*

99. *Id.* at 138.

viding an adequate account of conditions under which subjects gain access to membership and how power structures within those communities are created and maintained.

4. *Theories of care break conceptual holds by emphasizing the importance of mutual interdependence, consideration of relationships, responsibilities to society, and collective values in the law.*

Theories of care break down moral judgments into distinct categories, and argue that not only are there two distinct ways of approaching moral problems, but that those ways often fall along the lines of sex, and, furthermore, that one sex, and therefore one entire type of approach to moral problems, has been excluded from research circles and hence policy formulation. Theories of care, thus, enable us to recast moral problems, as enshrined in theories of justice and legal regimes, by incorporating values including the importance of mutual interdependence, consideration of relationships to society, and collective values.¹⁰⁰

Feminist theories of care are perhaps most reknown in the work of Carol Gilligan, a developmental psychologist who has contributed much to feminist theory through her work on the issue of women's "difference." Gilligan observed that Kohlberg's work on moral development had been exclusively derived from male subjects, and suggested, based on her own work, that Kohlberg had thus inadequately—and inaccurately—represented human moral development.¹⁰¹

Gilligan's theories are based on her accounts of two subjects, Jake and Amy, and their responses to the Heinz dilemma, which Kohlberg developed to measure moral development.¹⁰² In the Heinz dilemma, Heinz has to decide whether to steal a drug that he cannot afford and which is necessary to save his wife's life. Jake and Amy, who are both eleven, are asked whether Heinz should steal the drug. Jake considers the problem to be "sort of like a math problem with humans," sets it up as an equation, and works out the solution. He recognized that

100. For a comprehensive examination of theories of care, both inside and outside the work of Carol Gilligan, see JUSTICE AND CARE: ESSENTIAL READINGS IN FEMINIST ETHICS (Virginia Held ed., 1995); and DIEMUT ELISABET BUBECK, CARE, GENDER, AND JUSTICE (1995).

101. Jenny Morgan, *Feminist Theory as Legal Theory*, 16 MELB. U. L. REV. 743, 746 (1988), reprinted in FEMINIST LEGAL THEORY I, *supra* note 2, at 33; DuBois et al., *supra* note 12, at 40-41 (conversation with Carol Gilligan); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). See generally LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE (1981).

102. DuBois et al., *supra* note 12, at 40-41 (conversation with Carol Gilligan).

the issue is one between life and property, and concludes that Heinz should steal the drug based on his conclusion that life is more important than property.¹⁰³

Amy, however, is "evasive and unsure."¹⁰⁴ When asked whether Heinz should steal the drug, Amy responds, "Well, I don't think so. I think there might be other ways besides stealing it, like if he could borrow the money or make a loan or something but he really shouldn't steal the drug—but his wife shouldn't die, either."¹⁰⁵ She considers then not the conflict between life and property, but the effect of the potential theft on Heinz and his wife: "If he stole the drug, then he might save his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug and it might not be good. So, they should really just talk it out and find some other way to make the money."¹⁰⁶ While on Kohlberg's scale of moral development Jake would receive higher scores than Amy, Gilligan suggests that both responses are equally sophisticated, just different, with Amy "seeing not a math problem with humans but a narrative of relationships that extends over time . . ."¹⁰⁷

103. GILLIGAN, *supra* note 101, at 26. See also Morgan, *supra* note 101, at 747 (discussing Gilligan's research).

104. GILLIGAN, *supra* note 101, at 28. See also Morgan, *supra* note 101, at 747 (discussing Gilligan's research).

105. GILLIGAN, *supra* note 101, at 28.

106. *Id.*

107. *Id.* Interestingly, when Amy and Jake were interviewed again, at the age of 15, Amy's response was different:

I hated these dilemmas last time as much as I do now. . . It all depends. What if the husband got caught? It would not help his wife. And anyway, from everything I know about cancer, it cannot be cured by a single treatment. And, where would this drug be, sitting out on the shelf of a drugstore? The whole situation is unreal.

Id. And, after a pause, "like I said last time," (when she actually had not), "life comes before property. She should steal the drug." Gilligan concluded as follows:

That, by the way, is the "right" answer. She jumps a full stage in moral development, as measured by Kohlberg's scale – from eleven to fifteen years. But look what she has done now: She is learning that if she enters into a construction of reality which she has identified as unreal and problematic, she will advance in "moral development." In other words, if you equate moral development with justice reasoning, then, in a sense you render her more deeply uncertain, more susceptible to the tension between what she thinks and what she really thinks, less convinced that her voice will be heard.

Id. at 129.

Jake's response at 15 was that "money comes and goes, but human life only comes once, so therefore the wife's claim to her life takes precedence over the druggist's claim to his property." When asked to comment on the fact that the druggist may feel strongly about his profit, Jake responds that the druggist has "the wrong set of priorities." Jake starts to consider the feelings that would be involved on both sides and says, "I think that what the druggist is going to experience is some sorrow and some anger over losing his money, and it is a shame that he has to feel that." But, on the whole, and applying the same template of evaluation, Jake concludes that "it is not as deplorable a thing as the idea of Heinz – with his wife dying and him having to deal with his wife's dying."

Based on a body of research of which Jake and Amy are one part, Gilligan asserts that it is possible to differentiate two distinct voices in the way people define moral problems. She defines these voices as justice reasoning¹⁰⁸ and care reasoning. One voice speaks of values such as equality, fairness, rights, and reciprocity; the other talks of connection, care, response and not hurting others. Gilligan posits that one can see the presence of these two voices in the construction, resolution, and evaluation of moral problems. The two voices are aware of each other's presence, and most people, in fact—both men and women—represent both voices to some extent in defining moral problems. The striking finding, however, was the strong tendency of individuals to focus on one voice or the other, a tendency that holds true across gender lines. While the inclusion of both voices into moral discourse, into conflict resolution, and in decision-making transforms the very discourse itself,¹⁰⁹ the traditional legal systems we have set up to support the foundations of society do not easily accommodate both voices which are, although at times coexistent, often in opposition to each other.¹¹⁰ The adversarial system emphasizes certainty, which inevitably results in eliminating one perspective or the other. If a psychological analysis of how people view moral problems consists of a sample exclusively comprised of men, then given Gilligan's findings indicating that there is an overwhelming tendency in men to focus on justice and only minimally on care,¹¹¹ the voice of care will be smothered by its opposition.¹¹² If theorists, like Kohlberg, base conclusions on all male samples, then the inclusion of women at all in the application of that research is "problematic because it challenges the very definition of the problem."¹¹³

On Kohlberg's scale, Jake has not matured in his moral development, because his justice reasoning has stayed the same. Thus, Gilligan concludes, "these interpretive schemes encourage Amy to become more deeply uncertain and Jake to become more simply dogmatic- to take the position that anyone who does not agree with him has 'the wrong set of priorities.'" *Id.*; DuBois et al., *supra* note 12, at 41 (conversation with Carol Gilligan).

108. Although I base much research on Carol Gilligan's research on the moral conceptualizations of men and women as she has defined them, in the "ethic of care" and the "ethic of justice," it is essential for my analysis to keep those categorizations as terms of art for referential purposes, and not to allow "justice" itself to be defined in this manner.

109. DuBois et al., *supra* note 12, at 42 (conversation with Carol Gilligan).

110. *Id.* at 48.

111. *Id.*

112. *Id.* Gilligan recalls: In a sense you can now hear through these findings the empirical basis for such statements of psychologists as Freud's observations that women have less sense of justice than men and that women have less tendency to focus on justice issues in resolving moral problems or Piaget's observation that girls are less concerned with the elaboration of rules and are "deficient in the legal sense."

113. *Id.*

You have this group that focuses on care and cannot be accounted for by a theory that equates morality with justice reasoning. The question shifts by virtue of the observation that *both* men and women in fact represent both justice and care considerations in defining moral problems. The question shifts from, "Why are women confusing morality with care or interpersonal relationships?" to, "Why are men not representing in their formal decisions-making procedures what in fact is present in their thinking—the realization that there is another dimension to moral problems, a dimension which has to do with issues of care, responsibility, and interdependence?"¹¹⁴

Gilligan's research demonstrates the presence of a distinct moral voice, a voice largely attributed to women and ignored in the historical development not only of psychological theory but legal theory and structure. This voice is one that emphasizes interdependence, responsibility, and care for others. It involves cultivating desirable forms of emotion rather than exerting control over, and detachment from, those emotions. This voice must be heard in a legal regime that purports to provide a system for moral decision-making and justice "for all."

E. A FEMINIST THEORY OF JUSTICE – A SUMMARY

In the first section of Part II, I introduced the need for feminist legal theory that reconceptualizes justice—in both its righteousness and its implementation of that right—by viewing its ideological and institutional operatives. In the first of a three step process to do just that, I discussed historical developments in feminist legal theory, in an effort to provide perspective on legal reform in so far as that perspective enables one to see both continuities and change over time. In the next section, I explored assumptions the law makes about its legal subjects, specifically, methods in which the law continues to be "sexed" in both substance and form, particularly criminal law governing sexual violence against women. In the third step, I provided an analysis of various theories having a direct application to a feminist reconceptualization of justice. These theories, including (but certainly not limited to) deconstruction, postmodernism, communitarianism, and the ethic of care, enable us to break the conceptual holds of justice and its current manifestations, and to examine its underpinnings—to recognize that it is impossible (and inadvisable) to extract context from justice, and that attempts to do so merely end up being un"just," by enshrining into law contexts that operate beneath the surface—con-

114. *Id.* at 48-49.

texts that codify discrimination, that aspire to rationality and objectivity while codifying a very particularized form of rationality, defined historically by those with economic, social, and political power.

Rather, we learn that values are codified in concepts of justice at all levels, institutional, ideological, and organizational, and that, as such, laws must reflect values that are inclusive and holistic, not merely representative of one political perspective over time. From history, from theory, from a thorough explication of legal structure and form, we learn that it is vital to acknowledge existent inequalities; that equality of opportunity may be precluded by inequality of condition. We learn that law can benefit from emphasizing the mutual interdependence of its subjects, rather than those subjects' autonomy or independence. We learn that it is valuable to take into consideration responsibilities to society, and future generations, in the interest of connectivity and the intersubjectivity of human beings. And finally, we learn that justice must take into account context, most particularly, a context that dismantles inequalities and power structures rather than enshrines them.

III. APPLICATION OF THESE PRINCIPLES TO VICTIMS OF SEXUAL VIOLENCE IN POST-CONFLICT RWANDA

In Part III of this Article, I apply these five principles to the situation of women survivors of sexual violence in post-conflict Rwanda in an effort to inform the empowerment of women and construction and administration of justice. This effort is a three-step process. First, I discuss a brief history of the genocide in Rwanda, particularly events relative to the commission of systematic sexual violence during the genocide. Secondly, I provide a somewhat abbreviated discussion of the development of crimes of sexual violence in the context of international law. While an extensive discussion of the history of the Rwandan genocide and/or the development of crimes of sexual violence in international law is outside the scope of this Article, a brief contextual discussion is necessary to inform the analysis. The bulk of the analysis is contained within the third section. Therein, I apply the principles discussed above to particular legal operatives in post-conflict Rwanda in an effort to critique their potential for empowering victims of sexual violence.

A. THE RWANDAN GENOCIDE

The political, economic, and social forces leading up to the genocide in Rwanda are complex and, in large part, beyond the scope of this endeavour. In the following section, I seek rather to provide a

general history of events, as those events set the stage for crimes of sexual violence committed during the genocide.

The genocide that occurred over the course of approximately one hundred days in Rwanda was the culmination of approximately one hundred years of conflict—conflict that was largely socially constructed by parties both inside and outside Rwanda.¹¹⁵ Over this period of time, Rwandans were socially constructed as consisting of distinct races and ethnicities, despite the fact that many scholars—and many Rwandans—do not see ethnic differences, let alone racial ones.¹¹⁶

There are three basic groups that comprise the social fabric of Rwanda: the Hutus; the Tutsis; and the Twas.¹¹⁷ The Hutus have historically comprised approximately eighty-five percent of the population of Rwanda. However, this majority position has not translated into political and/or economic control. The Tutsis, who have enjoyed positions of economic and political power, have consistently had fourteen percent of the population of Rwanda.¹¹⁸ After entering Rwanda in the fifteenth century, the Tutsis quickly rose to aristocracy, establishing a monarchy and feudal system over the already present Hutus

115. For a thorough explication of the history of the genocide in Rwanda, see ALISON LIEBHAFSKY DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999), available at <http://www.hrw.org/reports/1999/rwanda/>; PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998); and GERARD PRUNIER, *THE RWANDA CRISIS, HISTORY OF A GENOCIDE* (1995). Figures vary on the exact number of people killed. See, e.g., DES FORGES, *supra* ("Serious authorities differ by hundreds of thousands of deaths – a quite remarkable variation. The highest persuasive figure for Tutsi killed seems to be 800,000, the very lowest, 500,000."); Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 361 n.16 (2002) (stating "the number of Hutu who were killed is probably between 200,000 and 300,000."); see generally PAUL J. MAGNARELLA, *JUSTICE IN AFRICA: RWANDA'S GENOCIDE, ITS COURTS, AND THE U.N. CRIMINAL TRIBUNAL* (2000) (noting the disparity of information).

116. Ian F. Haney Lopez has defined race in the following way: "Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing, plastic process subject to the macro forces of social and political struggle and the micro effects of daily decisions." Ian F. Haney Lopez, *The Social Construction of Race*, in CRITICAL RACE THEORY: THE CUTTING EDGE 163, 165 (Richard Delgado & Jean Stefancic eds., 2000); Adrien Katherine Wing & Mark Richard Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247, 249-50 (2002).

117. There is some differentiation among scholars as to whether the plural of "Hutu," "Tutsi," and "Twa" contains an "s." Many times, "Twa" is not pluralized with an "s," although the practice varies. For consistency's sake, I have elected here to include the "s" for all three groups.

118. Linda Maguire, *Power Ethnicized: The Pursuit of Protection and Participation in Rwanda and Burundi*, 2 BUFF. J. INT'L L. 49, 60-62 (1995); Wing et al., *supra* note 116, at 253-54.

and engaging them in a form of serfdom by which the Hutus entered into contracts, called *ubuhake*, with the Tutsis.¹¹⁹

While the Tutsis maintained an aristocratic rule, there were permeable lines between groups and the Hutus and Tutsis shared a great deal.¹²⁰ Intermarriage was common, and the groups shared a single language and a common culture.¹²¹ They subscribe to the same religious practices, have similar tastes in food, music, and art, and use personal names interchangeably.¹²² Perceived physical differences became more apparent than real.¹²³

The Tutsis were preferred by Belgian colonizers and rose in superiority at the expense of the Hutus, as the colonizers placed great emphasis on perceived ethnic differences between the two groups. The Belgians implemented a programme under which an individual's ethnic group was to be specified on identity cards, and, in the census of 1933-34, constructed the Tutsis as "nonindigenous" and the Hutus as "indigenous," establishing a legal difference between the two groups.¹²⁴ During the push for decolonization, loyalties changed as the Hutu majority supported Belgian decolonization efforts.¹²⁵

Post-independence politics in Rwanda were largely characterized by ethnicity as Tutsis fled to neighbouring countries.¹²⁶ Many émigrés concentrated in Uganda, where they formed a number of po-

119. Maguire, *supra* note 118, at 60-62; Wing et al., *supra* note 116, at 253-54. Under the terms of *ubuhake*, the Hutus promised services in exchange for the use of cattle and land. According to Phillip Gourevitch, this was the original inequality: "cattle are a more valuable asset than produce, and... the word Tutsi became synonymous with a political and economic elite." GOUREVITCH, *supra* note 115, at 48.

120. Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999). Despite a distinct lack of historical records and oral tradition, the records that do exist are virtually absent of a pre-colonial history of hatred or violence; the relationship between the groups was hierarchical but relatively harmonious.

121. Wing et al., *supra* note 116, at 254.

122. *Id.*

123. Tutsis were perceived as being taller, with thinner noses, and Hutus were thought to be shorter, stockier, and with wide, short noses. GOUREVITCH, *supra* note 115, at 57.

124. *Id.* at 57; Wing et al., *supra* note 116, at 258; MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS 100 (2001).

125. See Bureau of African Affairs, U.S. Department of State, Background Note: Rwanda, <http://www.state.gov/r/pa/bgn/2861.htm> (last visited at Apr. 28, 2008); see also MAMDANI, *supra* note 124, at 114-24. In 1959, a Mwami (chief) died without an heir, and his half-brother succeeded to the throne without colonial consultation. *Id.* This act set off a round of violence between the Tutsi political party, the Union Nationale Rwandaise, and the Hutu party, PARMEHUTU. *Id.* Belgium declared a state of emergency and began replacing Tutsi Mwamis with Hutus, presumably because the Hutus were in support of Belgian democratic reform efforts, an act which sharply heightened already grave tensions. *Id.* Rwanda finally obtained independence at the hands of the General Assembly when it ended the trusteeship of Belgium in 1962. *Id.*

126. Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 557 (1998).

litical and military groups that eventually merged into the Rwandan Patriotic Front ("RPF").¹²⁷ After Hutu Major-General Juvenal Habyarimana ascended to power, Tutsis continued to experience increasing social and political discrimination,¹²⁸ which heightened tensions, eventually resulting in negotiations between the Habyarimana regime and opposition forces and the signing of the Arusha Accords in 1993. While the regime put on a front of peace and reconciliation, it was preparing for genocide behind the scenes.¹²⁹

The government created Interahamwe ("those who attack together") and Impuzamugambi ("those who have the same goal") as civilian militia, and Hutus were encouraged to launch a preemptive massacre to save themselves.¹³⁰ As part of this effort, Hutus were encouraged to satisfy their *umuganda*, a day of unpaid labour given once a month for community service projects, by slaughtering Tutsis.¹³¹ Slaughtering as a civic duty began in 1991 and 1992.¹³²

Within this political framework, bright lines were drawn onto the canvas of history while the reality of the actual individuals involved was shaded into the background. Much of the Hutu opposition did not oppose Habyarimana's regime and its anti-Tutsi positions, and many of the Tutsis who lived in Rwanda did not support the RPF.¹³³ The RPF was comprised mostly of children of the 1960s émigrés who had been raised in Uganda, and distinct from the Tutsi population of Rwanda.¹³⁴ Despite the RPF's lack of connection with the local Tutsi population, it was the local Tutsi population who suffered as innocent

127. United States Institute of Peace, Rwanda: Accountability for War Crimes and Genocide (Jan. 1995), <http://www.usip.org/pubs/specialreports/early/rwanda1.html> [hereinafter USIP Special Report]. The RPF became integrated within the Ugandan state and contained an estimated 400,000 to 500,000 Tutsi refugees by 1990. Drumbl, *supra* note 126, at 557.

128. Drumbl, *supra* note 126. For example, by law, Tutsi participation in the community was proportional to the group's percentage of the population, although the figures used by the government were not quite reflective of the demographic reality. *Id.* For example, the government pursued an affirmative action policy whereby, despite the fact that the Tutsis comprised fourteen percent of the population, they were said to comprise nine percent of the population and were therefore only entitled to nine percent of employment and education positions. *Id.*

129. *Id.* at 559. During this time, Habyarimana's propaganda machine went into action. *Id.* The government staged an attack on Kigali, blaming the attack on the RPF and inspiring fear of the RPF in the majority population. *Id.* The regime claimed that in rural villages Tutsi "devils" lurked in the bushes. *Id.* The radio service began to be used as a tool to fuel hatred and fear of the Tutsis. *Id.* The Habyarimana regime also received assistance from the international community. *Id.* France sent troops who helped the Rwandan government fend off an RPF attack in 1990, and France, Egypt, and South Africa all continued to send troops even after the Tutsi pogroms began. *Id.*

130. Wing et al., *supra* note 116, at 270.

131. Drumbl, *supra* note 126, at 558.

132. *Id.*

133. *Id.* at 558-62.

134. *Id.*

victims of Habyarimana's reprisals when the RPF staged its intervention.¹³⁵

The framework of Rwandan society, sitting as it was on a slag heap of socially constructed ethnicities and politically motivated fear, collapsed into disaster when President Habyarimana was killed in a plane crash on April 6, 1994.¹³⁶ Hutu extremists within Habyarimana's party immediately assumed power, set up roadblocks, and implemented a policy of political realignment through mass murder. Genocide raged in Rwanda for fifteen weeks from April to July.¹³⁷ During this time, up to three-quarters of the Tutsi population of Rwanda was murdered and the country's infrastructure practically destroyed.¹³⁸

1. *Propaganda was instrumental in encouraging sexual violence against Tutsi women in so far as it was used extensively to incite hatred of Tutsi women and fear of their sexuality.*

Propaganda was crucial in setting the stage for crimes of sexual violence committed against Tutsi women.¹³⁹ Propaganda characterized Tutsi women as enemy infiltrators; intermarrying was strongly discouraged, and Hutu women were exalted as being superior to Tutsi

135. *Id.* (citing GERARD PRUNIER, *THE RWANDA CRISIS, HISTORY OF A GENOCIDE* 156 (1995)) (stating who "underscores the comments of an elderly Tutsi man to an RPF guerrilla entering his village: 'You want power? You will get it. But here we will all die. Is it worth it to you?'"). *Id.* at 561.

136. See HUMAN RIGHTS WATCH, *PLAYING THE "COMMUNAL CARD:" COMMUNAL VIOLENCE AND HUMAN RIGHTS* 1 (1995) (discussing the crash that killed President Habyarimana); PRUNIER, *supra* note 135 (providing a thorough discussion of the events). There is speculation that the plane may have been shot down by Habyarimana's own soldiers. *Id.*

137. Annonciata Mukanyonga, a survivor of the genocide whose children were killed in the violence, commented: "Looking out on the hills you could think they were just cutting banana trees. When you cut a banana tree you feel no pity. They piled up the bodies by the roadsides. The more they killed the bigger the reward." GACACA: LIVING TOGETHER AGAIN IN RWANDA? (Dominant 7/Gacaca Productions 2002) [hereinafter GACACA].

138. Ironically, the ratio of Hutu to Tutsi remains approximately the same. When Tutsi leaders regained power at the end of the genocide in July 1994, hundreds of thousands of Tutsi refugees who had been living outside the country returned, replenishing the Tutsi population. See generally ALISON LIEBHAFSKY DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999), available at <http://www.hrw.org/reports/1999/rwanda/> (providing an account of the Tutsi's return). The Twas, which have historically comprised approximately one percent of Rwanda's population, are considered to be descendants of Rwanda's first inhabitants, which were pygmy-like forest dwellers. Maguire, *supra* note 118, at 60-62; Wing et al., *supra* note 116, at 253-54.

139. See generally William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 141 (2000) (noting the influence of propaganda on the incitement to genocide).

women.¹⁴⁰ One of the primary tools for Hutu extremist propaganda was the magazine *Kangura*, which benefited from extensive government support.¹⁴¹ *Kangura* billed itself as “the voice that seeks to awake and guide the majority people.”¹⁴² Among its anti-Tutsi messages, *Kangura* published the Hutu Ten Commandments, which prohibited Hutus from forming various types of social, commercial, and legal relationships with Tutsis. Extraordinarily, the first three commandments related to Tutsi women:

1. Every Muhutu should know that a Mututsi woman, wherever she is, works for the interest of the Tutsi ethnic group. As a result, we shall consider a traitor any Muhutu who: marries a Tutsi woman; befriends a Tutsi woman; [and/or] employs a Tutsi woman as secretary or concubine.
2. Every Muhutu should know that our Hutu daughters are more suitable and conscientious in their role as woman, wife, and mother of the family. Are they not beautiful, good secretaries and more honest?
3. Bahutu women, be vigilant and try to bring your husbands, brothers, and sons back to reason.¹⁴³

Kangura also published many articles and cartoons that focused on Tutsi women, with particular emphasis on their sexuality. One article was entitled, for example, “A Cockroach Cannot Give Birth to a Butterfly.”¹⁴⁴ Propaganda portrayed Tutsi women as more beautiful and desirable, as sexual objects who used their charms to seduce

140. Llezlie L. Green, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 COLUM. HUM. RTS. L. REV. 733, 733-55 (2002). In *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 732 (Sept. 2, 1998), the Tribunal found:

As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. . . [B]efore being raped and killed, Alexia, who was the wife of the Professor, Ntereye, and her two nieces, were forced by the Interahamwe to undress and ordered to run and do exercises “in order to display the thighs of Tutsi women.” The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her “let us now see what the vagina of a Tutsi woman tastes like” . . . Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: “don’t ever ask again what a Tutsi woman tastes like.”

141. Green, *supra* note 140 (commenting on the active support from the Rwandan government for *Kangura*). Forty-two new journals were created in 1991 in Rwanda, eleven of which were linked to the Habyarimana government. *Id.*

142. *Id.*; Schabas, *supra* note 139, at 145 (stating that *Kangura* “enjoyed enormous influence within the country.”).

143. Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: Report of the Mission to Rwanda on the Issues of Violence against Women in Situations of Armed Conflict, U.N. Doc. E/CN.4/1998/54/Add.1 (1998) [hereinafter *Violence against Women*].

144. Tutsis were referred to as “cockroaches” in the propaganda. Because ethnicity was determined along patrilineal lines, the offspring of Tutsi women and Hutu men were technically Hutu. Green, *supra* note 140, at 742, 746.

members of the Western presence stationed in Rwanda.¹⁴⁵ One infamous cartoon depicted Canadian General Romeo Dallaire, head of the UN peacekeeping force in Rwanda, in an embrace with a Tutsi woman who was nearly naked.¹⁴⁶ The caption read: "General Dallaire and his army have fallen into the trap of fatal women."¹⁴⁷ The propaganda had a clear effect on the perpetrators of sexual violence during the genocide. Survivors have stated that during the assaults, their violators made statements such as: "You Tutsi women think that you are too good for us," and "We want to see how sweet Tutsi women are."¹⁴⁸

B. INTERNATIONAL LAW GOVERNING SEXUAL VIOLENCE IN ARMED CONFLICT HAS A PIECEMEAL HISTORY AND HAS ONLY RECENTLY BEGUN TO BE RECOGNIZED AS A CRIME IN ITS OWN RIGHT.

Inextricable from the history of organized conflict is a history of sexual violence against women.¹⁴⁹ Sexual violence includes many different crimes, such as rape, sexual mutilation, forced prostitution, and forced pregnancy. Considered to be an inevitable product of war rather than a weapon of war, sexual violence has been historically downplayed in the international legal community;¹⁵⁰ both its status as a crime and its effects on victimized populations have been largely ignored within formal legal frameworks.¹⁵¹ It was not until the early 1990s, in the context of the conflict in the former Yugoslavia, that the

145. *Id.* at 748.

146. *Id.*

147. *Id.* Radio was by far the most influential and pervasive media for information and propaganda. See generally LINDA KIRSCHKE, *BROADCASTING GENOCIDE: CENSORSHIP, PROPAGANDA AND STATE-SPONSORED VIOLENCE IN RWANDA 1990-1994* (1996). Radio Television Libre des Mille Collines, founded in large part by Hutu extremists, worked with Radio Rwanda—the official voice of the government—to spread anti-Tutsi messages. *Id.* Broadcasts warned the Tutsi people: "You cockroaches must know you are made of flesh! We won't let you kill! We will kill you!" *Id.*

148. HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* 18 (1996), available at <http://www.hrw.org/reports/1996/Rwanda.htm> [hereinafter HUMAN RIGHTS WATCH, *SHATTERED LIVES*]; Green, *supra* note 140, at 749.

149. See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 347 (1975) (analyzing the history of rape in the context of war). While sexual violence in conflict situations affects men as well as women, men are targeted as victims for different reasons and affected in distinct ways. As such, this analysis focuses specifically on violence toward women.

150. See generally Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59 (1993) (discussing the history of wartime rape as a hierarchical assertion of male dominance over female subjectivity). See also BROWNMILLER, *supra* note 149 (providing an analysis of rape in the context of war).

151. Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45 (1997); Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, 46 INT'L & COMP. L.Q. 55 (1997). But see Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J.

international legal community finally acknowledged that sexual violence against women in the context of armed conflict violates fundamental principles of human rights and humanitarian law.¹⁵²

Sexual violence during armed conflicts can have a variety of underlying causes. One commonly discussed factor has been intertwined with the view of women as property—that women are part of the “spoils” of war to which victors are entitled.¹⁵³ Another reason for sexual violence against women is the satisfaction and placation of troops, such as occurred when “comfort women” were forced into military sexual slavery by the Japanese Army in World War II.¹⁵⁴ Another way that sexual violence toward women is used in armed conflict is to destroy male, and hence community, pride.¹⁵⁵ If women are raped, their husbands, fathers, and brothers are emasculated, and the community is broken.¹⁵⁶ Sexual violence may also be used as a punishment for women who are perceived as having a certain amount of power, as an instrument of terror, and as a genocidal strategy.¹⁵⁷

Victims of sexual violence suffer physical and psychological effects, which can be heightened within the context of war, when many victims suffer from other abuse, such as the loss of family, displacement, and/or loss of possessions.¹⁵⁸ The social stigma attached to rape can have severe effects on its victims, who may bear children from the rape or be considered by the community to be “unmarriageable” after-

INT'L L. 424 (1993) (arguing that rape has been prohibited in wartime for centuries and discussing the conviction of individual soldiers in domestic courts for isolated acts).

152. See Women2000, Sexual Violence and Armed Conflict: United Nations Response 2 (Apr. 1998), <http://www.un.org/womenwatch/daw/public/w2apr98.htm> [hereinafter Women2000] (taking a stand against sexual violence in armed conflict and noting its prevalence); U.N. GAOR, 51st Sess., Agenda Item 110(c), U.N. Doc. A/51/557 (Oct. 25, 1996) (addressing sexual violence in armed conflict); MacKinnon, *supra* note 150 (discussing rape in the context of war).

153. Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Un-speakable*, 70:4 NOTRE DAME L. REV. 845, 848, 851 (1995) (noting General Patton's suggestion that rape is “an inevitable byproduct of war.”); *Id.* at 848 (remarking that General Andrew Jackson originally coined the phrase “booty and beauty” in the War of 1812, to make clear what kind of “spoils . . . to the victor go.”).

154. See, e.g., Interview with Radhika Coomaraswamy, United Nation's Special Rapporteur on Violence against Women, in *Libertas, International Centre for Human Rights and Democratic Development* 7 (Dec. 1997) (“I don't think I have ever heard such horrendous tales.”); Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335 (2001) (discussing justice and Japanese “comfort women” during World War II).

155. See Women2000, *supra* note 152; BROWNMILLER, *supra* note 149; Adrien Katherine Wing, *Critical Race Feminism and the International Human Rights of Women in Bosnia, Palestine, and South Africa: Issues for LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 337, 343-44 (1996-97).

156. Women2000, *supra* note 152.

157. *Id.*

158. *Id.*; Tompkins, *supra* note 153, at 856-59. See also *infra* Part III.C.2, 3.

ward.¹⁵⁹ Permanent physical damage, including damage to the reproductive system, often results.¹⁶⁰

Despite receiving evidence of rape in World War II, neither the charters of the Nuremberg nor the Tokyo tribunals made reference to sexual violence.¹⁶¹ While rape was explicitly listed as a crime under Control Council Law No. 10 when additional war crimes trials were held, no rape charges were actually brought under that law.¹⁶² Decades later, the legal silence about sexual violence in armed conflicts remained. The Declaration on the Protection of Women and Children in Armed Conflict, adopted by the UN General Assembly in 1974, failed to make explicit reference to sexual violence in armed conflict,¹⁶³ as did the Forward-looking Strategies for the Advancement of Women, adopted in 1985 to provide a blueprint for women's issues to the year 2000.¹⁶⁴ A UN report following the invasion of Kuwait by Iraq in 1990 documented the prevalence of sexual violence committed by Iraqi soldiers against Kuwaiti women.¹⁶⁵ While UN resolutions omitted explicit reference to sexual violence, the Compensation Commission developed to compensate victims who suffered damage as a result of the invasion expressly included compensation within its ju-

159. Tompkins, *supra* note 153, at 856-59. See also *infra* Part III.C.3.

160. *Id.* See also *infra* Part III.C.2.

161. See, e.g., TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 404-07 (1946) (failing to address crimes of sexual violence); JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 1012 (1948) (failing to address crimes of sexual violence); INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, THE TOKYO WAR CRIMES TRIALS 4467-68 (R. John Pritchard & Sonia M. Zaide eds., 1981) (failing to address crimes of sexual violence).

162. 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, art. II(1)(c) at XVII (1950) (giving jurisdiction over 'Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.'). *Id.*

163. U.N. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318 (XXIX), at 146, 29 U.N. GAOR, Supp. No. 31 (Dec. 14, 1974); This omission is particularly glaring in light of preceding evidence that rape had been committed on a massive scale three years previously in the armed conflict in Bangladesh. Special Rapporteur, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994). See also Women2000, *supra* note 152, at 4 (discussing incidents of rape in this context).

164. World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, July 15-26, 1985, *Nairobi Forward-looking Strategies for the Advancement of Women*, U.N. Doc. A/CONF.116/28/Rev.1 (July 26, 1985). The document did, however, reference the vulnerability of women to sexual abuse generally.

165. Special Rapporteur, *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Kuwait under Iraqi Occupation, delivered to the U.N. Econ. and Soc. Council*, U.N. Doc. E/CN.4/1992/26 (1992) (prepared by Walter Kalin).

risdiction for physical or mental injury resulting from sexual assault.¹⁶⁶

It was in the context of the conflict in the former Yugoslavia, however, that the issue of sexual violence came into focus as a serious crime in the international community.¹⁶⁷ In 1992, Security Council Resolution 798 referenced the "massive, organized and systematic detention and rape of women" in Bosnia and Herzegovina.¹⁶⁸ The Special Rapporteur sent a team of medical experts to investigate rape in 1993,¹⁶⁹ while also in that year the Security Council created the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY"), whose mandate envisaged the prosecution of crimes of sexual violence committed during the conflict.¹⁷⁰ The first testimony at the international level from women regarding rape in armed conflict was given in the *Tadic*¹⁷¹ case, the first prosecution brought before the ICTY.¹⁷² The conflict in the former Yugoslavia was a watershed event regarding international recognition and awareness of crimes of sexual violence in armed conflict.¹⁷³

166. Women2000, *supra* note 152, at 7. See also U.N. Security Council, Compensation Commission, *Personal Injury and Mental Pain and Anguish*, 13, U.N. Doc. S/24589 (Sep. 28, 1992); The Panel of Commissioners, *Report and Recommendations made by the Panel of Commissioners Concerning Part One of the Second Installment of Claims for Serious Personal Injury or Death*, ¶10, U.N. Doc. S/AC.26/1994/4 (Dec. 15, 1994).

167. See generally Special Rapporteur, *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Former Yugoslavia, delivered to the U.N. Econ. and Soc. Council*, U.N. Doc. E/CN.4/1993/50 (Feb. 10, 1993) (delivered by Mr. Tadeusz Mazowiecki).

168. S.C. Res. 798, U.N. Doc. S/RES/798 (Dec. 18, 1992).

169. S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992). See also Security General, *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. Doc. (Feb. 10, 1993) [hereinafter Security General, *Interim Report*]; Secretary General, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. Doc. S/1994/674 (May 27, 1994).

170. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

171. *Prosecutor v. Tadic*, Case No. IT-94-1-I, Indictment (Feb. 13, 1995), *amended*, Case No. IT-94-1-I (Sept. 1, 1995), *amended*, Case No. IT-94-1-I (Dec. 14, 1995).

172. The initial indictment charged Tadic with rape of a female prisoner at the Omarska camp. *Tadic*, Case No. IT-94-1-I (crimes of sexual violence were included differently or added with each amendment of the indictment). While the charge was withdrawn pre-trial, evidence of rape was still provided as general evidence against the defendant. *Id.*

173. Around this time, the issue began receiving a significant amount of attention within the U.N. system. See, e.g., World Conference on Human Rights, June 14-25, 1993, *The Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights*, U.N. Doc. A/CONF.157/24 (Oct. 13, 1993) (recognizing that violence against women is a human rights issue); Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (recognizing that women in conflict situations are particularly vulnerable to violence); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot.

Despite the raised consciousness of the international community regarding these issues, the application of that consciousness to the conflict in Rwanda was slow to come about. During the genocide, reports detailed crimes of sexual violence that were stunning in both prevalence and gravity, including rape, mutilation, forced slavery, and myriad sexual torture.¹⁷⁴ However, neither the Security Council nor the preliminary report of its Commission of Experts, which was given the mandate to investigate violations of international humanitarian law during the genocide, referred to sexual violence.¹⁷⁵ It was only when NGOs put pressure on the UN that the Commission began to include rape as part of its investigations.¹⁷⁶ Sexual violence received an increasing amount of attention in UN investigations, such that the Special Rapporteur for Rwanda concluded in a 1996 report that "[r]ape was systematic and was used as a 'weapon' by the perpetrators of the massacres . . . rape was the rule and its absence was the exception."¹⁷⁷

Of Minorities, *Preparatory Document on the Question of Systematic Rape, Sexual Slavery and Slavery-Like Practices During Wartime*, U.N. Doc. E/CN.4/Sub.2/1993/44 (Sept. 7, 1993) (submitted by Linda Chavez). In 1995, women and armed conflict was listed as one of the twelve areas of concern at the Fourth World Conference on Women held in Beijing:

Para. 135. While entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex. Parties to the conflict often rape women with impunity sometimes using systematic rape as a tactic of war and terrorism. The impact of violence against women and violations of the human rights of women in such situations is experienced by women of all ages, who suffer displacement, loss of home and property, loss or involuntary disappearance of close relatives, poverty and family separation and disintegration, and who are victims of acts of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. This is compounded by the life-long social, economic and psychologically traumatic consequences of armed conflict and foreign occupation and alien domination.

The Fourth World Conference on Women, September 4-15, 1995, ¶135, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995).

174. HUMAN RIGHTS WATCH, *SHATTERED LIVES*, *supra* note 148.

175. See Security General, *Preliminary Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, delivered to the Security Council, U.N. Doc. S/1994/1125 (Oct. 4, 1994).

176. Women2000, *supra* note 152, at 7 ("The NGO community was ultimately responsible for insisting that the international community place the issue on its agenda."). See also *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, ¶¶136-37, U.N. Doc. S/1994/1405 (Dec. 9, 1994) (referencing information submitted by the NGO African Rights).

177. Special Rapporteur, *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Rwanda*, ¶16, delivered to Econ. and Soc. Council, U.N. Doc. E/CN.4/1996/68 (Jan. 29, 1996) (submitted by Mr. René Degni-Ségui).

The Minister of Gender and Women's Development in Rwanda estimates that 250,000 women were raped during the genocide.¹⁷⁸ Other estimates put the figure much higher.¹⁷⁹ A 1999 study by a survivors' group found that 80.9% of survivors of sexual and gender violence showed symptoms of trauma, 69% are HIV positive, 13% had broken vertebrae, 12% had lost leg usage, and 7.9% had their legs amputated.¹⁸⁰

In 1994, the UN created an *ad hoc* tribunal, the International Criminal Tribunal for Rwanda (the "ICTR," or the "Tribunal"), to investigate and prosecute crimes arising out of the Rwandan genocide.¹⁸¹ In the first few years of its existence, however, little attempt was made to prosecute crimes of sexual violence, despite the fact that the ICTR Statute, like that of the ICTY, lists rape as a crime against humanity.¹⁸² In fact, the ICTR Statute also expressly refers to crimes such as "rape, enforced prostitution, and sexual assault" as being violations of Common Article 3 of the Geneva Conventions, discussed below.¹⁸³ Despite the legal framework put in place, no charges on grounds of sexual violence were included in an indictment until 1997.¹⁸⁴

C. THE PRINCIPLES OF A FEMINIST THEORY OF JUSTICE IDENTIFIED IN PART II CAN BE APPLIED IN RWANDA TO EMPOWER WOMEN VICTIMS OF SEXUAL VIOLENCE.

This section will apply the following principles to particular issues in post-conflict Rwanda in an effort to illustrate their potential for empowering victims of sexual violence: (1) an emphasis on context while sustaining a commitment to regulative legal principles; (2) the acknowledgment of existent inequalities; (3) consideration of un-

178. Rwanda Launches Anti-Sexual Violence Programme, Latest News from Rwanda, <http://www.gov.rw/government/060802.html> (last visited Apr. 28, 2008) [hereinafter Rwanda Launches].

179. See generally HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 148, at 34.

180. Rwanda Launches, *supra* note 178 (Avega-Aghozo is a survivors' group in Rwanda.)

181. S.C.Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), available at <http://www1.umn.edu/humanrts/peace/docs/scres955.html> [hereinafter ICTR Statute].

182. *Id.*

183. *Id.* (The ICTR Statute explicitly lists sexual violence as a crime, authorizing jurisdiction over crimes included in Articles 2-4, specifically, genocide, crimes against humanity, and violations of Common Article 3 of the Geneva Conventions and Additional Protocol II. Articles 6(1) and 6(3) of the Statute grant authority to try defendants for individual criminal responsibility on the basis of both individual culpability and superior authority.)

184. See *Akayesu Indictment*, Case No. ICTR-96-4-T (including rape in the indictment after repeated testimony before the court).

chosen relationships; (4) an emphasis on mutual interdependence; and (5) the recognition of collective values and societal responsibilities.

1. *Women victims of sexual violence in Rwanda will be empowered by legal operatives that maintain a strong contextualized understanding while sustaining a commitment to regulative legal principles.*

In the following section, I apply this principle to three distinct issues in post-conflict Rwanda. The first issue is that of legal regimes that overlap both in jurisdiction and substance. The second issue is the trial of crimes of sexual violence under the *gacaca* tribunals. The third is the use of context in the *Akayesu* judgment.

- a. Legal protections for victims of sexual violence in post-conflict Rwanda exist at multiple levels and overlap in both form and substance, creating a tension that may compromise the commitment to regulative legal principles.

Sexual violence is a crime under both international law and the domestic law of Rwanda, and there are three potential fora within which these crimes may be prosecuted. Under international law, sexual violence may in certain circumstances constitute a war crime,¹⁸⁵

185. Sexual violence falls under the ambit of common Article 3 of the 1949 Geneva Conventions, which prohibits 'violence to life and person, in particular . . . mutilation, cruel treatment and torture' and 'outrages upon personal dignity, in particular humiliating and degrading treatment'. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4, Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Protocol II]. Common Article 3 is considered to be customary international law and thus applies to both international and internal conflicts. *Id.* Article 4(2)(e) of Protocol II to the Geneva Conventions, also applying to the protection of citizens in internal armed conflicts, prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.' *Id.* Article 27 of the Fourth Geneva Convention explicitly requires that States protect women against rape and enforced prostitution. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Oct. 21, 1950, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] ('Women shall be especially protected against any attack on their honour, in particular against rape.').

Rape has been interpreted as a grave breach of the Geneva Conventions, despite the fact that it is not explicitly included in the laundry list defining such offenses. See, e.g., Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783 (1995) (recognizing rape as a grave breach). Grave breaches are those acts against persons protected by the Geneva Conventions in an international armed conflict, for which states must seek out and prosecute or extradite the perpetrators. Rape has been interpreted as a grave breach under the crime of 'torture or inhuman treatment' and/or 'wilfully causing great suffering or serious injury to body or health'. Geneva Conventions I-IV arts. 50, 51, 130, and 147, Aug. 12, 1949, 75 U.N.T.S. 970-73.; Aide-Memoire, International Committee of the Red Cross (Dec. 3, 1992).

torture,¹⁸⁶ a crime against humanity,¹⁸⁷ an act of genocide,¹⁸⁸ and a

186. Article 1 of the Convention Against Torture defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (June 26, 1987). Rape can be an act of torture. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Report of the U.N. Special Rapporteur on Torture, Mr. Nigel S. Rodley*, ¶19, U.N. Doc. E/CN.4/1995/34 (Jan. 12, 1995). See also *Prosecutor v. Furundzija*, Case No. IT-95-17/1-PT, Judgment (Dec. 10, 1998) amended Indictment (June 2, 1998) (convicting a defendant of torture for aiding and abetting rape).

The ICTR emphasized that rape can amount to torture in many instances, including when it is 'used for such purposes as intimidation, degradation, humiliation, or discrimination, punishment, control, or destruction of a person.' Further, 'Rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' *Akayesu*, Case No. ICTR-96-4-T, at ¶ 598. The 'official capacity' requirement is waning in contemporary customary international law. The ICC Statute, for example, does not necessarily require official capacity to constitute torture, including sexual torture. Rome Statute of the International Criminal Court (ICC Statute), July 17, 1998, U.N. Doc. A/CONF.183.9, 37 I.L.M. 1002. See also Kelly Dawn Askin, *Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. OF INTER. L. 97, 110 (1999) (providing an analysis of sexual violence as treated in the international tribunals).

187. Crimes against humanity are 'inhumane acts of a very serious nature . . . committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.' The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶48, U.N. Doc. S/25704 (May 3, 1993). The ICTR Statute explicitly includes rape as a crime against humanity. *Id.*

188. Sexual violence, in some circumstances, can be considered an act of genocide. See *Akayesu*, Case No. ICTR-96-4-T (holding that rape can be an act of genocide). Genocide is defined under international instruments, including the Genocide Convention and the ICTR Statute, as:

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

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within a group;
- (e) forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. See also Catherine A. MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, MS (1993), at 27 ("[T]he world has never seen sex used this sciously, this cynically, this elaborately, this openly, this systematically, with this degree of technology and psychological sophistication, as a means of destroying a whole people.").

grave breach of the Geneva Conventions.¹⁸⁹ The key issue is not the existence of adequate legal protections, but “in the international community’s willingness to tolerate sexual abuse of women.”¹⁹⁰

- i. The ICTR is an *ad hoc* international tribunal that has jurisdiction over crimes of sexual violence committed during the genocide.

The UN Security Council created the ICTR on November 8, 1994, to prosecute those “responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States.”¹⁹¹ The Tribunal, headquartered in Arusha, Tanzania, has primacy over national courts both in Rwanda and in the rest of the world.¹⁹² It is designed to focus prosecution efforts on the central core of individuals who planned and orchestrated the genocide, in an effort to hold those individuals accountable for their actions and to deter others “who may be tempted in the future to perpetuate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.”¹⁹³

Without regard to what are arguably material differences between the circumstances of the two post-conflict situations, the Security Council used the ICTY Statute as a model when creating the ICTR.¹⁹⁴ In fact, while the ICTR is a separate entity with its own trial judges and administration, the same person who served as chief prosecutor for the ICTY served in that capacity for the ICTR until very recently.¹⁹⁵ Furthermore, the ICTR adopted the same rules of

189. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 14, Aug. 12, 1949, 6 U.S.T. 3526, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

190. Human Rights Watch, Federal Republic of Yugoslavia, Kosovo: Rape as a Weapon of ‘Ethnic Cleansing’ (2000), http://www.hrw.org/reports/2000/fry/kosov003-04.htm#P497_108434.

191. ICTR Statute, *supra* note 181; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, 2 (Dec. 6, 1999). It is worth noting, however, that the international community, including the U.S. government, has not always been fully cooperative with ICTR efforts at securing accountability. For a detailed discussion, see Robert Kushen & Kenneth J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AM. J. OF INT’L. L. 254 (1996).

192. United Nations Statute of the International Criminal Tribunal for Rwanda (2007), available at <http://1169.94.11.53/ENGLISH/basicdocs/statute/2007.pdf>.

193. *Id.*

194. *Id.* One often cited difference is that the ICTY is meant to cover a conflict that was largely international, while the ICTR has jurisdiction over an exclusively internal conflict. Askin, *supra* note 186, at 121.

195. *Id.*; Global Policy Forum, New Rwanda Prosecutor Named (Aug. 29, 2003), <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2003/0829jallow.htm>.

evidence and procedure that were developed for the ICTY.¹⁹⁶ At the time the ICTR was established, commentators believed that the decision to follow the ICTY model and link the two tribunals had a variety of benefits, both administrative and legal—including cost, start-up time, and consistency in substantive law and procedure.¹⁹⁷ Others believe that the use of the ICTY mechanism as boilerplate for the ICTR demonstrated a lack of understanding of material differences between the two conflicts.

There has been consistent tension between the ICTR and domestic courts in Rwanda. In fact, the Rwandan government resisted the formation of the ICTR, casting the only vote against its establishment, believing that justice must come from within.¹⁹⁸ Furthermore, because the ICTR and the Rwandan government share jurisdiction, both entities have on occasion sought custody over the same suspects and access to the same witnesses.¹⁹⁹ This conflict becomes particularly notable in the case of Category 1 offenders, who are subject to the death penalty under Rwanda's domestic genocide law but not under the ICTR.²⁰⁰ In 1996, the ICTR gained custody of some allegedly key leaders of the genocide for whom the Rwandan government had issued

196. See USIP Special Report, *supra* note 127, at 5 (discussing the interplay between the ICTR and ICTY).

197. *Id.*

198. *Id.* at 6. The UN Commission of Experts, prior to the establishment of the ICTR, published a report arguing that prosecution 'would better be undertaken by an international, rather than a municipal, tribunal,' warning that decisions made by national courts would be perceived not as justice but as mere retribution. *Id.* It was thought that a non-national tribunal would have more administrative capabilities and infrastructure, including trained staff and officers of the court; that it would be able to more effectively advance the development and enforcement of international norms of criminal law; that there would be a greater perception of impartiality and independence; and that it would convey to the world that the international community will not tolerate the type of violence that occurred in the Rwandan genocide. *Id.*

199. In one instance, the ICTR granted a stay of proceedings where one and a half years had passed from the time of arrest to the detainee's being charged in the national courts. *Barayagwiza v. Prosecutor*, Case No. ICTR 97-19, Decision (Nov. 3, 1999). Barayagwiza was a central figure in the genocide, believed to have established a radio station used to incite the violence. Stephane Bourgon, Remarks on the Rights of the Accused, The International Criminal Court Summer Course, Irish Centre for Human Rights, National University of Ireland, Galway (July 24, 2003) (notes on file with author). The Rwandan government took a political stand, threatening non-cooperation with the Tribunal if it released Barayagwiza. *Id.* In what is largely believed to be a political move, the prosecutor sought an appeal based on the discovery of 'new facts,' and the decision was overturned. *Id.* See also Amnesty International, *Gacaca: A Question of Justice*, n. 13, AFR 47/007/2002, available at <http://www.amnesty.org/en/library/asset/AFR47/007/2002/en/AFR470072002en.html> (discussing justice in the ICTR).

200. In a few cases, the ICTR has sentenced defendants to life terms, specifically noting that had those individuals been convicted in Rwanda's domestic court system, they would have been sentenced to death. See, e.g., *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, ¶6, Judgment (May 21, 1999).

arrest warrants.²⁰¹ The Rwandan government controls access to witnesses and crime sites in the region and has, at times, denied access to ICTR investigative teams.²⁰² The Tribunal, on the other hand, has escalated tensions by issuing many indictments against individuals operating under the auspices of the former Rwandan government.²⁰³ These tensions between the ICTR and the Rwandan government interfere with the channels of justice and frustrate the efficiency of an already stretched judicial system.

- ii. National courts in Rwanda share jurisdiction with the ICTR over crimes of sexual violence, with laws that differ in substance and procedure.

The Government of National Unity decided early on that it would punish the perpetrators of the genocide, and has made it “among the highest priorities to apprehend and bring [them] to justice.”²⁰⁴ The government has opted for extensive judicial prosecution as the principle mechanism by which to secure the rule of law, promote order, and, purportedly, reconcile a broken country.²⁰⁵

While Rwanda had ratified the Genocide Convention, it had not provided in its Penal Code for procedures for the imposition of punishments for the offences of genocide and crimes against humanity.²⁰⁶ The Organic Law No. 08/96 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990 (“Law No. 8/96”)²⁰⁷ did just

201. These individuals included Andre Ntagerura, Anatole Nsengiyumva, Theoneste Bagosora, Ferdinand Nahimana, Laurent Semanza, and Jean-Bosco Baryagwiza, who is the defendant mentioned above. Amnesty International, *supra* note 199, at n. 13. Rwandan genocide survivors’ groups AVEGA and IBUKA have also refused to testify before the ICTR, stating that they would not cooperate with ‘people who ridicule us and treat our suffering as a banality.’ *Id.* at 7.

202. *Id.*

203. *Id.* These indictments may have played a part in the petition of the Rwandan government to the Security Council to replace the ICTR prosecutor. See generally *supra* note 194 and accompanying text.

204. The Government of Rwanda, Genocide & Justice, www.gov.rw/government/genocide.html (last visited Apr. 26, 2008).

205. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1286 (Nov. 2000). See also Special Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, ORGANIZATION FOR AFRICAN UNITY, para. 18.3 (discussing the implementation of domestic judicial prosecutions).

206. For a detailed discussion of Rwandan national law, see WILLIAM A. SCHABAS & MARTIN IMBLEAU, *INTRODUCTION TO RWANDAN LAW* (1997).

207. Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since October 1, 1990, Organic Law No. 08/96 (1996) (Rwanda), available at www.preventgenocide.org/law/domestic/rwanda.htm [hereinafter Law No. 8/96].

that.²⁰⁸ In theory, Law No. 8/96 takes a holistic approach to rectifying communal wrongs arising out of the genocide. Law No. 8/96 encompasses "crimes against humanity," potentially bringing within its ambit violence, including sexual violence, which would not fall within the elements of genocide.²⁰⁹ While the subject matter jurisdiction is there, the contours of its practical application, disappointingly, remain to be tested.

Law No. 8/96 creates four categories of offences indicating the degree of individual responsibility and respective penalties.²¹⁰ Sexual torture is considered to be a Category 1 offense.²¹¹ However, the concept of "sexual torture" under Rwandan domestic law has not been adequately addressed, either by statute or case law in the domestic system. In fact, sexual violence has played an extremely minor part in domestic genocide trials. Law No. 8/96 was designed to provide specially adapted measures to satisfy the need for justice of the people of Rwanda.²¹² According to unofficial commentaries, it seeks to "allow the return of social peace among Rwanda's people through legitimate tribunals judging on the basis of legal principles that are clearly established."²¹³ However, these legal principles can only satisfy the need for justice in their practical application to Rwandan citizens.

208. Law No. 8/96 consists of special measures streamlining and isolating crimes sanctioned by the Penal Code that were committed between October 1, 1990 and December 31, 1994. Law No. 8/96 *supra* note 207. The crimes are effectively divided into three categories: (1) genocide; (2) crimes against humanity; and (3) collateral offences, including offences enumerated in the Rwandan Penal Code allegedly committed in connection with events surrounding the genocide and crimes against humanity. *Id.* at art. 1, 2.

209. *Id.* at arts. 2, 3. As such, the Law No. 8/96 covers three potential types of offenders: (1) members of the Hutu opposition (who, incidentally, may not have opposed the regime because of its anti-Tutsi policies); (2) participants in the genocide against the Tutsis; and (3) RPA members whose campaigns resulted in crimes against humanity. *Id.*

210. *Id.* at art. 2. Category 1 offenders include leaders and organizers of the genocide, persons who abused positions of authority, notorious killers who 'by virtue of the zeal or excessive malice with which they committed atrocities' distinguished themselves in some way; and perpetrators of sexual torture. *Id.* Category 2 offenders include the perpetrators of or accomplices to intentional homicide or serious assaults against individuals that led to their death. *Id.* Category 3 includes persons guilty of other serious assaults against individuals, and Category 4 includes property offences. *Id.* There is an automatic death penalty for Category 1 offenders. *Id.*

211. *Id.*

212. 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, Organic Law, No. 40/2000, preamble (2001) (Rwanda) [hereinafter Law No. 40/2000].

213. INTERNATIONAL CENTRE FOR THE STUDY AND PROMOTION OF HUMAN RIGHTS AND INFORMATION, THE GENOCIDE AND THE CRIMES AGAINST HUMANITY IN RWANDAN LAW, Commentary at 4 (prologue) (1997).

- iii. The *gacaca* is a form of traditional justice that also has jurisdiction over some crimes of sexual violence and has a distinct penalty structure.

There is yet a third forum that has jurisdiction over crimes of sexual violence committed during the genocide in Rwanda, with yet another system of operation and a distinct penalty structure. In what is effectively a populist response to a populist genocide, Rwanda has implemented a form of traditional justice known as *gacaca* to complement the efforts of national courts and the ICTR.²¹⁴ The *gacaca* system is a remarkable advancement in transitional justice, arguably unique both in the complexity of the issues it seeks to address and the way in which it seeks to achieve those goals.

Gacaca is the Kinyarwanda word for grass, and the present incarnation of *gacaca* is based on a traditional justice system in Rwanda of the same name, in which community elders (called *inyangamugayo*, or persons of integrity) would sit on the grass and resolve community conflicts.²¹⁵ Under the traditional *gacaca* system, when disputes arose—over property, marital disputes, or inheritance, for example—the parties would come before the community and the *inyangamugayo* to seek a solution.²¹⁶ The primary goal of the *gacaca* system “was to restore social order, after sanctioning the violation of shared values, through the re-integration of offender(s) into the community.”²¹⁷ Even throughout the time of colonial rule and thereafter, *gacaca* sessions remained an integral part of the community, in some cases be-

214. Law No. 40/2000, *supra* note 212.

215. For general information on the *gacaca* system, see Government of Rwanda, Introduction on Gacaca, <http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm> (last visited Apr. 26, 2008); Fondation Hirondelle, Law on Traditional Courts Declared Constitutional (Feb. 16, 2001), <http://www.hirondelle.org/hirondelle.nsf/0/9117de1eb28f7a4241256beb006b4bc7>; Fondation Hirondelle, Gacaca Judges to be Elected on October 4th (Aug. 9, 2001), <http://www.hirondelle.org/hirondelle.nsf/0/9117de1eb28f7a4241256beb006b4bc7>; Jane Ciabattari, *Rwanda Gambles on Renewal, not Revenge*, WOMEN'S E-NEWS, Oct. 9, 2000, www.womenenews.org; Jeremy Sarkin, *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 J. AFR. L. 143 (2001); *Rwanda Implementing Controversial 'Gacaca' Courts*, AFROL.COM, Dec. 1, 2001, www.afrol.com/News/rwa018_gacaca_courts3.htm; Laurie Anne Pearlman & Ervin Staub, *The Gacaca Process as an Avenue toward Healing and Reconciliation*, www-unix.oit.umass.edu/~gubin/rwandasup/gacaca.htm (last visited Apr. 14, 2008); International Helsinki Federation for Human Rights, Prosecuting Genocide in Rwanda—The Gacaca System and the International Criminal Tribunal for Rwanda (Oct. 12, 2002) (on file with author); Daly, *supra* note 115. See also Ian Fisher, *Massacres of '94: Rwanda Seeks Justice in Villages*, N.Y. TIMES, Apr. 21, 1999 (explaining that *Gacaca* “refers to the grass that village elders once sat on as they mediated the disputes of rural life in Rwanda.”).

216. See, e.g., Daly, *supra* note 115 (discussing the history of the *gacaca* courts).

217. Amnesty International, *supra* note 199, at 14.

coming institutionalized to the extent that local governmental or administrative authorities assumed the role of *inyangamugayo*.²¹⁸

The former President of Rwanda, Pasteur Bizimungu, created a commission on October 17, 1998, to study the applicability of *gacaca* to the trial of *genocidaires*. Organic Law No. 40/2000 of 26 January 2001 ("Law No. 40/2000") established *gacaca* jurisdictions for the prosecution of genocide offenses and crimes against humanity committed between October 1, 1990, and December 31, 1994, a law that came into effect on March 15, 2001.²¹⁹ Community members elected *gacaca* judges in October 2001, using as a basis the traditional election criteria of integrity; among other criteria, the judges are "to be recognized as having a good behaviour and morals; to be characterized by honesty and a spirit of sharing speech; . . . (and) to be free from the spirit of sectarianism and discrimination."²²⁰ Political appointees, government administrators, members of the national police, and career magistrates are excluded from eligibility.²²¹

The organizational structure of *gacaca* is hierarchical, at its lowest level comprised of nearly 10,000 cells across the country which are responsible for categorizing criminals according to the structure set out in Law No. 8/96.²²² In order to accomplish this aim, the cells can use the case files to the extent that such files exist, as well as testimony from the accused and the community assembly. The second

218. *Id.* Some theorists argue that the *gacaca* system is inappropriate as applied to the Rwandan genocide because *gacaca* has traditionally been used to adjudicate the relatively minor disputes typical of rural life in Rwanda, over property or petty theft. *Id.* However, contrary to popular understanding, use of *gacaca* in the case of murder is not without precedent. Traditionally, under the *gacaca* system, when a murder had taken place 'the family of the victim would be allowed to symbolically end the killer's life by taking him in front of the community and pretending to kill him. However, the killer would walk away.' Drumbl, *supra* note 126, at 565 (citing *Rwanda Tradition May Rule Prosecution*, ARK. DEMOCRAT-GAZETTE, Oct. 9, 1999, at 11A (identifying Tharcisse Karugarama, Vice President of Rwanda's Supreme Court, as a supporter of possibilities of *gacaca* even for the crime of murder)).

219. Law No. 40/2000, *supra* note 212.

220. PRESIDENTIAL ORDER NO. 12/01 OF 26/6/2001, ESTABLISHING MODALITIES FOR ORGANIZING ELECTIONS OF MEMBERS OF 'GACACA JURISDICTIONS' ORGANS, art. 7. Article 7 provides, in pertinent part:

Can be elected at the level of the Cell's 'Gacaca Jurisdiction', any person recognized by people as fulfilling the following conditions: (1) to be of Rwandese nationality; (2) to be living in the Cell where he wants to stand for elections; (3) to be at least 21 years old; (4) to be recognized as having a good behaviour and morals; (5) to be characterized by honesty and a spirit of sharing speech; (6) not having been sentenced, during five years starting from the beginning of elections, by a trial emanating from the tried case to a penalty of 6 months or more; (7) not having participated in perpetrating offences of the genocide crime or crimes against humanity; (8) to be free from the spirit of sectarianism and discrimination; (9) not having been the subject of dismissal for lack of discipline.'

221. *Id.* at art. 10.

222. Law No. 40/2000, *supra* note 212, at tit. II.

phase of *gacaca* involves trials of the accused, with each level having competence to judge appeals from the level below. "The progression of lists, from the most neutral topic of the cell's residents in 1994, to the lists of the deceased, to the claims for compensation, and finally to the most sensitive and contentious topic of the accused, allows the assembly to gradually establish a rhythm and atmosphere that can become more and more refined as the difficulty of the tasks increases."²²³

Gacaca courts have jurisdiction over all offenses listed under Law No. 8/96, with the exception of Category 1 offenses. As discussed below, it is unclear what types of sexual violence will fall within the practical subject matter jurisdiction of the *gacaca* courts. While the *gacaca* courts share jurisdiction with the domestic courts under Law No. 8/96, the emphasis on sentencing in the two tribunals is different. Confession procedures are an extremely important component of the *gacaca* system.²²⁴ Prisoners who confess and ask for forgiveness may receive dramatic reductions in penalties, up to one half of a given sentence.²²⁵ In addition, community service is expected to play a significant role in the proceedings; up to half of a sentence may be transmuted to community service if an accused publicly asks for forgiveness.²²⁶

- b. A lack of sensitivity to cultural context makes the *gacaca* courts an inappropriate forum for crimes of sexual violence and may result in an overall lack of justice for victims.

Given the inefficiency of the ICTR and the backlog of cases being prosecuted in national courts, the *gacaca* is seen by the Rwandan government, as well as the international community, as a mechanism to speed up trials and reduce a caseload that would take hundreds of years to process.²²⁷ The post-genocide infrastructure of Rwanda, as discussed above, is extremely weak; the criminal justice system was crippled by the death of professionals during the genocide, and the sheer number of genocide suspects and cases awaiting trial has stretched the system beyond capacity.²²⁸ Prisons are extremely overcrowded, and the economy is unable to absorb the cost of feeding and

223. GACACA JURISDICTIONS: TRANSITIONAL JUSTICE IN RWANDA (2002), http://www.convenor.com/madison/PDF_Gacaca_Report.pdf ('Interim Report').

224. Law No. 40/2000, *supra* note 212, at ch. 2. While confessions are incorporated *de jure* into the national courts, there is a disconnect between law and practice. Confessions are granted on a discretionary basis, the procedure for doing so is somewhat protracted, and the bureaucracy in Rwanda is insufficient to process a large number of claims.

225. *Id.* at chs. 2 & 4.

226. *Id.* at ch. 4.

227. The Government of Rwanda, *supra* note 204.

228. *Id.*

clothing the detainees.²²⁹ As of 2001, only approximately 5000 trials had taken place, with 125,000 detainees awaiting trial in prisons built to accommodate 10,000 individuals.²³⁰ As of 2003, there were approximately 87,000 detainees in Rwandan prisons.²³¹ A Swedish radio journalist commented:

I think I understood something of the magnitude of that problem when I talked to Kibuye Chief Prosecutor Rafael Ngarumbe, who led the pre-*gacaca* proceedings in Bisesero. He has got 250,000 murders and 7000 suspects to investigate. His staff consists of 12 persons and they have got one vehicle, unfortunately without petrol.²³²

In an effort to find a practical solution to this situation, *gacaca* courts have been established across the country. *Gacaca* courts, as discussed above, have jurisdiction over offenses falling under Categories 2-4 of Law No. 8/96; while this jurisdiction excludes "sexual torture," crimes of sexual violence falling outside that realm will potentially be within the scope of the *gacaca* tribunals.²³³ Furthermore, Category 1 crimes may soon be within the jurisdiction of the *gacaca*: an amendment bill which would "pave way for the quick trial of a bulk of genocide-related cases" by enabling *gacaca* courts to try cases falling under Category 1 has recently been adopted by Rwandan lawmakers and will now be forwarded to the Parliamentary Commission for consideration.²³⁴ The particular cultural operatives at play with regard to crimes of sexual violence, however, may mean that these crimes do not in fact get dealt with in this setting, and conse-

229. *Id.*

230. Amnesty International, *supra* note 199.

231. Press Release, Amnesty International, Rwanda: End of Provisional Release of Genocide Suspects (Apr. 29, 2003), available at <http://www.amnesty.org/en/library/as-set/AFR47/005/2003/en/AFR470052003en.html>.

232. Excerpt from radio program, Genocide in Paradise, Radio Sweden (Dec. 8, 2001) (from a visit to a pre-*gacaca* hearing in Bisesero, Kibuye).

233. See Law 40/2000, *supra* note 212. There is some apparent confusion regarding the jurisdiction of *gacaca* tribunals over types of sexual violence. In one pre-*gacaca* hearing, the prosecutor announced that 'anyone who attacked a woman, especially in a sexual way, will be considered a major criminal' and 'fall in Category 1' (thus outside the scope of the *gacaca* jurisdiction). GACACA, *supra* note 137. However, in another *gacaca* proceeding, the prosecutor asked a witness directly and openly for testimony regarding rape:

Prosecutor: Were there rapes?

Witness: Sorry?

Prosecutor: Did they rape you?

Witness: No. But another boy still in prison had a piece of wood this big (holding up her arm), with which he raped the wives of the Tutsi.

Id.

234. Sulah Nuwamanya, *Gacaca Courts to get more Powers*, WEEKLY OBSERVER, Mar. 6, 2008, available at <http://allafrica.com/stories/printable/200803060759.html>.

quently fall through the cracks, whether or not those crimes are directly within the jurisdiction of the *gacaca*.

Sexual crimes are heavily stigmatized in Rwanda, and both the physical and the psychological traumas suffered by the victims are aggravated by ostracization by the community and a sense of isolation.²³⁵ Rwandan women generally do not discuss their experiences out of a fear that they will be rejected by their family or community or will be considered "unmarriageable" as a result.²³⁶ It has been noted that words to describe some sexual acts do not even exist in Kinyarwanda.²³⁷ Many fear revenge or retribution from their attacker(s) if they speak out.²³⁸ The *gacaca* tribunals are simply not designed to accommodate this cultural context. In the laws governing the *gacaca* courts, there are no specialized victim protection mechanisms or witness protection mechanisms for these women. Exacerbating this problem is the fact that there will be no counsel representing them during the hearings.²³⁹ In short, within this cultural context, it is extremely unlikely that these survivors will stand up in front of their entire community and discuss the details of sexual violence committed against them. Where the *gacaca* tribunals are meant to alleviate caseload of the national courts, and where that caseload includes crimes of sexual violence, the *gacaca* courts may simply be unable to serve as a venue for justice for the victims and survivors because of a lack of consideration of the surrounding cultural context.

- c. The *Akayesu* Judgment of the ICTR was a watershed event for victims of sexual violence because it used the context of the Rwandan genocide to hold that rape could be a form of genocide under international law.

*Prosecutor v. Akayesu*²⁴⁰ was the first case to convict a defendant for crimes of sexual violence under international law.²⁴¹ In doing so, the ICTR adopted a definition of sexual violence that would serve as an overarching principle of law while allowing room for context in its application. In an extremely detailed and lengthy opinion, the Tribunal emphasized context with regard to both the elements of the crime and the *mens rea* required. It acknowledged the legal importance of

235. HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 148, at 3.

236. *Id.*

237. Violence against Women, *supra* note 143, at Part III.A, ¶50.

238. *Id.*

239. See, e.g., GACACA, *supra* note 137 (providing a local prosecutor instructed the Gacaca participants at Ntongwe Communal Lockup: "Your lawyer will be your neighbor, your prosecutor will be your neighbor, your judge will be your neighbor.").

240. *Akayesu*, Case No. ICTR-96-4-T.

241. *Id.* at ¶696, 697. For a general discussion of the *Akayesu* Judgment relative to other cases of the ICTR and the ICTY, see Askin, *supra* note 186.

the factual particulars, and held that rape can be an act of genocide in its own right.²⁴²

Jean Paul Akayesu was *bourgmestre* (mayor) of the Taba commune, located near Kigali.²⁴³ As *bourgmestre*, he was in charge of the communal police and was responsible for maintaining public order within the commune.²⁴⁴ Akayesu was an academic and was appointed to his political post by then President Habyarimana in 1991.²⁴⁵ Evidence submitted at trial indicated that Akayesu initially attempted to prevent violence in the Taba commune.²⁴⁶ The court found, however, that after a meeting calling for support of the *bourgmestres* in the genocide, Akayesu participated in the violence both actively and through passive facilitation of crimes.²⁴⁷ The court records show that at least two thousand Tutsis were killed in Taba during the months of May and June 1994 while he was in power.²⁴⁸

Akayesu was the first time an international court punished sexual violence in an internal armed conflict.²⁴⁹ However, rape was not included in the initial indictment against Akayesu.²⁵⁰ It was only when the Tribunal heard consistent and repeated evidence of sexual violence, and came under a significant amount of pressure from non-governmental organizations ("NGOs") that the indictment was amended to cover these crimes.²⁵¹

242. Akayesu, Case No. ICTR-96-4-T, at ¶¶ 698-734. See also William A. Schabas, Commentary, Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), in André Klip & Goran Sluiter, ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: VOLUME II, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999, 541 (2001).

243. Akayesu, Case No. ICTR-96-4-T, at ¶¶ 1, 54.

244. *Id.* at ¶¶ 54, 55, 77.

245. *Id.* at ¶¶ 6, 51, 52.

246. *Id.* at ¶¶ 52, 55.

247. *Id.* at ¶¶ 637-744.

248. *Id.* at ¶ 181.

249. *Id.* ¶¶ 416-60 (particularly discussing evidence of sexual violence).

250. See Akayesu Indictment, Case No. ICTR-96-4-T, amended (June 1997) (including rape as amended); Akayesu, Case No. 1 CTR-96-4-T, at ¶ 6 (discussing the amendments).

251. Akayesu, Case No. 1 CTR-96-4-T, at ¶ 6; Margaret A. Lyons, Note, *Hearing the Cry without Answering the Call: Rape, Genocide, and the Rwandan Tribunal*, 28 SYRACUSE J. INT'L L. & COM. 99, 105 (2001). Lyons provided the following:

A Tutsi woman testified in front of the Tribunal that three Hutu soldiers raped her six year old daughter when they came to kill her husband. The same witness, referred to as witness J, also testified that she heard of young girls raped at the communal. Witness H testified that she did not know if Akayesu knew about the abuse. . . After hearing witness testimony regarding sexual assaults, Judge Pillay amended the indictment to include the crime of rape as genocide. Judge Pillay was the only woman on the panel.

Id. The NGO Coalition for Women's Human Rights in Conflict Situations (the 'Coalition') filed an *amicus* brief that proved influential in the Tribunal's decision to amend the indictment. Brief for NGO Coalition for Women's Human Rights in Conflict Situations as Amicus Curiae Respecting Amendment of the Indictment and Supplementation

In defining rape, the Tribunal moved away from a description of objects and acts toward a contextual approach that it found to be "more useful in international law."²⁵² Without this broad construction, it is possible that many acts of sexual violence that occurred during the genocide would not fit the legal definition. The Tribunal reasoned that "sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact," including forced nudity.²⁵³ The ICTR defined sexual violence as any act of a sexual nature committed on a person under circumstances that are coercive.²⁵⁴ It recognized that "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts" and noted "the cultural sensitivities involved in public discussion of intimate matters" and recalled "the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured."²⁵⁵ The Tribunal determined that rape is a form of genocide, in so far as it constitutes serious bodily or mental harm pursuant to paragraph 3(b) of the ICTR Statute.²⁵⁶

The ICTR also held that rape fell under paragraph (d).²⁵⁷ It held that, under Article 2, measures intended to prevent births could be sexual mutilation, sterilization, separation of the sexes, or forced birth control. The deliberate rape of a woman with intent to impregnate her falls within the scope of this provision in patriarchal societies where membership of the group moves through the father. The Tribunal further interpreted serious mental or bodily injury to include all acts of torture, persecution, and inhumane treatment.

By applying the law with regard to the context involved, the Tribunal found that the sexual violence in question satisfied the elements

of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence Within the Competence of the Tribunal (May 1997) (on file with author). The Coalition is a group of more than 100 organizations related to women's human rights in conflict situations. *Id.* It is coordinated by the International Center for Human Rights and Democratic Development, in Montreal, Canada. *Id.*

252. *Akayesu* Case No. 1CTR-96-4-T, at ¶¶ 687-88. According to the Tribunal, rape is:

[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive. . . Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.

Id.

253. *Id.* at ¶¶ 6, 596-98, 688.

254. *Id.* at ¶ 598.

255. *Id.* at ¶ 687.

256. *Id.* at ¶¶ 731-35.

257. *Id.* at ¶¶ 731-34.

of genocide.²⁵⁸ It held that the rapes were systematic and discriminatory. Acts of sexual violence often preceded murder, and were used for the destruction of the Tutsi will to live.²⁵⁹ While the Tribunal acknowledged that murder followed rape in many cases, it determined that the rape itself constituted an act of genocide.²⁶⁰ In order to find Akayesu guilty of genocide, it had to find intent. The ICTR expanded the *mens rea* requirement for command responsibility to include constructive intent—that is, inferring intent where a superior knows or should have known that his or her subordinates were about to, or already had, committed an act.²⁶¹

The ICTR convicted Akayesu of genocide (including commission of genocide, and direct and public incitement to commit genocide) and crimes against humanity (including extermination, murder, torture, rape, and other inhumane acts).²⁶² The ICTR failed to convict him for violations of Common Article 3 of the Geneva Conventions (including murder and cruel treatment) and Article 4(2)(e) of Additional Protocol II (including outrage upon personal dignity, in particular rape, degrading and humiliating treatment, and indecent assault).²⁶³ The Tribunal found that the Prosecutor had not proved beyond a reasonable doubt that the acts committed by Akayesu in the Taba commune during the time period alleged in the Indictment “were committed in conjunction with the armed conflict”²⁶⁴ or that he had acted either for the Government or as a member of the armed forces under military command.²⁶⁵

2. *Justice for women victims of sexual violence will be enhanced where it is premised on an acknowledgement of existent inequalities.*

The woman must be fertile, hard-working, and reserved. She must learn the art of silence and reserve.²⁶⁶

258. *Id.* Beverly Allen, a scholar on rape as a form of genocide, posits that rape is a form of ‘biological warfare’ and constitutes genocide. BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA (1996).

259. Evidence showed that many rapes took place at mass graves to facilitate easy disposal of the bodies. *Akayesu*, Case No. 1 CTR-96-4-T, at ¶ 733. Further, evidence showed that following a particularly brutal gang rape, Akayesu said, ‘Tomorrow they will be killed’. *Id.*

260. *Id.* at ¶¶ 731-34.

261. *Id.* at ¶¶ 488-89; Lyons, *supra* note 251, at 108-09.

262. *Akayesu*, Case No. 1 CTR-96-4-T, at ¶¶ 654-744.

263. *Id.* at ¶¶ 638-44.

264. *Id.* at ¶ 643.

265. *Id.*

266. HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 148, at 20 (citing The Fourth World Conference on Women, Sept. 4-15, 1995, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995) [hereinafter Conference on Women]).

The status of women in Rwandan society is one of distinct inequality; this inequality clearly and effectively exacerbated the violence experienced by women during the genocide.²⁶⁷ In order to seek justice for the survivors, it is essential that legal operatives and programmatic advances take into account the social, political, and economic realities of their subjects. This section will discuss some of the existent inequalities that inhere within Rwandan society, and how those inequalities affect the quest for justice for women victims of sexual violence.

- a. Domestic violence is deeply entrenched in the fabric of Rwandan society.

Even outside the context of genocide, Rwandan women are in large proportions subject to violence at the hands of their partners or family members. The Rwandan National Report to the Fourth World Conference on Women states that one-fifth of all Rwandan women have been victims of domestic violence by their male partners.²⁶⁸ Women's groups estimate this figure to be much higher.²⁶⁹ A common Rwandan proverb states "that a woman who is not yet battered is not a real woman."²⁷⁰

- b. Victims of sexual violence may be unable to obtain necessary medical care.

Women in Rwanda do not receive adequate health care, and the health care system has fallen far short in its abilities to address the needs of women victims of sexual violence. Sixty-three percent of all deaths of women in 1993—even before the medical infrastructure was decimated in the genocide—were due to inadequate reproductive health care.²⁷¹ The Special Rapporteur noted that the health services in Rwanda were entirely unable to address the physical needs of women victims of sexual violence;²⁷² in 1997 there were only five gynaecologists in the whole of Rwanda.²⁷³ The "health services seemed insensitive to women's needs, and only after constant ques-

267. *Id.* at 12-13.

268. HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 148, at 13 (citing Conference on Women, *supra* note 266); Violence against Women, *supra* note 143, at sec. I.

269. Violence against Women, *supra* note 143, at sec. I.

270. HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 148, at 13.

271. *Id.* at 13, 21.

272. HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 148, at 38 ("[T]he most common medical problems were sexually transmitted diseases, such as syphilis, gonorrhea or vaginitis. Other medical problems include AIDS, vesico-vaginal fistula, trauma, mutilation, complications from botched abortions and psychological problems.').

273. Violence against Women, *supra* note 143, at sec. I, ¶ 36.

tioning did health officials admit that sexual violence required a very specialized medical approach.²⁷⁴

- c. While women make up a majority of Rwandan citizenry, they enjoy very little political power.

Women's participation in the government has been low. Women never comprised more than 17% of the National Assembly, and only 3.2% of local government officials were female.²⁷⁵ Given these stark demographic inequalities, it is particularly striking that women in post-genocide Rwanda now comprise 50% of the heads of household.²⁷⁶ Women currently comprise, in fact, approximately 70% of the entire population of Rwanda.²⁷⁷

- i. A lack of consideration for these existent inequalities could hamper the success of the *gacaca* tribunals.

The *gacaca* tribunals depend directly upon community participation for their success. However, women may have a difficult time participating in the process, because they have historically been excluded from participation in *gacaca* hearings. Women may consequently be reluctant to participate, and uncomfortable with the process if and when they do. A long-standing tradition of discrimination, in a tribunal that has as its main selling point its long-standing tradition, may lead to the exclusion of women's voices.

Perhaps in part to accommodate these concerns and educate the public about the "reconstituted" *gacaca* tribunals, a variety of mechanisms have been used to heighten awareness, to educate, and to train the public about the *gacaca* system. The Rwandan government, as well as members of the international community, have spearheaded mass information dissemination, education, and training programs geared equally toward educating participants and garnering support.²⁷⁸ Based on research showing that community leaders are sources of information for the community at large, such leaders were trained especially to serve as informants about the *gacaca* process, including training in general communication techniques.²⁷⁹ Printed materials and "*gacaca* kits" were disseminated, which contained re-

274. *Id.*

275. *Id.* at sec. I, ¶ 20.

276. *Id.* at sec. I, ¶ 22.

277. *Id.*

278. See, e.g., Inkiko Gacaca, <http://www.inkiko-gacaca.gov.rw/> (last visited Apr. 21, 2008) (providing information about these activities).

279. Johns Hopkins Center for Communication Programs, Rwanda: Gacaca, <http://www.jhuccp.org/africa/rwanda/gacaca.shtml> (last visited Apr. 21, 2008) [hereinafter Hopkins, Rwanda].

search, handouts, badges, and “*aide memoires*.”²⁸⁰ Weekly radio spots were broadcast on local radio programs, as well as a bi-weekly radio talk show that was produced and aired on Rwanda Radio to cover aspects of the *gacaca* law.²⁸¹ Efforts at imparting knowledge, garnering support, and increasing widespread participation in the *gacaca* process filtered down into social and cultural life, as well; there was a *gacaca* song competition, educational sessions were held during soccer matches, and one of Rwanda’s top theatre troupes produced a *gacaca* play.²⁸² It is unclear, however, to what extent these campaigns targeted women and their participation in the process. Because of the historical prohibition on women’s participation, combined with the existent economic, social and political inequalities discussed in this section, it is crucial for the success of the *gacaca* that it address these issues directly.

- d. Reforms in laws governing land ownership in Rwanda are demonstrative of legal efforts to recognize existent inequalities and remedy them in the interest of achieving justice for women survivors.

These changing proportions have led to legislative reform that takes into account existent inequalities in an effort to bring justice to Rwandan women as they assume new roles in society. Perhaps one of the most important reforms has occurred with regard to land ownership and economic empowerment. Prior to the genocide, women could not inherit land, nor were they eligible for credit or loans.²⁸³ In fact, wives were not permitted to be employed or engage in commercial activity without the express authorization of their husbands.²⁸⁴ While Rwanda has yet to adopt a national land policy, two important developments have occurred in this area. First, the government implemented the *imidugudu* policy, which resettled refugees and displaced persons on their original lands. Under this policy, many women returned to the lands that were held in the past by their families.²⁸⁵ Secondly, after intense lobbying by NGOs and the international com-

280. *Id.* Throughout this time, efforts were made to conduct research on Rwandan attitudes toward and knowledge of the *gacaca*. *Id.* Overall, these efforts were successful: An estimated 2.7 million people were exposed to educational messages through radio spots and talk shows. *Id.* More than 250,000 people read handouts on the *gacaca* process. *Id.* More than 200,000 followed the cartoon strip. More than 120,000 people listened regularly to the *gacaca* radio drama. *Id.* More than 65,000 watched the *gacaca* film. *Id.* And more than 60,000 followed the *Inkiko Gacaca* monthly journal. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. Human Rights Watch, Women’s Property Rights Violation in Sub-Saharan Africa, www.hrw.org/campaigns/women/property/qna.htm (last visited Apr. 20, 2008).

285. *Id.*

munity, Rwanda passed an Inheritance Law in 1999.²⁸⁶ The succession law explicitly recognizes the equal right of Rwandan female and male children to inheritance and ownership of land and property.²⁸⁷ Under this law, couples are also afforded the opportunity to choose between distinct property regimes upon marriage, effectively increasing married women's rights to land.²⁸⁸

These developments have three important weaknesses, however. First, the property protections apply only to civil law marriages, thus excluding a large percentage of the population who have been married according to local custom.²⁸⁹ Secondly, inheritance rights are limited to "legitimate" children—that is, children born outside of a civil union do not fall under the scope of the Inheritance Law.²⁹⁰ This exclusion directly affects women who are victims of sexual violence and who have borne children as a result of that violence. Finally, and ironically, the property protections may be entirely inapplicable to land, because the Rwandan government itself technically owns all land.²⁹¹

3. *Post-conflict solutions will empower women victims of sexual violence in Rwanda where they incorporate consideration of unchosen relationships.*

Later, I found out that I was pregnant and I was unhappy. I thought about having an abortion, but I was afraid of dying. I knew that I was going to have an unwanted child and that I was not able to look after a baby. But I didn't want to behave like an Interahamwe and abandon my baby. . . . Almost all my family members have refused to accept the baby—it is a child of an Interahamwe. They have told me that they do not want a child of wicked people. They always tell me that when my baby grows up they will not give him a parcel of land. I don't know what is going to happen to him.²⁹²

286. *Id.*

287. Women's Land and Property Rights in Situations of Conflict and Reconstruction: A Reader Based on the February 1998 Inter-Regional Consultation, in Kigali, Rwanda, UNDP. 16-19 (Feb. 1998). This includes the Kigali Plan of Action of 1998; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Implementation of the Human Rights of Women: The Role and Equal Participation of Women in Development*, U.N.Doc. E/CN.4/Sub.2/1998/L.29 (Aug. 17, 1998). See also Ministry for Lands, Human Resettlement & Environmental Protection, Brookings Initiative in Rwanda: Land and Human Settlements (Nov. 2001); Robin Palmer, Oxfam GB Land Adviser, A Review for LandNet Rwanda of the Draft National Land Policy—and Beyond (Nov. 2001).

288. Human Rights Watch, *supra* note 284.

289. *Id.*

290. *Id.*

291. *Id.*

292. HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 148, at 41.

Among the most important types of unchosen relationships experienced by women victims of sexual violence in Rwanda are the children borne of that violence. Out of the estimated 250,000 women who were raped during the time period from 1990 to 1994, it is estimated that 30,000 pregnancies resulted.²⁹³ Health workers in the Kigali and Kabgayi hospitals estimated that between six to seven out of ten pregnancies that they saw in the months after September 1994 were the result of wartime rape.²⁹⁴ A study conducted by UNICEF and the Rwanda Ministry of Family and Promotion of Women indicated that thirty-five percent of rape survivors had become pregnant.²⁹⁵

Women often could not bear the thought of having a child as a result of the violence perpetrated against them. Some women performed self-induced abortions at great risk to their health, some committed suicide, some committed infanticide, and others abandoned their children after birth.²⁹⁶ One doctor stated that some women would not reveal that they had been raped, and then cry out, "my child is an Interahamwe!" during the birth.²⁹⁷ Many women who did accept their children were subject to their families' rejection of them and their babies.²⁹⁸ With regard to the succession law, discussed above, the lack of consideration of unchosen relationships leads to a denial of justice.²⁹⁹ "The women who have had children after being raped are the most marginalized. People say this is the child of an Interahamwe."³⁰⁰

- a. Reforms in laws governing land ownership in Rwanda are inadequate where they discriminate against women victims of sexual violence.

While inheritance law reforms have received much favourable press, they discriminate against women victims of sexual violence in three ways: First, (and as discussed in the previous section), children who have been born to rape victims do not fall within these protection mechanisms. Secondly, women may themselves fall outside the ambit

293. Rwanda Launches Anti-Sexual Violence Programme, Aug. 6, 2002, <http://www.gov.rw/government/060802.html> (last visited May 16, 2008).

294. HUMAN RIGHTS WATCH, *SHATTERED LIVES*, *supra* note 148, at 39-40 (citing Bonnet, *Le viol des femmes survivantes du genocide du Rwanda* 23) (on file with author).

295. *Id.* at 40 (citing Government of Rwanda, Ministry of Family, and the Promotion of Women, *Enquete effectuee aupres des victimes*) (on file with author).

296. *Id.* at 40-41.

297. *Id.* (citing Interview by Human Rights Watch/FIDH with Dr. Nyiramilimo Odette, *Le Bon Samaritain Clinic*, in Kigali (Mar. 18, 1996)).

298. *Id.*

299. Human Rights Watch, *supra* note 284.

300. HUMAN RIGHTS WATCH, *SHATTERED LIVES*, *supra* note 148, at 36 (citing Interview by Human Rights Watch/FIDH with Godelieva Mukasarasi, *Réseau des femmes*, in Taba, Egypt (Mar. 26, 1996)).

of the property protections: Women who have been victims of sexual violence incur much stigma in Rwandan society, including being considered "unmarriageable."³⁰¹ Women who are "unmarriageable" will, by extension, not be afforded the property protections because they will not be within the context of a civil law marriage.³⁰² Third, women also may face discrimination where they have given birth to a child following the death of the father in the genocide. Because many women are reluctant to discuss sexual violence,³⁰³ children born after the genocide to a woman whose husband is deceased may be ostracized by the community, even if that child was conceived within the bonds of marriage.³⁰⁴

4. *Women victims of sexual violence in Rwanda will be empowered by legal frameworks that emphasize mutual interdependence over autonomy or independence.*

Prosecutor: Why do we wish to present prisoners like you to the people?

Prisoner: So you can rebuild the country.

Prosecutor: So *we* can rebuild!

Prisoner: So we rebuild Rwanda.

Prosecutor: Yes, you included.

Prisoner: That's the reason, so people don't stay in jail but become reconciled to build a new Rwanda instead of tearing each other apart. That's the aim of these laws.

Prosecutor: Yes, that's right, what else?

Prisoner: Also because the country can't rebuild, as it lacks manpower.

Prosecutor: Because of the 100,000 people in prison?

Prisoner: And because others spend their time feeding us.

301. *Id.* at 36-37.

302. Human Rights Watch, *supra* note 284.

303. *Id.* ("Many of the Rwandan women who have been raped do not dare reveal publicly that they have been raped.").

304. HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 148, at 37 (citing Interview by Human Rights Watch/FIDH Interview with Ester Mujawayo, Ass'n for Widows of the Apr. Genocide, in Kigali, Rwanda (Mar. 18, 1996). Another type of unchosen relationship that must be considered is the vast number of war widows in Rwanda. Over twenty-two percent of all women over the age of twenty-one are widowed. *Id.* at 35. War widows may similarly be discriminated against with regard to property laws. *Id.* The psychological trauma that war widows experience in post-genocide Rwanda is striking. *Id.* The Human Rights Watch provides as follows:

In the past there was respect for widows. Now there is nothing. You are nothing if you are a widow now. We have always been considered lower than a man. But now as a woman without a husband, a brother, a father, or an uncle, you are nothing. The widows are isolated by the community. You don't get invited to community events. People forget to invite you to weddings. People forget you. You are alone. It's a feeling of being really isolated.

Id. at 35, 37.

Prosecutor: But we must also replenish our hearts. That the survivors forgive and the others seek forgiveness. For the country to be reborn.³⁰⁵

The *gacaca* courts, in effect, are premised on the idea that justice in a community can be achieved through active realization of the interdependence of its members. The Gacaca Jurisdictions under Law No. 40/2000 retain certain characteristics of the customary system, characteristics founded on the tenet of restoration of social harmony and principles of community. These include a basis in the local community and participation of community members.

- a. *Gacaca* demonstrates a commitment to justice by effectively codifying the mutual interdependence of Rwandan people.

The success of *gacaca* depends directly on the community working together, openly and vigorously, in the interests of justice and reconciliation. As one prosecutor stated to the prisoners at the Ntongwe Communal Lockup, "Your lawyer will be your neighbour, your prosecutor will be your neighbour, your judge will be your neighbour."³⁰⁶

Some scholars argue that current demographics within communities may adversely impact the success of the *gacaca*. One of the consequences of the long history of armed conflict and the genocide in Rwanda is that the composition of communities has changed dramatically, as have the interrelationships of the people that comprise those communities. Before the genocide began, hundreds of thousands of Tutsi refugees resided in neighbouring countries. Then, nearly one million Rwandans were killed during the genocide. Then, tens of thousands were killed after the RPF took power in July 1994. By the end of the violence, there were approximately 1.8 million refugees in countries bordering Rwanda and 400,000 internally displaced persons.³⁰⁷ Additionally, the present government has relocated many Rwandans, in a practice termed "villagization." If a community has been fractured irreparably—that is, if there is, in fact, no community—then success may be difficult to achieve.

Importantly, *gacaca* enjoys widespread support among Rwandans.³⁰⁸ As an initial indicator of the potential success of *gacaca*, more than ninety percent of the Rwandan electorate participated

305. GACACA, *supra* note 137 (providing dialogue between a prosecutor and a prisoner at the Ntongwe Communal Lockup).

306. *Id.*

307. Amnesty International, *supra* note 199, at 15.

308. Security General, *Interim Report*, *supra* note 169, at sec. III ("Gacaca has . . . been embraced by most with whom we spoke as Rwanda's best hope for the future.").

in electing the judges.³⁰⁹ There is hope among the population that *gacaca* is the forum within which "the truth will come out."³¹⁰ Such widespread support is necessary, as the success of *gacaca* depends directly on its legitimization by, and participation of, members of the community.³¹¹

While some argue that to rebuild a community there must be a pre-existent community, I propose that the committed and vigorous participation of individuals in the process has the potential to in fact build and strengthen communities, as well as to empower its participants, by in effect codifying a commitment to mutual interdependence. Because *gacaca* requires people within the communities to work together at a—quite literally—grassroots level, as voters, witnesses, personnel, and jurors, it will create a common experience of working together toward a common goal, replacing "the divisive experience of the genocide with the cohesive experience of securing justice."³¹²

5. *Justice in Rwanda must have at its basis collective values and societal responsibilities.*

[T]he issue of accountability for violations of human dignity is ultimately one of human connection. The international law project is to reconnect the victims, and sometimes even the perpetrators, to the community, and, in doing so, to reestablish that community and a normative universe in which it can thrive.³¹³

A philosophy of personhood that is integral to both Rwandan culture and restorative justice is *ubuntu*.³¹⁴ The concept of *ubuntu* as personhood is based on the idea that every individual is affected by the harm of another, and that reactions to harm must be aimed at restoring that damage.³¹⁵ Collective solidarity, conformity to community values, compassion, respect, and human dignity are values that underpin the concept of *ubuntu*.³¹⁶

309. Hopkins, Rwanda *supra* note 279. See also Johns Hopkins Center for Communication Programs, Rwandans Turn Out in Force to Elect Gacaca Judges after Communication Campaign Urges Post-Genocide Reconciliation (Oct. 29, 2001), <http://www.jhuccp.org/pressroom/2001/10-29.shtml>.

310. GACACA, *supra* note 137 (commenting on her hopes for *gacaca*).

311. See *supra* Part II. (The support for *gacaca* comes both from its historical roots in the community and an intense campaign on the part of the Rwandan government).

312. Daly, *supra* note 115, at 376.

313. Barbara Stark, *After/word(s): 'Violations of Human Dignity' and Postmodern International Law*, 27 YALE J. INT'L L. 315, 362 (2002).

314. L. MBIBI & J. MAREE, UBUNTU: THE SPIRIT OF AFRICAN TRANSFORMATION MANAGEMENT (1995).

315. *Id.*

316. *Id.*

- a. Meaningful victim and witness protection mechanisms can help to achieve justice for women victims of sexual violence by reducing social stigma and assuming responsibility for harm within the fabric of Rwandan society.

As discussed throughout the course of this Article, the social stigma of rape is nearly unfathomably pervasive and extreme in Rwandan society. Women who have suffered the most severe brutalities, the “crimes worse than death,” internalize the shame from those crimes:

For two days, myself and eight other women were held and raped by Interahamwe, one after another. Perhaps as many of twenty of them . . . I tried to leave, but could barely walk . . . [I] found refuge in an old church . . . I was in the church building when the Interahamwe came there . . . One of [the Interahamwe] sharpened the end of the stick of a hoe. They held open my legs and pushed the stick into me. I was screaming. They did it three times until I was bleeding everywhere. Then they told me to leave. I tried to stand up, but I kept falling down . . . [I] was taken to a mass grave . . . organized by a woman [who] cut me immediately behind the knee. [An Interahamwe] took me to the lake. There, he raped me . . . After the rape I was left alone and naked. I couldn't walk properly and so I was on all fours. When people passed me, I sat down and stopped walking so they wouldn't know that I had been raped because I was ashamed.³¹⁷

In a context where women victims are reluctant to acknowledge the horrific violence they have suffered, out of shame and a fear of additional violence, it is imperative that the rule of law protect these victims as much as possible from suffering additional harm. Strong victim and witness protection mechanisms are essential to protect these women and to send a message to the community at large that sexual violence is serious and that it is not merely an attack against honor, but rather a violent crime against bodily integrity.³¹⁸

The Victims and Witnesses Protection Programme for the ICTR has been sharply criticized by members of the international community.³¹⁹ The Rules of Procedure and Evidence for the ICTR provide the same protections as do the ICTY Rules; however, there is a discon-

317. HUMAN RIGHTS WATCH, *SHATTERED LIVES*, *supra* note 148, at 22-23 (providing the story of Perpetue, who was twenty years old and living in Runda Commune with her husband, child, and sister when the violence began).

318. *Women2000*, *supra* note 152, at 4.

319. See, e.g., HUMAN RIGHTS WATCH, *SHATTERED LIVES*, *supra* note 148 (offering an incidental critique of this program); Violence against Women, *supra* note 143 (addressing the shortcomings of this program).

nect between the *de jure* rules and their *de facto* application.³²⁰ Witness protection rules require a great deal of cooperation between the local authorities and the Tribunal—cooperation that, as discussed above, is not always forthcoming on either side.³²¹

Many women have professed reluctance to travel to Arusha to testify at the ICTR because of a fear of reprisals upon their return.³²² Two witnesses who did testify in Arusha, in fact, were killed following their testimony.³²³ While a Gender Adviser has been appointed in the office of the Registrar, and while the Victims and Witness Protection Unit has established a Sexual Assault Team, concerns both among survivors and within the international community remain strong.³²⁴ There is a strong sense that these improvements have been in name only and that witnesses and survivors lack adequate protection both during the trial and upon their return.³²⁵ Pragmatic difficulties present problems, as well; relocation of witnesses within Rwanda, for example, is problematic because of the closed society.³²⁶ Whether or not adequate victim and witness protection mechanisms are in place, the fact remains that there is a perception among potential witnesses that these mechanisms are insufficient, resulting in fear, and a resultant dearth of witness testimony.³²⁷ Evidence that should be put before the Tribunal is not, and justice is hindered.

IV. CONCLUSION

In this Article, I have sought to develop principles underlying a feminist theory of justice and to apply those principles critically to specific legal structures and operatives as they relate to justice for women victims of sexual violence in post-conflict Rwanda.

In this Article, I have sought to develop theory that will analyze the workings of patriarchy and account for continuity and change over time. I have sought to develop principles that allow us to think in terms of pluralities and diversities rather than of unities and univer-

320. ICTY, Rules of Procedure and Evidence, Feb. 11, 1994, *reprinted in* 33 I.L.M. 484 (1994), *as revised and amended* July 9-10, 1998, UN Doc. IT/32/Rev.13 (1998); ICTR, Rules of Procedure and Evidence, June 29, 1998 (5th Rev.).

321. *See supra* Part II.A.i.a.1.

322. Violence against Women, *supra* note 143, at sec. III(A).

323. *Id.* (addressing VWPU claims that these two deaths were unrelated to their testimony at the ICTR).

324. *Id.*

325. *Id.*

326. Violence against Women, *supra* note 143, at sec. III(A) (discussing the fact that the VWPU has suggested that witnesses may be relocated outside Rwanda, but the international community has not responded).

327. *See* Violence against Women, *supra* note 143 (discussing the importance of perception among potential witnesses).

sals. I have sought to develop theory that rejects construction of masculine universals and feminine specificities, and that, most importantly, is useful and relevant for a legal (and demographic) reality. Finally, I have sought to apply these principles in a real-world setting to critique legal mechanisms, for it is only in the application of these principles to real-world situation that we can see their potential to serve as a foundation for critique—a foundation not built on sand, but on justice, bare justice, to suit all.

