

RAPE POLICY IN RWANDA

TO: Deputy Prosecutor for the International Criminal Tribunal for Rwanda

FROM: Kelli Boyer - New England School of Law - 2 Credits

DATE: Fall 2003

RE: Issue #35 - Is evidence of a formalized policy of rape necessary to establish a causal connection to an Accused or can this be established by inference? If inference is sufficient, consider the nature and scope of evidence required. Propose a legal test.

I. INTRODUCTION AND SUMMARY OF CONCLUSION

Rape should not be viewed as a simple byproduct of violent conflicts. The ICTR Statute provides for criminal liability under numerous sections when evidence of rape is proven. Political and community leaders initiated a propaganda campaign designed to incite the Hutu population to eradicate the Tutsi. These campaigns encouraged rape and presented such acts as a duty. The only way to now provide justice for the victims of the attacks is to prosecute not only the assailants but also the leadership that created an environment of hate and violence. In order to achieve this goal, the ICTR must make inferences to establish a causal connection between an accused that may have set an example by his own action, incited others to follow him, or tacitly endorsed by standing by while his subordinates brutally raped, sexually mutilated and tortured women.

II. FACTUAL BACKGROUND

In 1994, thousands of Rwandan women were raped, gang-raped, sexually tortured and mutilated during the Rwandan genocide at the hands of the Hutu militia group, the Interahamwe. For months prior to the genocide perpetrated against the Tutsi population, Hutu political leaders supported newspaper, television, and radio advertisements degrading the Tutsi and encouraging the rape and humiliation of Tutsi women. When the fighting began, the Interahamwe leaders participated in and conspired with their subordinates to rape Tutsi women as a method of destroying the group. These actions created long term effects for the women who became

victims. Rwanda's National Population Office estimates that between 2,000 and 5,000 children were born out of this violence. AIDS and other sexually transmitted diseases are rampant among the survivors of these brutal attacks. The survivors now must learn to live on a daily basis, struggling not only with the guilt of escaping death while their families were murdered during the genocide, but also with the shame and isolation that plague victims of rape.

Rape under any circumstance is horrific and traumatic to the victim. It is important then to distinguish the crimes committed against the Rwandan women from the general perception of what rape is. There should be a different word to describe the atrocities inflicted upon these women. The Human Rights Watch/Africa has since interviewed many of the victims. The common phrase repeated throughout the interviews, "it was worse than death". The following is an excerpt from an interview with a twenty year old Tutsi woman, Perpetue, who lived with her husband and child when the violence began. The interview is taken from the Human Rights Watch Women's Rights Project, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (1996):

On April 9, 1994, they found me. I was taken to the Nyabarongo River by a group of Interahamwe. When I got there, an Interahamwe said to me that he knew the best method to check that Tutsi women were like Hutu women. For two days, myself and eight other young women were held and raped by Interahamwe, one after another. Perhaps as many as twenty of them. I knew three of them. Some Interahamwe watched over us while others went to eat and sleep. All the young women killed at that river were raped before being thrown in. I didn't know any of the other women. On the third day, one Interahamwe saw that I was not able to walk anymore. He told me that I had already died and could go. I tried to leave, but I could barely walk. There was blood everywhere and my stomach hurt. I walked towards Kamonyi and found refuge in an old church there. When I was going there, I saw that the Interahamwe had been burning people to death. I saw at least ten burnt bodies.

I was in the church building when the Interahamwe came there on May 15 and told us that it was our turn to be burnt. They took a lot of people outside to kill them. One Interahamwe chose me, but told me that he would protect me so that I

would not be burnt to death. He took me to another building near the church and raped me there. Before he raped me, he said that he wanted to check if Tutsi women were like other women before he took me back to the church to be burnt. There were other women being raped there at the same time, maybe ten women and seven young girls. The next day, two Interahamwe watched over us while the others went to kill. The two were complaining they were feeling tired from all the killing. Then, one of them 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. Finally I crawled outside. I was naked and crawling on the ground covered in blood.

It is imperative that Perpetue's story, and the thousands of others like it, be remembered throughout the following discussion of the justice system that was created to punish her attackers. It must now be determined whether a formalized policy of rape is necessary to establish a causal connection to Perpetue's attackers and the Interahamwe leadership or whether this can be established by inference. If inference is sufficient, what is the nature and scope of the evidence required for conviction?

III. LEGAL DISCUSSION

A. APPLICABLE LAW

The Statute of the International Tribunal for Rwanda (hereinafter, ICTR) allows for the prosecution of rape as 1) a means of Genocide, 2) a crime against humanity and 3) a violation of Article 3 common to the Geneva Convention and of Additional Protocol II. Article 6 of the ICTR creates superior liability and provides that military and militia leaders can be prosecuted for acts committed by their subordinates. The ICTR is also influenced by international

precedents including but not limited to : ICTR case law, decisions from the International Criminal Tribunal for the Former Yugoslavia (hereinafter, ICTY), and the International Criminal Court Statute (hereinafter, ICC Statute).

1. Rape as an Element of Genocide

The accepted definition of genocide adopted by the ICTR statute is taken directly from Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, Genocide Convention).¹ Genocide is defined as:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²

In *Prosecutor v. Rutaganda* the Tribunal included acts of rape and sexual violence as instances of serious bodily or mental harm as that phrase is used in ICTR Article

¹*Prosecutor v. Rutaganda, Judgment*, ICTR-96-3-T, para. 45 (Dec. 6, 1999)

²Convention on the Prevention and Punishment of the Crime of Genocide, De. 9, 1948, 78 U.N.T.S.277.

2(2)(b).³ This is an expansion beyond the precedents of the ICTY, and the Genocide Convention, which had found only forced impregnation to be genocide, while rape, no matter how brutal or how prevalent, remained just rape absent an intent to forcibly impregnate.⁴ Evidence from rape survivors in Rwanda indicate a pattern of sexual violence which was intended to destroy the Tutsi as a group, not by forced impregnation, but by the psychological and social effects, and possible deaths of their victims.⁵

Recall the story of the rape survivor, Perpetue, that was described above. She met numerous members of the Interahamwe who violently raped her. In her description of these rapes, Perpetue describes at least two of her attackers making almost identical statements: "...an Interahamwe said to me that he knew the best method to check that Tutsi women were like Hutu women" and "...he said that he wanted to check if Tutsi women were like other women...". These statements which clearly indicate an intent to violate Tutsi women, are perhaps the best evidence of the pattern of sexual violence used as a method of destroying the Tutsi as a whole.

³*Rutaganda*, ICTR 96-3-T, para.51.

⁴Fisher, Siobhan K., *Occupation of the Womb: Forced Impregnation as Genocide*, 46 Duke L.J. 91, 125 (1996).

⁵Human Rights Watch Women's Rights Project: *Shattered Lives, Sexual Violence during the Rwanda Genocide and its Aftermath* (1996).

2. Rape as a Crime against Humanity

Article 3 of the ICTR: Crimes against Humanity subsection (f) defines torture to include rape as a source of severe suffering inflicted for the purposes of discrimination. Subsection (g) explicitly includes the crime of rape. There are four elements of intent required to show that an act falls within the category of Crimes against Humanity under the ICTR statute. They are :

- (a) The actus reus must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
- (b) The actus reus must be committed as part of a widespread or systematic attack;
- (c) The actus reus must be committed against members of the civilian population;
- (d) The actus reus must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.⁶

The ICTY first included rape as a crime against humanity in *Prosecutor v. Kunarac*.⁷ This decision specifically connects sexual autonomy to human dignity and bodily integrity. The ICTR followed this precedent in *Prosecutor v. Niyitegeka*, which held that where an accused has raped one or more persons, a crime against humanity will be found, so long as the act was committed as part of a widespread, systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The judgment then expanded the ICTR statute by holding that the accused is not required

⁶*Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, para. 578 (Sept. 2, 1998).

⁷*Prosecutor v. Kunarac*, Judgment, IT-96-23-T (Feb. 22, 2001).

to have acted with discriminatory intent, only to know that his acts were part of a widespread and systematic attack.⁸

3. Rape as a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II

Article 4 of the ICTR: Violations of Article 3 common to the Geneva Convention and of Additional Protocol II subsection(e) provide prosecution for outrages upon personal dignity including rape. In order to convict an accused of rape and/or torture by rape under this article, the Prosecutor must prove: “(1) that a non-international armed conflict existed on the territory of the concerned state; (2) that the victims were not taking part in the hostilities at the time of the alleged violation; and (3) that a nexus existed between the Accused’s alleged crimes and the non-international armed conflict. If these three elements are proved, the Chamber will then assess whether a specific violation of common Article 3 or Additional Protocol II occurred.”⁹ The acts must be committed by agents of the state or the political party in control in furtherance of political policies.

⁸*Prosecutor v. Niyitegeka*, Judgment, ICTR-96-14-T, para. 456 (May 16, 2003).

⁹*Prosecutor v. Semanza*, Judgment, ICTR-97-20-T, para. 512 (May 15, 2003).

4. Superior Liability

Under the ICTR Article 6: Individual Criminal Responsibility (3), the fact that any of the acts referred to in articles 2 to 4 of the statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. Subsection (4) states: “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.”

The *Celebici* Judgment created the “had reason to know” test for liability, which extends liability where there is information that would reasonably place the superior on notice of the risk that criminal acts would occur.¹⁰ Factors that contribute to a finding of superior liability include “de facto” or “de jure” control over a group, attendance, actual participation, knowledge or reason to know of the crimes, and failure to either prevent commission or punish subordinates for the acts.¹¹

¹⁰*Prosecutor v. Delalic* (“*Celebici*”), IT-96-21-T, para. 58 (Nov. 16, 1998).

¹¹*Prosecutor v. Musema*, ICTR-96-13-T, (Jan. 27, 2000).

5. Definitions of Rape

Although neither the ICTR nor the ICTY statutes define rape, both Tribunals have defined the act in case law. In the ICTR case, *Prosecutor v. Akayesu*, rape is defined as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive... not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”¹² The decision of the ICTY in *Prosecutor v. Furundzija*, created two elements of rape:

- (1) the sexual penetration, however slight:
 - a. of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - b. of the mouth of the victim by the penis of the perpetrator; and
- (2) by coercion or force or threat of force against the victim or a third person.¹³

The ICTR definition of rape differs from that of the ICTY in its focus on linking rape with torture rather than with specific sexual acts.¹⁴ The ICTY later expanded its definition of rape to recognize sexual autonomy, which noted, places rape in the category of a crime against humanity.¹⁵

¹²Akayesu, ICTR-96-4-T, para. 598

¹³Prosecutor v. Furundzija, Judgment, IT-95-17/1, para. 185 (Dec. 10,1998).

¹⁴Boon, Kristen, *Rape and Forced Pregnancy Under the ICC statute: Human Dignity, Autonomy, and Consent*, 32 Colum. Human Rights L. Rev. 625,648 (2001).

¹⁵Kunarac, IT-96-23-T, para. 440.

The common element of each of these definitions is a lack of consent. Under the generally accepted meaning of consent, it seems impossible that in a time of war, in which rape, murder and torture are rampant in a lawless atmosphere, that meaningful consent could be obtained. The ICTY Tribunal has held that consent is no defense to sexual crimes perpetrated as part of enslavement, torture and genocide.¹⁶ Prior to the 1994 genocide, women in Rwanda were defined and controlled by their male relatives. While women were granted constitutional rights, the society did not generally allow them to exercise those rights.¹⁷ Women thus remained objects to bear children and possessed few meaningful rights. The questionable ability of a woman to consent prior to the violence makes it impossible to believe that her consent was ever considered during the war. The issue of consent is significant when prosecuting rape, because if the act is charged as torture, consent cannot be asserted as a defense, whereas if the act is prosecuted as rape, mistake of fact as to consent can be used as a defense.¹⁸

The Interahamwe did not have to threaten women into submission (although most

¹⁶Boon, 32 Colum. Human Rights L. Rev. 625 at 669.

¹⁷Human Rights Watch Women's Rights Project: *Shattered Lives, Sexual Violence during the Rwandan Genocide and its Aftermath* (1996).

¹⁸Kelly Dawn Askin, *The International Criminal Tribunal for Rwanda and Its Treatment of Crimes Against Women*, 2 International Humanitarian Law: Origins, Challenges and Prospect (2001).

did), they knew that their lives were in danger. In essence, an Accused charged with rape could claim that the woman consented as a defense to rape charges. In a setting like that of the ICTR, which deals solely with crimes committed during a period of genocide, consent should not be the focus of either the investigation or the prosecution nor should it be available as a defense. When the accused is a participant in the murder and torture of an ethnic group, meaningful consent prior to violently forcing themselves on a woman is nothing more than a legal fiction. The ICC has recognized this and developed Principles of Evidence in Cases of Sexual Assault which state:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of genuine consent;
- (c) Consent cannot be inferred by reason of the silence of or lack of resistance by a victim to the alleged sexual violence.¹⁹

B. PROPAGANDA

¹⁹Boon, 32 Colum. Human Rights L. Rev. 625 at 651.

Propaganda encouraging the genocide in general, and rape of Tutsi women specifically, inundated Rwandan society after the October 1990 invasion. The newspaper, *Kangura*, published articles and cartoons depicting the Tutsi as demons that were determined to eradicate the Hutu who were displayed as innocent victims. (See Appendix A-D for examples of the cartoons printed.) Radio broadcasts asserted similar messages and gathered a large listening base by playing lively music and have an informal conversational style of speaking. The messages claimed that the Tutsi were attempting to divide the Hutu, that they had stolen the country from the Hutu, and that intermarriage between the groups created hybrid children thereby diluting the Hutu culture.²⁰ The goal of these messages was to convince the Hutu that the Tutsi had exploited them in the past and would attempt to do so in the future. On the cover of the December 1993 Issue of *Kangura* a cartoon entitled “Tutsi, Race of God” was published. It displayed a machete, and posed the question of what weapons could be used to defeat the Tutsi.²¹

The authorities tolerated, and often encouraged, small attacks on the Tutsi for the three years before the 1994 genocide.²² Officials then claimed that the Tutsi planned to attack the Hutu and rumors of Hutu deaths at the hands of the Tutsi were spread

²⁰Human Rights Watch: *Propaganda and Practice* (1999)

²¹*Id.* at 6.

²²*Id.* at 21.

throughout the region.²³ Local officials as well as community leaders began to tell the Hutu population that the attacks against the Tutsi were part of their communal work obligation.²⁴

During the trial of Akayesu, Dr. Alsimon DesForges (a Rwandan historian) testified that:

²³Id. at 8.

²⁴Id. at 21.

...on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that - as they said on certain occasions - their children, later on, should not know what a Tutsi looked like, unless they referred to history books.²⁵

The propaganda targeting the destruction of the Tutsi race encouraged and incited the Hutu to act out against the Tutsi. The cartoons depicting Hutu women being raped by Tutsi men directly led to the mass rapes of Tutsi women during the genocide. It is for this reason that the political leaders should be held accountable not only for their own actions but also for the acts committed by their subordinates.

C. SUFFICIENCY OF EVIDENCE

²⁵*Akayesu*, ICTR-96-4-T, para. 118.

In the trial of Musema, the Tribunal found that the Prosecution had met its burden of proof to show that Musema ordered the rape of a Tutsi woman, and the cutting off of her breast to be fed to her son. The Tribunal held that while “no evidence was introduced to indicate that he ordered her to be killed... there is conclusive evidence that she was in fact killed. Considering Musema’s high position in the commune, he must have know that his words would necessarily have had an important and even binding impact on his interlocutors.”²⁶ While the Tribunal did not find conclusive evidence that this incident took place, they nevertheless considered it to be true based on inferences made from the evidence presented.²⁷ Thus it seems that where credible evidence of rape is presented, that will be sufficient to infer that the act took place. Conclusive evidence is not required. However, even where conclusive evidence of an order to rape is presented, such an order is not in and of itself sufficient to create criminal responsibility. The Tribunal will then require credible evidence that the rape actually occurred based on the order given.²⁸

The *Musema* decision did not provide a specific test to determine specifically what evidence is required in order to find superior liability. The Tribunal did, however, make clear that a factor to be considered is the superior’s standing or social position

²⁶*Musema*, ICTR-96-13-T, para. 618.

²⁷*Id.* at para. 619.

²⁸*Id.* at para. 889.

within the commune. A person holding such a high position should thus have reason to know that his words or orders will incite the specified violence by others in the commune.

In the case of *Semanza*, the Tribunal found that encouraging a crowd to rape women based on their ethnicity was sufficient to demonstrate torture. The Tribunal held that “his words were causally connected to and substantially contributed to the torture of Victim A because immediately after the Accused made his remarks to the crowd, the assailant went to a nearby home and tortured Victim A by raping her because she was a Tutsi woman.”²⁹ The apparent difference between these two cases is that the Prosecutors in *Semanza* were able to present witness testimony that the acts which had been encouraged did in fact occur. The *Semanza* decision contributes an additional factor to be considered when making an inference of superior liability, time. The temporal connection between *Semanza*’s words and the assailant’s actions seemed to weigh substantially with the Tribunal.

Akayesu was convicted for his encouragement of the rape of Tutsi women because he was present during the commission of the acts. Evidence was presented which showed that Akayesu said to the Interahamwe who were committing the rapes: “don’t ever ask again what a Tutsi woman tastes like.” Witnesses testified that prior to the raping of Tutsi women the Interahamwe we heard to repeat Akayesu’s sentiment. The victim of one Tutsi woman raped testified that her attacker said “let us now see what

²⁹*Prosecutor v. Semanza*, ICTR-97-20-T, para. 485 (May 15,2003).

the vagina of a Tutsi woman tastes like.”³⁰

It seems that although the Tribunal was willing to infer that Musema’s words and actions encouraged his subordinates to commit rapes, it was not willing to find him criminally responsible for those rapes unless supported by testimony that the crimes eventuated. Semanza was convicted based on the temporal connection between his words, which were designed to incite a crowd, and an assailant from that crowd committing rape. Akayesu was found guilty of rape based on his presence during the commission of the crime.

D. PROPOSED LEGAL TEST

The precedents of the ICTR to date suggest that the following factors will be considered by the Tribunal in determining superior liability:

- 1.) witness testimony is necessary to corroborate the words spoken by the accused;
- 2.) the encouraged acts must actually be carried out;
- 3.) physical presence during the rapes provides evidence that the accused abetted or at least failed to stop his subordinates from perpetrating the criminal acts; and
- 4.) a temporal connection between the words of the superior and the act of the subordinate.

The *Celebici* precedent from the ICTY created the “had reason to know test” which looked to the following circumstantial evidence to determine superior liability:

- (a) The number of illegal acts;

³⁰*Akayesu*, ICTR-96-4-T, para. 732.

- (b) The type of illegal acts;
- (c) The scope of illegal acts;
- (d) The time during which the illegal acts occurred;
- (e) The number and type of troops involved;
- (f) The logistics involved, if any;
- (g) The geographical location of the acts;
- (h) The widespread occurrence of the acts;
- (i) The tactical tempo of operations;
- (j) The modus operandi of similar illegal acts;
- (k) The officers and staff involved;
- (l) The location of the commander at the time. —

The Celebici judgment held that a leader cannot remain wilfully blind to crimes committed by subordinates when in actual possession of knowledge of the offenses. Even if the superior does not have actual knowledge of the criminal acts of subordinates, the superior has a duty to remain informed of the activities of his subordinates. The ICTY has adopted a less stringent test for superior liability in that they do not require that the superior was involved in deliberately inciting others, he simply must have been in control of subordinates and either have reason to know of their activities or a duty to find out.

Taking these precedents together, the legal test to convict of rape based on superior liability should be based on three factors. First, the superior must have standing in the community and have reason to know that his words or actions will be influential on the

³¹*Delalic*, IT-96-21-T, para. 386

³²*Id.* at para. 387

³³*Id.* at para. 388

behavior of others. The accused need not be a member of an organized military group to be deemed a superior, anyone with power and influence over their geographical area will be a superior.

Next, circumstantial evidence of words or actions designed to incite or condone rape should be presented. If witness testimony is available it can be used as such evidence, however, witness testimony should be sufficient and not necessary. Words and actions designed to incite include any type of speech made to either crowds or individuals, written words with the same intent, and actions whether proactive or passive.

Lastly, circumstantial evidence of the actual occurrence of the rape must be presented. Again, eye witness testimony is sufficient but not necessary. This is especially true since the only eye witness to the actual rape may be the victim. Because of the emotional distress involved in confronting the assailant and the fear of retribution and shame from the community, such witness testimony may be difficult to obtain. With these extenuating circumstances, the evidentiary requirements should be relaxed, including but not limited to allowing hearsay evidence to show that the rape took place.

The superior persons in the various communities in Rwanda were inciting the Hutu to rape Tutsi women as a method of destroying the group. When the three noted factors are satisfied, the superior has been effectively placed on notice of the risk that their subordinates might follow their suggestions, orders, or personal example. Thus the superior should be held criminally liable for not only their own actions but also those of their subordinates.

E. CONCLUSION

The violence which took place in Rwanda was atrocious. The specific acts of sexual violence and torture were even more so. For a leader of the community who incited such violence to be able to avoid prosecution and punishment for their role in creating such an atmosphere, shocks the conscience. The community leaders who supported the propaganda campaign against the Tutsi should be held responsible for the consequences of their actions. The only way to provide justice to the victims of rape is to prosecute both their assailants and the superiors that incited the violence. Anything less would be a severe miscarriage of justice. While there is no evidence of a formalized policy of rape implicated by the Hutu as a whole, there is circumstantial evidence which infers that such a rape policy existed. Individuals with high standing in the community encouraged and participated in rape, radio and newspapers portrayed rape as a duty to one's ethnic background, and members of the Interahamwe openly raped thousands of women as a form of torture and often death. Presented with these facts it is impossible not to recognize that there was a policy of rape throughout the genocide in Rwanda.

