AND SINCE AKAYESU?

THE DEVELOPMENT OF ICTR

JURISPRUDENCE ON GENDER CRIMES:

A COMPARISON OF AKAYESU AND

MUHIMANA

SUZANNE CHENAULT*

INTRODUCTION

The first judgment of the International Criminal Tribunal for Rwanda (ICTR), Prosecutor v. Jean-Paul Akayesu, heralded the legacy of the Tribunal in prosecuting crimes of sexual violence. The judgment was ground-breaking in several aspects, most significantly for articulating a conceptual definition of rape under international law and for convicting a defendant of rape as both a crime against humanity and as an instrument of genocide.1

In light of the consistent reliable evidence that sexual violations were widely and systematically perpetrated throughout Rwanda during the 1994 genocide, gender crimes prosecutions at the ICTR have thus far been inadequate. Despite the legacy of the Akayesu judgment in promoting progress in the prosecution of sexual violations in the context of mass violence and armed conflict, relatively few persons have been convicted by the ICTR for a sex-related crime.2 To date, there have been only eight

---

* Suzanne Chenault is a legal officer in the Chambers of the International Criminal Tribunal for Rwanda. Ms. Chenault is an American lawyer admitted to practice in Washington, D.C., the Commonwealth of Pennsylvania, and the State of California.


2. Convictions for sexual violations, including rape, have been issued and upheld on appeal for the following four persons to date: Jean-Paul Akayesu, Laurent Semanza, Sylvestre Gacumbitsi, and Mikaeli Muhimana. See Prosecutor v. Akayesu, Case No. ICTR 96-1-A, Appeals Chamber Judgment (June 1, 2001); Semanza v. Prosecutor,
judgments, including Akayesu, in which the ICTR Trial Chambers convicted or acquitted persons charged with crimes of rape or sexual violence.3 Of these judgments, Prosecutor v. Muhimana, issued on 28 April 2005, aligns closely in several respects with the Akayesu legacy. It is also the most recent of the eight ICTR judgments to have addressed charges of rape and sexual violence. Thus, in an attempt to understand the limited development of gender crimes jurisprudence at the ICTR, this paper will compare Akayesu and Muhimana, the first and the most recent judgments, in regard to testimonial evidence of rape, the definition of rape, and the holdings of rape as a crime against humanity and as an instrument of genocide.

I. THE PROSECUTOR V. JEAN-PAUL AKAYESU, 2 SEPTEMBER 1998:
CONVICTION FOR RAPE AS GENOCIDE AND A CRIME AGAINST HUMANITY

A. Background

In April 1993, Mr. Jean-Paul Akayesu was elected bourgmestre, or mayor, of Taba Commune, where he had been born forty years earlier. He served in this position for thirteen months, from April 1993 until June 1994. As bourgmestre, Mr. Akayesu was a civil authority who exerted significant influence in the community. According to testimony, “His advice would generally be followed, and he was considered a father-figure or parent of the commune, to whom people would also come for informal advice.”4

---

3. The eight ICTR cases to date in which defendants have been tried for sexual violations, including rape, are Akayesu, ICTR 96-4-T, Judgment; Prosecutor v. Musema, Case No. ICTR 96-13-T, Judgment (Jan. 27, 2000); Prosecutor v. Semanza, Case No. ICTR 97-20-T, Judgment (May 15, 2003); Prosecutor v. Nyirahabimana, Case No. ICTR 96-14-T, Judgment (May 16, 2003); Prosecutor v. Kajelijeli, Case No. ICTR 98-444-T, Judgment (Dec. 1, 2003); Prosecutor v. Kamuhanda, Case No. ICTR 99-54-T, Judgment (Jan. 22, 2003); Prosecutor v. Gacumbitsi, Case No. ICTR 01-64-T, Judgment (June 17, 2004); and Prosecutor v. Muhimana, Case No. ICTR 95-1B-T, Judgment (Apr. 28, 2005).

4. Akayesu, ICTR 96-4-T, Judgment, ¶ 55.
B. Amended Indictment

At the end of the Prosecution case, in May 1997, Witnesses J and H spontaneously testified about rapes that they had personally experienced or witnessed, including the gang rape of Witness J’s six-year old daughter. As a result of this evidence, the Prosecution requested, on 16 June 1997, and was granted by the Chamber, on 17 June 1997, leave to amend the indictment to include three new charges against Akayesu: rape and inhuman acts as crimes against humanity, outrages upon personal dignity as a war crime, and genocide. The proceedings were suspended to provide the Parties with time to prepare their cases concerning the new charges. Four months later, on 23 October 1997, the Prosecution re-opened its case and presented six additional witnesses who testified about how Akayesu encouraged, by his words or by his presence, brutal rapes and acts of gender violence, including sexual mutilation and forced nudity. On 26 March 1998, the Akayesu trial ended.

The Amended Indictment alleged the following facts in support of the new charges:

12A. Between April 7 and the end of June 1994, hundreds of civilians (hereinafter “displaced civilians”) sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.

12B. Jean Paul Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murder, Jean Paul Akayesu
encouraged these activities.\footnote{Prosecutor v. Akayesu, Case No. ICTR 96-4-I, Amended Indictment, ¶¶ 12A-12B (Oct. 3, 1997).}

The factual allegations in paragraphs 12A and 12B above in support of the new charges refer to “sexual violence, beatings, and murders” of Tutsi civilians, many of whom were women. The crimes are alleged to have occurred on or near the premises of the Taba Commune office, between 7 April and the end of June 1994. It is noteworthy that the victims are not identified or named in the above paragraphs, that no concise crime is described, and that the dates and places of the offences are imprecise.

Today, in light of the “fair notice” jurisprudence established by the \textit{ad hoc} Tribunals subsequent to the \textit{Akayesu} Judgment, it is highly doubtful that this or any amended indictment containing one or more new charges against a defendant would be allowed five months into the proceedings, and at the close of the Prosecution case. It is also doubtful that the facts in support of the new charges would be considered sufficiently concise to fairly inform a defendant about the nature and cause of the charges or to provide adequate time for the preparation of the case.\footnote{See Prosecutor v. Niyitegeka, Case No. ICTR 96-14-A, Appeals Chamber Judgment, ¶¶ 193-95 (July 9, 2004); Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeals Chamber Judgment, ¶¶ 88-89 (Oct. 23, 2001).} However, if the Trial Chamber had not allowed the amendment of this indictment in the midst of the proceedings, there would be no \textit{Akayesu} legacy of gender jurisprudence.

C. Definition of Rape

Noting that there was no commonly accepted definition of rape in international law, the \textit{Akayesu} Trial Chamber defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”\footnote{\textit{Akayesu}, ICTR 96-4-T, Judgment, ¶ 688.} This definition represented a significant departure from a traditional, or mechanical, description which identified the crime in terms of the victim’s non-consent to sexual intercourse and in terms of parts of the body of the perpetrator and the victim. The Trial Chamber expressed the view that rape is not limited to non-consensual sexual intercourse but “may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual,” such as a piece of wood thrust into the sexual organs of a woman as she lay dying.\footnote{\textit{Id.} ¶ 686.}

The Chamber then continued to describe sexual violence, “which
includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive.” 9 According to the Chamber, sexual violence, such as forced nudity, may exist even without a physical invasion of the human body or physical contact.10

The Trial Chamber also emphasized that coercive circumstances may be inherent in certain situations, such as that of armed conflict or the presence of Interahamwe militia among refugee women, and need not be evidenced by a show of physical force. Specifically, the Chamber said “Threats, intimidation, extortion, and other forms of duress which prey [up]on fear or desperation may constitute coercion…”11

This definition of sexual violence, which included rape, considered gender crimes in light of unbalanced power circumstances where the victim’s consent cannot be freely given. In referring specifically to genocidal rape, the Chamber compared it to torture, the purpose of which is to dominate and to degrade the victim.12 The Chamber further emphasized that inquiry into individual consent to acts of sexual violence was not even worth consideration, under conditions of overwhelming force present in a widespread or systematic attack.13

Thus, the definition of sexual violence, which includes rape, articulated in Akayesu can be distinguished from traditional descriptions in two significant respects: first, lack of the victim’s consent is not an element to be proved, or even considered, in coercive circumstances; second, sexual violence may involve acts of a sexual nature which do not involve penetration of the sexual organs or even physical contact, such as forced undressing or forced performance of exercises in the nude. In addition to the two points above, the Akayesu definition of rape can be distinguished because it does not refer to the crime in terms of the body parts of the victim and the perpetrator and includes acts involving the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.

It is noteworthy that the Akayesu definition of rape, as distinguished from traditional definitions, has influenced not only international criminal law but also national criminal laws. Indeed this influence is evidenced, as Catharine MacKinnon has observed, by the fact that the definition has been incorporated into the criminal code in two states in the United States:

9. Id. ¶ 688.
10. Id.
11. Id.
12. Id. ¶ 687.
13. See Akayesu, ICTR 96-4-T, Judgment, ¶ 688.
D. Evidence of Rape and Sexual Violence in the Akayesu Judgment

To understand the Trial Chamber’s findings that Mr. Akayesu was guilty of rape as a crime against humanity and as an instrument of genocide, it is pertinent to consider the nature of the evidence. Specifically, seven Tutsi women provided poignant, detailed but uncorroborated accounts of rape and sexual violence that they had experienced or witnessed in Taba Commune during the 1994 genocide. None of the seven witnesses testified to ever seeing Jean-Paul Akayesu rape anyone.

1. Akayesu Could Have Prevented the Rapes and Sexual Violence

Four of the witnesses, all surviving rape victims, explicitly expressed the opinion that Mr. Akayesu, as bourgmestre, could have prevented the rapes by the Interahamwe in Taba Commune but did not do so. When asked how it was that Mr. Akayesu had the authority to protect her from rape, Witness OO replied, “If he had told the Interahamwe not to take her from the commune office, they would have listened to him because he was the bourgmestre.” Witness OO, who was fifteen years old at the time, recalled that she and two other girls tried to flee from Interahamwe, who were wielding machetes and killing refugees at the commune office. However, the girls were stopped by other Interahamwe, who then spoke to Mr. Akayesu about taking the girls away to “sleep with them.” The witness testified that, standing five metres from Mr. Akayesu, she heard him say to the Interahamwe, “Take them.” Witness OO was separated from the other girls and forced by Antoine, an Interahamwe, to walk from

---


15. See Akayesu, ICTR 96-4-T, Judgment; see id. ¶¶ 416-448 (for testimonies of seven Prosecution witnesses, all Tutsi women, and seven Defence witnesses).

16. See id. ¶¶ 422, 426, 436 (for the respective testimonies of Witnesses H and JJ, OO, and N).

17. Id. ¶ 426.

18. Id. ¶ 424.

19. Id.

the commune office to a field where he brutally raped her. A few days later Antoine led her to the home of another Interahamwe, Emmanuel, where for three days and nights she was sexually violated by both men. Another victim, Witness NN, narrated not only incidents of personal rape committed by Interahamwe outside the commune premises but also recounted seeing the rape of a pregnant woman on the premises when Mr. Akayesu was present. Witness NN said that, on the morning after her arrival, she saw Mr. Akayesu, with a towel around his neck, watching two Interahamwe drag the naked woman to an area between the commune office and the cultural center. The witness said that Mr. Akayesu watched for a while, then entered his office and did nothing to prevent the rape, following which the pregnant woman died.

2. Akayesu Encouraged Rape and Acts of Sexual Violence

While none of the seven rape witnesses recalled that Mr. Akayesu personally saw any rape being committed, several of them described how he encouraged the Interahamwe to commit acts of sexual violence and rape. Witness JJ recalled seeing Mr. Akayesu standing at the entrance of the cultural center, where she and other Tutsi girls had been herded on several occasions by the Interahamwe to be raped. JJ testified that, on this occasion, she heard Mr. Akayesu say loudly to the Interahamwe, “Never ask me again what a Tutsi woman tastes like.” According to JJ, most of the raped Tutsi girls and women were subsequently killed. Another witness, KK, described how Mr. Akayesu told the Interahamwe to undress a young girl named Chantal, who was a gymnast, so that she could perform her stunts naked. A third witness, PP, recounted that Interahamwe, at the direction of Mr. Akayesu, transported Alexia, who was pregnant, and her two young nieces in a vehicle belonging to the commune to Kinihira, a valley located near the commune office. At Kinihira, the three women were forced to undress and told to walk, run and perform exercises “so that they could display the thighs of Tutsi women.” Then the Interahamwe repeatedly raped Alexia and her two nieces, before turning them on their
stomachs and beating them with sticks until they were dead.29

E. Judgment

The Akayesu Judgment was issued on 2 September 1998 by Trial Chamber I, composed of one woman, Judge Navanethem Pillay from South Africa, and two men, Judge Laity Kama from Senegal, and Judge Leonard Aspegren from Denmark. The trial was held over a period of sixty days of hearings, opening on 9 January 1997 and closing on 26 March 1998.30 Trial Chamber I found Mr. Akayesu guilty of rape as genocide, and of rape and other sexual inhumane acts as crimes against humanity,31 pursuant to Article 6(1) of the ICTR Statute, for ordering and instigating, as well as aiding and abetting, rape and sexual violence in or around Taba Commune.32

1. Rape and Sexual Violence as Crimes Against Humanity

On the basis of the evidence presented, The Trial Chamber found that there were widespread and systematic attacks against the Tutsi civilian population in Taba Commune between 7 April and the end of June 1994. The Trial Chamber further found that crimes of rape and other inhumane sexual violations on or near the Taba Commune premises were committed as part of this attack.33 Thus, Mr. Akayesu was convicted of both rape and inhumane sexual violations as crimes against humanity for his role in ordering, instigating, and aiding and abetting acts of rape and sexual violence; by allowing these crimes to take place on or near the communal premises; and by facilitating the commission of the crimes through his words of encouragement and by virtue of his authority as bourgmestre.34

29. Id.
30. Id. ¶ 28.
31. Id. ¶ 697-98, 734.
32. Akayaesu, ICTR 96-4-T, Judgment, ¶¶ 692-97, 724, 734.
33. Id. ¶ 695.
34. Id. ¶¶ 692-95. Mr. Akayesu, as bourgmestre, was charged, pursuant to both Articles 6(1) and 6(3) of the Statute of the Tribunal (Statute), for sex crimes committed in Taba Commune during the 1994 genocide. While Article 6(1) concerns the responsibility of an individual for any of the crimes prosecuted at the ICTR -- genocide, crimes against humanity, or war crimes (in terms of one through five specific modes of participation: planning, instigating, ordering, committing, or aiding/abetting), Article 6(3) addresses the criminal responsibility of a superior by virtue of his or her knowledge of the acts and omissions of subordinates in the preparation and execution of the crimes charged. A civilian or a military superior, with or without official status, may be held criminally responsible for offences committed by subordinates who are under his or her effective control. In this case, the
2. Rape and Sexual Violence as Genocide

Genocide, pursuant to Article 2 of the ICTR Statute:

means any 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 the group;

(e) Forcibly transferring children of the group to another group.  

On the basis of the same evidence considered in relation to crimes against humanity, the Trial Chamber found Mr. Akayesu guilty of genocide, pursuant to Article 6(1), for having caused bodily and mental harm to Tutsi women with the intent to destroy them as well as their families and communities. The Judgment stressed that rape and sexual violence “constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.” Referring to numerous examples provided in the evidence, including Mr. Akayesu’s own words to the Interahamwe, the Trial Chamber noted that “[T]utsi women were subjected

Chamber was satisfied that the evidence demonstrated a superior/subordinate relationship between Mr. Akayesu, as bourgmestre, and the Interahamwe, the “armed local militia,” who committed many of the crimes at or near the commune office. However, the Chamber also noted that there was no specific allegation in the indictment that the Interahamwe were Mr. Akayesu’s subordinates. Therefore, the Chamber did not even consider Mr. Akayesu’s criminal responsibility, pursuant to Article 6(3), and he was found guilty, pursuant only to Article 6(1), for the acts of rape and sexual violence committed by the Interahamwe in Taba Commune during the 1994 genocide.


36. Akayaesu, ICTR 96-4-T, Judgment, ¶¶ 731, 733.

37. Id. ¶ 731.
to sexual violence because they were Tutsi.”38 The Trial Chamber also observed that “[s]exual violence was a step in the process of destruction of the [T]utsi group – destruction of the spirit, of the will to live, and of life itself.”39

3. Sentence

Trial Chamber I sentenced Mr. Akayesu to life imprisonment. The Judgment emphasized that:

acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.40

4. Significance of the Akayesu Case

The Akayesu Judgment is significant for many reasons. It was the first Judgment issued by the ICTR, the first to provide a definition of rape under international law, one of the first international Judgments to influence national laws on rape, the first Judgment to find rape and sexual violence as crimes against humanity, and the first to issue a conviction for rape and sexual violence as genocide. The significance of the gender jurisprudence in Akayesu is particularly evident in the Muhimana Judgment, considered below.

II. THE PROSECUTOR V. MIKAELI MUHIMANA, 28 APRIL 2005:
CONVICTION FOR RAPE AS A CRIME AGAINST HUMANITY

A. Background

During the 1994 genocide, Mikaeli Muhimana was thirty-three years old. He was well known and held a position of influence as a conseiller (local official) in the Gishyita Commune in Kibuye Préfecture. Mr. Muhimana was indicted on charges of genocide, or in the alternative, complicity in genocide, and crimes against humanity (rape and murder), pursuant to Articles 1 and 2 of the ICTR Statute, respectively. The indictment alleged that Mr. Muhimana mobilized, armed, and led assailants in attacks on 5000 Tutsi civilians who sought refuge at the Mubuga

38. Id. ¶ 732.
39. Id.
40. Id. ¶ 733.
Catholic Church and 6000 Tutsi refugees at the Mugonero complex in Gishyita Commune. Mr. Muhimana, alone or in a gang, also allegedly raped numerous women and children and murdered many identified Tutsi civilians in and around the Mugonero parish, hospital, and nursing school in Gishyita and Gisovu Communes.

B. Indictment

The factual allegations in the Muhimana Indictment were significantly more specific than the facts alleged in the Akayesu Indictment in respect to the identities of the sixteen named rape victims as well as the dates and places of the rapes. Yet the Muhimana Trial Chamber did not find the defendant guilty of many of the precisely identified acts of rape because the times and the locations set out in the Indictment were somewhat different from the testimonies of several witnesses.

C. Judgment

The Muhimana trial began on 29 March 2004, and thirteen months later, on 28 April 2005, Trial Chamber III issued the Judgment. As noted above, this was the eighth Judgment to address crimes of sexual violence, as charged in the indictment. In Muhimana, as in Akayesu, one of the three judges deciding the case was a woman. In Akayesu, the sole female judge in the Chamber was Judge Navanethem Pillay; in Muhimana, Judge Khalida Rachid Kahn, who presided, was the lone female judge. It is likely that the expertise of both judges influenced the gender jurisprudence in these trials.

The Trial Chamber convicted Mr. Muhimana, pursuant to Article 6(1) of the ICTR Statute, for personally raping and for aiding and abetting others to rape twelve identified Tutsi women and children. Mr. Muhimana

41. Prosecutor v. Muhimana, Case No. ICTR 95-1B-I, Amended Indictment, ¶ 5 (July 29, 2004).
42. Id.
43. See id. ¶¶ 5-6.
44. See id. ¶ 6.
45. Similarly, it may be noted that Judge Navanethem Pillay sat as one of three Trial Chamber judges in Prosecutor v. Musema, Case No. ICTR 96-13-T, Judgment (Jan. 27, 2000) and in Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Judgment (May 16, 2003). As indicated above, on appeal, the Musema rape conviction was overturned. See Musema v. Prosecutor, Case No. ICTR 96-13-A, Appeals Chamber Judgment (Nov. 16, 2001).
46. Prosecutor v. Muhimana, Case No. ICTR 95-1B-T, Judgment, ¶¶ 552-53 (Apr. 28, 2005). See also Muhimana v. Prosecutor, Case No. ICTR 95-1B-A, Appeals Chamber Judgment, ¶¶ 50-52 (May 21, 2007), in which the Appeals Chamber reversed the
was also found guilty for committing and instigating the murder of eight named Tutsi men and women.47

D. Definition of Rape

The Muhimana Trial Chamber endorsed the Akayesu definition of rape, as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”48 Noting a seeming split in the ICTR jurisprudence in relation to the definition of rape,49 Muhimana explained that the divergences could be aligned within the conceptual rape definition articulated in Akayesu.

1. The Akayesu Definition Encompasses the Physical Elements of Rape Articulated by the Kunarac Appeals Chamber

According to Muhimana, the physical elements of rape articulated by the ICTY Appeals Chamber in Kunarac simply specify the parameters of what constitutes “a physical invasion of a sexual nature” amounting to rape. Thus the Akayesu definition encompasses the Kunarac elements of rape.50

47. Muhimana, ICTR 95-1B-T, Judgment, ¶¶ 513, 570, 576.
48. Muhimana, ICTR 95-1B-T, Judgment, ¶ 537.
49. Two ICTR Judgments issued by Trial Chamber I endorsed the Akayesu conceptual definition: Musema, ICTR 96-13-T, Judgment and Niyitegeka, ICTR 96-14-T, Judgment. However, three other Judgments, issued by Trial Chambers II and III, shifted their rape analyses away from the conceptual definition and back to a narrower body parts definition: Prosecutor v. Semanza, Case No. ICTR 97-20-T, Judgment (May 15, 2003); Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Judgment (Dec. 2003); and Prosecutor v. Kamuhanda, Case No. ICTR 99-54A-T, Judgment (Jan. 22, 2004). Rape was not defined in Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-T, Judgment (June 17, 2004). However, the Gacumbitsi Judgment did find the defendant guilty of rape, as a crime against humanity and as a tool of genocide and extermination. Gacumbitsi, ICTR 2001-64-T, Judgment, ¶¶ 291-93, 321-33.
50. Muhimana, ICTR 95-1B-T, Judgment, ¶¶ 541-46. The ICTY Appeals Chamber in Kunarac accepted the following elements within the definition of the crime of rape:

The *actus reus* of the crime of rape in international law is constituted by: 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, where such sexual penetration occurs without the consent of the
2. Coercive Circumstances Provide Clear Evidence of Non-Consent

In affirming the Akayesu definition of rape, the Muhimana Trial Chamber questioned the relevance of any consideration of the victim’s non-consent, as evidence of rape, under coercive circumstances prevailing in times of an armed conflict or a genocide campaign. As the Trial Chamber noted, consent was one of the elements of rape accepted by the ICTY Appeals Chamber in Kunarac to demonstrate both the actus reus and mens rea of the crime. Yet, paradoxically, even the Appeals Chamber acknowledged that coercive circumstances provide clear evidence of non-consent, and consequently eliminate the relevance of consent as an evidentiary factor in sex crimes.51 Accordingly, the Muhimana Trial Chamber concluded that circumstances which exist “in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent.”52

E. Evidence of Rape in the Muhimana Judgment

The Muhimana Trial Chamber heard the testimonies of eight prosecution witnesses about the violent rapes of fifteen women by Mr. Muhimana and the Interahamwe in Gishyita Commune.53 Each of the eight prosecution witnesses testified about a separate incident of rape, involving one to three victims. Their testimonies were not corroborated. Two prosecution witnesses, BG and AX, recounted how they were raped several times. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.

The mens rea is the intention to effect this sexual penetration and the knowledge that it occurs without the consent of the victim.


51. Muhimana, ICTR 95-18-T, Judgment, ¶ 544, citing Kunarac, IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶¶ 129-30. It is noteworthy that the Appeals Chamber subsequently expressed a parallel opinion that meaningful consent is not possible under coercive circumstances. In Gacumbitsi v. Prosecutor, Case No. ICTR 2001-64-A, Appeals Chamber Judgment, ¶ 155 (July 7, 2006), the Appeals Chamber stated that “the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim.”


53. Twenty-eight Defence witnesses attested that they had not heard of rapes committed by Muhimana in the commune.
times by Mr. Muhimana and the Interahamwe who travelled with him.64
Six other witnesses, AP, AQ, AV, BI, AT, and AW, provided detailed accounts of how, when, and where Mr. Muhimana committed rape and ordered or encouraged the Interahamwe to savagely rape and murder Tutsi women.55 On the basis of the detailed testimonies of these eight prosecution witnesses, the Trial Chamber found Mr. Muhimana to be guilty of rape as a crime against humanity.56

Only one of the eight prosecution witnesses mentioned above, AP, did not personally see Mr. Muhimana commit rape. Witness AP testified that she stood outside of Mr. Muhimana’s house, where he had taken two Tutsi girls, Goretti and Languida, who were family friends.57 From an estimated distance of fifteen metres from the house, the witness heard the girls “scream horribly, shouting the Accused’s name and saying that they were ‘not expecting him to do that to them.’”58 Among the sounds coming from inside the house, the witness recognized the voice of Bourgmestre Sikubwabo and heard him tell the girls to “shut up.”59 Shortly after the screaming ceased, the witness saw both young women emerge from the house, led by Mr. Muhimana.60 They were stark naked and walked stiffly with their “legs apart.”61 Mr. Muhimana then called for the young men in the house to come out and see “what Tutsi girls look like.”62 The witness saw the young men attack the girls with clubs.63 She never saw the girls again.64

Noting that Witness AP did not personally observe the rape of the two girls, the Chamber nonetheless found her testimony to be straightforward, credible, and unshaken under extensive cross-examination.65 On the basis of Witness AP’s evidence, the Chamber found Mr. Muhimana guilty for

55. Id. ¶¶ 18, 170-71, 211-13, 263-65, 392-96, 481.
56. Id. ¶¶ 552-53, 562-63.
57. Id. ¶ 18. AP stated in her testimony that the two girls were named Languida and Immaculée, but also said that Goretti and Immaculée were sisters and she may have may have made a mistake about their names because of the passage of time; the Chamber was satisfied with this explanation. Id. ¶¶ 28-29.
58. Id. ¶ 18.
60. Id.
61. Id. ¶ 19.
62. Id.
63. Id.
64. Id.
personally committing the rapes of the two young women.\textsuperscript{66}

On appeal, Mr. Muhimana’s conviction for the rapes of Goretti and Languida was reversed. The Appeals Chamber found that the Trial Chamber erred in fact in “determining that it was the Appellant who raped the two women, rather than another person present in the house, such as Sikubwabo.”\textsuperscript{67} The Appeals Chamber observed that, on the basis of Witness AP’s evidence, as accepted by the Trial Chamber, Mr. Muhimana could bear criminal responsibility as an aider and abettor, under Article 6(1), for the rapes of the two young women.\textsuperscript{68} However, the defendant was charged with, and convicted of, \textit{committing} the rapes of the two women— not with \textit{aiding and abetting} their rapes.\textsuperscript{69} Because the prosecution did not specify the appropriate form of Mr. Muhimana’s criminal participation, the Appeals Chamber majority overturned his conviction for these particular acts of rape.\textsuperscript{70}

The Appeals Chamber also noted that a conviction may be based on circumstantial evidence and that a Trial Chamber has the discretion to decide, in light of the circumstances of each case, whether corroboration of evidence is necessary.\textsuperscript{71} In relation to the uncorroborated testimony of Witness AP, the Appeals Chamber found no error on the part of the Trial Chamber in concluding that Goretti and Languida were raped in Mr. Muhimana’s home.\textsuperscript{72} The error was in the factual finding that Mr. Muhimana personally raped the girls.\textsuperscript{73}

\section*{F. Rape as a Crime Against Humanity}

Trial Chamber III found Mr. Muhimana, a \textit{conseiller} of Gishyita Commune, guilty of rape as a crime against humanity for personally committing rapes of seven young women and for aiding and abetting rapes of five other women committed by members of the \textit{Interahamwe}, who often accompanied him.\textsuperscript{74} The Trial Chamber found Mr. Muhimana not guilty for the rapes of ten other identified women because of insufficient

\begin{thebibliography}{99}
\bibitem{66} Id. ¶ 32.
\bibitem{67} Muhimana v. Prosecutor, Case No. ICTR 95-1B-A, Appeals Chamber Judgment, ¶ 51 (May 21, 2007).
\bibitem{68} Id. ¶ 52.
\bibitem{69} Id.
\bibitem{70} Id.
\bibitem{71} Id. ¶ 49.
\bibitem{72} Id. ¶ 50.
\bibitem{73} Muhimana, ICTR 95-1B-A, Appeals Chamber Judgment, ¶ 51.
\bibitem{74} Prosecutor v. Muhimana, Case No. ICTR 95-1B-T, Judgment, ¶¶ 552-53 (Apr. 28, 2005).
\end{thebibliography}
evidence or lack of precision concerning dates and locations of the
crimes.\textsuperscript{75} Additionally, Mr. Muhimana was not convicted of sexual
violence for disembowelling Pascasie Muharemera by cutting her open
with a machete from her breasts to her vagina.\textsuperscript{76} The Trial Chamber stated,
“Although the act interferes with the sexual organs, it does not constitute a
physical invasion of a sexual nature.”\textsuperscript{77} However, Mr. Muhimana was
found guilty for the murder of Pasca die as a crime against humanity.\textsuperscript{78}
In convicting Mr. Muhimana of rape as a crime against humanity,
Trial Chamber III found him to be responsible for both committing and
abetting sexual crimes, which formed part of a widespread and systematic
attack on the Tutsi civilian population.\textsuperscript{79} The Chamber’s holding refined
the standard of evidence required to meet the gender law articulated in

\textit{Prosecutor v. Akayesu}.  

G. Rape as Genocide

Unlike the Amended Indictment in \textit{Akayesu}, the final \textit{Muhimana}
Indictment did not charge rape or any sexual crime as genocide.
Consequently, the Judgment made no specific finding that the numerous
rapes committed by Mr. Muhimana constituted genocide. However, the
Trial Chamber did refer to Mr. Muhimana’s apology to a Hutu girl for
having raped her, under the mistaken belief that she was Tutsi, to illustrate
his intent to commit genocide.\textsuperscript{80}

H. Sentence

Trial Chamber III found Mr. Muhimana guilty of genocide, rape as a
crime against humanity, and murder as a crime against humanity.\textsuperscript{81}
Enumerating the crimes personally committed by Mr. Muhimana, the
Chamber found that his acts of sexual violence were particularly egregious
and were calculated to degrade and humiliate Tutsi women.\textsuperscript{82} Accordingly,
the Trial Chamber sentenced Mr. Muhimana to life imprisonment.\textsuperscript{83} On
appeal, the sentence was maintained.\textsuperscript{84}

\textsuperscript{75} \textit{Id}. \textsuperscript{¶¶} 554-56. 
\textsuperscript{76} \textit{Id}. \textsuperscript{¶} 557. 
\textsuperscript{77} \textit{Id}. 
\textsuperscript{78} \textit{Id}. \textsuperscript{¶} 576. 
\textsuperscript{79} \textit{Id}. \textsuperscript{¶} 561. 
\textsuperscript{80} \textit{Muhimana}, ICTR 95-1B-T, Judgment, \textsuperscript{¶} 517. 
\textsuperscript{81} \textit{Id}. \textsuperscript{¶¶} 519, 563, 583. 
\textsuperscript{82} \textit{Id}. \textsuperscript{¶} 561. 
\textsuperscript{83} \textit{Id}. \textsuperscript{¶} 618. 
\textsuperscript{84} \textit{Muhimana v. Prosecutor}, Case No. ICTR 95-1B-A, Appeals Chamber Judgment, \textsuperscript{¶}
CONCLUSION

A comparison of the gender jurisprudence in Prosecutor v. Akayesu and Prosecutor v. Muhimana reveals the strength of the Akayesu legacy. The Muhimana Judgment endorsed the Akayesu definition of rape as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” Muhimana also conciliated seeming divergences in the definition of rape, demonstrating that the Akayesu definition encompasses the physical elements of rape, set forth in the Kunarac ICTY Appeals Chamber Judgment. Muhimana further clarified that the element of consent is not a relevant consideration in assessing acts of rape committed in coercive circumstances—as recognized in Prosecutor v. Akayesu. While Muhimana is the most recent ICTR gender-related Judgment to date, it should not be the last. There are presently twelve men and one woman charged with crimes of sexual violence in ongoing ICTR cases, and it is foreseeable that the jurisprudence in relation to many of the alleged gender crimes will further develop the Akayesu legacy.

234 (May 21, 2007).

85. See Prosecutor v. Nyiramasuhuko, Case No. ICTR 97-21-T; Prosecutor v. Bagosora, Case No. ICTR 98-41-T; Prosecutor v. Ndindilyimana, Case No. ICTR 00-56-T; Prosecutor v. Karemera, Case No. ICTR 98-44-T; Prosecutor v. Renzaho, Case No. ICTR 97-31-T. Of the thirteen individuals charged with crimes of sexual violence in on-going cases at the ICTR, Pauline Nyiramasuhuko is the only woman. The male defendants are: Arsène Shalom Ntahobali, Théoneste Bagosora, Gratien Kabiligi, AnatoleNsengiyumva, Aloys Ntabakuze, Augustin Bizimungu, François-Xavier Nzuwonemeye, Innocent Sagahutu, Callixte Nzabonimana, Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirore, and Tharcisse Renzaho.