

2003

Rape as an Act of Genocide

Sherrie L. Russell-Brown

Recommended Citation

Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L LAW. 350 (2003).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol21/iss2/5>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z380M0V>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Rape as an Act of Genocide

By
Sherrie L. Russell-Brown*

Like all rape, genocidal rape is particular as well as part of the generic, and its particularity matters. This is ethnic rape as an official policy of war in a genocidal campaign for political control. That means not only a policy of the pleasure of male power unleashed, which happens all the time in so-called peace; not only a policy to defile, torture, humiliate, degrade, and demoralize the other side, which happens all the time in war; and not only a policy of men posturing to gain advantage and ground over other men. It is specifically rape under orders. This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others; rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.¹

I.

INTRODUCTION

Rape has occurred within internal and international armed conflicts, throughout history.² Unfortunately, for much of history, rape has been looked

* Assistant Professor of Law and Associate Director of the Center on Children and the Law, University of Florida, Fredric G. Levin College of Law, B.A. (Government), 1989, Pomona College; J.D., 1992, Columbia University School of Law; LL.M. (International Law, International Human Rights Law), 1999, Columbia University School of Law. I would like to thank Prof. Lori Damroch for her comments on an earlier version of this article. I would also like to thank Profs. Nancy Dowd, Berta Hernandez-Truyol, Christopher Slobogin, and Barbara Woodhouse for their comments and suggestions. Lastly, I would like to thank Maria Weydemuller for her great editing.

1. Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L. J. 5, 11-12 (1994).

2. Human Rights Watch summarizes the history as follows:

During the Second World War, some 200,000 Korean women were forcibly held in sexual slavery to the Japanese army. During the armed conflict in Bangladesh in 1971, it is estimated that 200,000 civilian women and girls were victims of rape committed by Pakistani soldiers. Mass rape of women has been used since the beginning of the conflict in the Former Yugoslavia. Throughout the Somali conflict beginning in 1991, rival ethnic factions have used rape against rival ethnic factions. During 1992 alone, 882 women were reportedly gang-raped by Indian security forces in Jammu and Kashmir. In Peru in 1982, rape of women by security forces was a common practice in the ongoing armed conflict between the Communist Party of Peru, the Shining Path, and government counterinsurgency forces. In Myanmar, in 1992, government troops raped women in a Rohingya Muslim village after the men had been inducted into forced labor. Under the former Haitian military regime of Lt. Gen. Raoul Cedras, rape was used as a tool of political repression against female activists or female relatives of opposition members.

upon as an unavoidable aspect of conflict.³ However, with the horrific reports of mass rapes and rape/death camps in Bosnia, the crime of rape both gained media attention and evoked public outrage.

In the wake of the attention given to the mass rapes committed in Bosnia, one legal scholar, Rhonda Copelon, expressed concern about this “overemphasis” and “focus” on *genocidal* rape. Her concerns were: 1) that an overemphasis on “genocidal rape” could result in the elision of rape and genocide; 2) that the gendered nature of the crime of rape—a violent crime committed against women *qua* women—could become obscured; 3) that rape victims could lose their subjectivity and become objectified because the crime of genocidal rape would be viewed primarily as a crime perpetrated against a group and not against the individual woman; and, lastly, 4) that rape committed in an armed conflict *outside* of the context of a genocide could become invisible. In response to these concerns, Copelon proposed “surfacing” gender in the midst of genocide, that is, acknowledging the relevancy of gender in genocidal rape.⁴

On the other side of the debate, there are legal scholars who contend that, notwithstanding the *gendered* nature of the crime of rape, it is important to acknowledge the intersectionality of genocidal rape. It is important to acknowledge that genocidal rape is in fact a crime that implicates both gender and ethnicity and to understand that *certain* women are being raped by *certain* men for *particular* reasons.⁵ In September 1998, the Rwandan Tribunal rendered an historic judgment in *Prosecutor v. Jean-Paul Akayesu*,⁶ becoming the first international criminal tribunal to define rape as an act of genocide and to find an individual guilty of genocide on the basis, *inter alia*, of acts of rape and sexual violence. The Rwandan Tribunal in its *Akayesu Judgment* addresses and clarifies many, if not all, of the concerns raised in the debate about genocidal rape.

First, the Rwandan Tribunal recognized the intersectionality of the crime of genocidal rape. The Tribunal recognized that “genocidal rape” during the Rwandan genocide happened to certain women because of their ethnicity—specifically to Tutsi women or Hutu women married to Tutsi men. The Tribunal

BINAIFER NOWROJEE, HUMAN RIGHTS WATCH/AFRICA, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* n.39 (Dorothy Q. Thomas & Janet Fleishman eds., 1996) [hereinafter *SHATTERED LIVES*].

3. At least one commentator has posited that rape has not received significant attention, either legally or socially, because: 1) rape has been viewed as “an inevitable but subsidiary component of warfare; a ‘natural’ sideshow in the theatre of war,” 2) “rape has been treated as a legitimate tactic in the arsenal of weapons used to fight the enemy nation by way of anti-morale campaigns, and in this sense is not an act against the individual woman, but is an attack on the whole community,” and, finally, 3) “rape can also been seen to have developed into a sophisticated form of political torture, albeit one informed by sexual impulses, used to punish suspected ‘enemies’ and to terrorize the population into submission.” Jasminka Kalajdzic, *Rape, Representation, and Rights: Permeating International Law with the Voices of Women*, 21 *QUEENS L.J.* 457, 463 (1996).

4. Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in *WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 197, 199 (Julie Peters & Andrea Wolper, eds., 1995).

5. Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 *UCLA WOMEN’S L.J.* 59, 64-65 (1993).

6. *Prosecutor v Akayesu*, Case No. ICTR-96-4-T (Judgment, September 2, 1998) ch. 6.3.1, ¶ 496, available at ICTR website, <http://www.ictor.org>.

also recognized that these women were targeted both because of their ethnicity and because of the beliefs and opinions held by Hutus about Tutsi women as women.

Second, the Rwandan Tribunal managed to “surface gender in the midst of genocide” by recognizing the subjectivity of victims of the crime of genocidal rape. The Tribunal recognized that although the intent of the act of genocidal rape is to destroy a particular group, the effect of the act is the infliction of serious injury and harm. The Rwandan Tribunal acknowledged genocidal rape as possibly the most effective and serious way of inflicting injury and harm on individual Tutsi women, thus advancing the destruction of the entire Tutsi group.

Lastly, through its definition of rape and the finding in its *Akayesu Judgment* that rape can be an *actus reus* of genocide, the Rwandan Tribunal acknowledged that it viewed rape not as sexual in nature but as a tool of war, as a violent act perpetrated against a member of a group with the intent of destroying that group. As Professor Katharine Franke argues, the Rwandan Tribunal in its *Akayesu Judgment* recognized how “sex worked” to destroy a people.⁷ This Article analyzes how the *Akayesu Judgment* advances not only the discussion of rape in armed conflict but also of rape as an act of genocide. However, the *Akayesu Judgment* is not the only case through which the Rwandan Tribunal has managed to advance the discussion of rape in armed conflict and genocidal rape. There is another historic case before the Rwandan Tribunal that further cements the advances made in the *Akayesu Judgment*.

On May 26, 1997, the prosecutor of the Rwandan Tribunal filed an indictment accusing Pauline Nyiramasuhuko of genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions, all of which were committed during the 1994 genocide in Rwanda. Nyiramasuhuko was the former Minister of Family and Women’s Development in both the government of Rwandan President Juvénal Habyarimana that collapsed after Habyarimana’s death on April 6, 1994 and the interim government that succeeded it.⁸ On August 10, 1999, the Tribunal granted the prosecution leave to amend the indictment to include charges of conspiracy to commit genocide, complicity in genocide and direct, and public incitement to commit genocide. The amended indictment was filed on March 1, 2001.⁹ Additional crimes against humanity included rape.¹⁰ Nyiramasuhuko is the first woman to be indicted by an international criminal tribunal, the first woman to be charged with rape as a war crime and a crime against humanity, and the first woman to be indicted before an

7. Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139 (1998).

8. Prosecutor v. Pauline Nyiramasuhuko & Arsénes Ntahobali, Case No. ICTR-97-21-I (case summary), available at <http://www.ictr.org/wwwroot/default.htm>

9. See Fondation Hirondelle, ICTR—Pauline Nyiramasuhuko, Former Minister, at http://www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/9bd9560889_73079cc1256721007da2a3?OpenDocument; see also Prosecutor v. Pauline Nyiramasuhuko, ICTR-97-21-I (Amended Indictment for March 1, 2001) [hereinafter Amended Indictment], available at <http://www.ictr.org>.

10. *Id.*

international tribunal for genocide.¹¹ Allegations of rape, sexual assault and other crimes of a sexual nature are part of the factual bases of the charge against Nyiramasuhuko for genocide.¹²

According to the accounts of Nyiramasuhuko's participation in acts of rape as part of the Rwandan genocide, one male *genocidaire* said that Nyiramasuhuko commanded, "Before you kill the women, you need to rape them."¹³ According to another male *genocidaire*, Nyiramasuhuko ordered him and others to burn the women and then said, "Why don't you rape them before you kill them?"¹⁴ The man explained that he and the other men had been killing all day and were tired.¹⁵ Therefore, they put the gasoline in bottles, scattered it among the women and then started burning.¹⁶ According to a young Tutsi woman survivor of the genocide, even though the "overarching objective was to kill, the men seemed particularly obsessed by what they did to women's bodies."¹⁷ She saw men rape two girls with spears then burn their pubic hair.¹⁸ She was also taken to another spot where a woman was giving birth.¹⁹ The baby was halfway out and the men speared it.²⁰ All the while, the young woman said, she heard the soldiers say that they were doing what Pauline Nyiramasuhuko ordered.²¹

In general, the rapes that were committed as part of the Rwandan genocide were committed "by many men in succession, were frequently accompanied by other forms of physical torture and often staged as public performances to multiply the terror and degradation."²² For example, one case included a 45-year old Rwandan woman who was raped by her 12-year-old son—with a hatchet held to his throat—in front of her husband while their five other young children were forced to hold open her thighs.²³ So many women feared the rapes that they begged to be killed instead.²⁴ Often the rapes were a prelude to murder.²⁵ However, sometimes, the women were not killed but instead were repeatedly raped and then left alive so that the humiliation would affect not only the survivor but also those closest to her.²⁶ Other times, women were used as a different

11. See generally HR-NET Hellenic Resources Network, United Nations Daily Highlight, 99-08-12, at <http://www.hri.org/news/world/undh/1999/99-08-12.undh.html> (last visited May 7, 2003).

12. See Amended Indictment, *supra* note 9, count 2.

13. Peter Landesman, *A Woman's Work*, THE N.Y. TIMES, Sept. 15, 2002, (Magazine) at 82-84.

14. *Id.* at 84.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 89.

23. *Id.* at 116.

24. *Id.* at 89.

25. *Id.*

26. *Id.*

kind of tool: half dead, or even already a corpse, a woman would be publicly raped as a way for the killing mobs to bond together.²⁷

But the destruction did not stop with the acts of rape. Indeed, according to recent reports, AIDS contracted through rape was deliberately used as a way to murder Tutsi's and particularly Tutsi women, slowly and more agonizingly.²⁸ According to one estimate, seventy percent of women raped during the Rwandan genocide have H.I.V. and most will eventually die from it.²⁹ Rwanda's President said that the former Hutu government released AIDS patients out of the hospitals specifically to form battalions of rapists.³⁰ Professor Charles B. Strozier, psychoanalyst and Professor of History at John Jay College of Criminal Justice in New York, has stated that "[b]y using a disease, a plague, as an apocalyptic terror, as biological warfare, you're annihilating the procreators, perpetuating the death unto the generations . . . [t]he killing continues and endures."³¹ The Rwandan Tribunal's acting chief of prosecutions, Silvana Arbia, stated that "H.I.V. infection is murder . . . [s]exual aggression is as much an act of genocide as murder is."³² According to one reporter, it is the use of AIDS as a tool of warfare against Tutsi women that helped the prosecutors of the Rwandan Tribunal focus on rape as a driving force of the genocide.³³

The case against Pauline Nyiramasuhuko and these recent reports of the intentional transmission of AIDS through rape as part of the 1994 Rwandan genocidal campaign, further concretize the precedent established in the *Akayesu Judgment*. First, a good example of the intersectionality of "genocidal rape" and of how rape can be understood as something other than an attack on honor or a "reward" for soldiers or something that soldiers "do" during war, is to charge a woman with rape as a means through which she committed genocide. It is difficult to argue that "genocidal rape" should be viewed solely as a crime about gender, something that male soldiers commit generally against women during armed conflict, when a Hutu *woman* (who quite tellingly might actually have been a Tutsi who re-categorized herself as a Hutu in order to maintain her political power and prestige³⁴) can commit "genocidal rape" against a Tutsi *woman* precisely because of that woman's gender but also because of her ethnic identity. Second, the same can be said about the recent news that transmitting AIDS through rape was part of the Rwandan genocidal campaign. It is yet another example of rape being used as a method of destruction, albeit slow and painful, of not only the individual Tutsi women who were raped but also the Tutsi group in general.

27. *Id.*

28. *Id.* at 89, 116; see also Nicole Itano, *How Rwanda's Genocide Lingers on for Women*, THE CHRISTIAN SCI. MONITOR, Nov. 27, 2002, available at <http://www.csmonitor.com/2002/1127/p08s01-woaf.html>.

29. Landesman, *supra* note 13, at 89, 116.

30. *Id.* at 116.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 130, 132.

As explained above, after the reports of mass rapes and rape camps in Bosnia in 1991 and 1992, a debate developed among legal scholars about rape as an act of genocide. One side essentially argued that rapes committed during genocide are no different from rapes that have occurred throughout history during armed conflict and, therefore, should not receive special attention or characterization. This side of the debate was concerned with the gendered nature of the crime of rape disappearing because of the focus on the group rather than the individual in genocide. The other side of the debate contended that, as murder is different in genocide than in other contexts, including non-genocidal armed conflict, rape as a form of genocide is also different. Not different in a normative sense, but yet still different from rape that occurs in non-genocidal armed conflict. This side of the debate emphasized focusing on the intersectionality (that it is about both gender and group identity) of genocidal rape.

The Rwandan genocide and the accounts of women being raped as part of that genocide were known at the time that some of the scholarship about rape as an act of genocide was being written. However, for reasons unknown to the author, the debate about rape as genocide centered around the sexual violence that occurred in Bosnia and did not seem to include in its discussion the acts of rape and sexual violence that had occurred in the 1994 African genocide. The Rwandan Tribunal in its *Akayesu Judgment* addresses and clarifies many of the concerns raised in the debate about genocidal rape, most likely in part because the nature of what occurred in Bosnia was different from what happened in Rwanda.

The “genocidal rapes” committed in Bosnia, were designed in large part to have the effect of impregnating the victim so that she would have a child that would be identified as being a member of the rapist’s/enemy’s ethnicity.³⁵ Another intended consequence of the “genocidal rapes” in Bosnia was that the raped woman would be ostracized and alienated from her ethnic community and would therefore be removed as a possible procreator for her own ethnic group.³⁶ Thus, rape as an act of genocide as “practiced” in Bosnia resulted, *inter alia*, in the prevention of births within the particular ethnic group of the victim, because the victim would either bear a child that would be recognized as having the ethnic identity of the rapist and/or as a result of the birth or the rape, the victim would no longer be a desirable candidate for having children of her own ethnicity.³⁷ Therefore, the women were, in a sense, vessels through which the dilution, disappearance, and destruction of their own ethnic group occurred.³⁸ This Bosnian “paradigm” of genocidal rape would give support to an argument that a focus on genocidal rape could result in the elision of rape in genocide—that women would merely be viewed as the object through which and by which, the destruction of the group occurred.

35. See Copelon, *supra* note 4, at 205-206.

36. *Id.*

37. *Id.*

38. *Id.*

In contrast, the aim of “genocidal rape” in Rwanda was to kill Tutsi women whether it be through the transmission of AIDS, penetration with sharp objects, or as a result of the sheer number of times a woman was raped. Rape was used as a method, weapon, or tool through which Tutsi women were destroyed. Tutsi men were often macheted and could pay to die a quicker death through being shot.³⁹ Tutsi women were targeted for rape as a method of their destruction (which would lead, in turn, to the destruction of the Tutsis, in general) and did not have the privilege of paying for a quicker death.⁴⁰

There is some validity, therefore, to one side of the debate about genocidal rape if the lens, albeit a Eurocentric lens, is on what happened in Bosnia as the paradigm. Had what happened to African women during the Rwandan genocide been included in the analysis of the debate about genocidal rape (and to be fair, the Rwandan genocide had occurred only by the time that the *responding* legal scholar had written much of her scholarship on the topic), I suspect that there would not have been a debate or perhaps the debate would have been more inclusive and comprehensive. What I hope this Article will do is to not only give voice to what happened to Rwandan women (many scholars have written many pages on what happened to the women in Bosnia) but also explain how the Rwandan Tribunal’s jurisprudence has advanced the discussion of rape in armed conflict as well as rape as an act of genocide.

Before I do so, however, by way of background, I summarize the historical status of rape as a war crime other than the crime of genocide in Part II of this Article. In Part III, I discuss the definition of genocide under the Genocide Convention and explain how, although not enumerated in the Genocide Convention, rape and other acts of sexual violence can be genocidal acts. In Part IV, I familiarize the reader with the debate about genocidal rape in legal scholarship. Part V, contains a brief history of the 1994 genocidal campaign in Rwanda, background on the Rwandan Tribunal and its *Akayesu Judgment*. Finally, in Part VI, I explain how the Rwandan Tribunal’s decision in the *Akayesu* case goes far towards answering and clarifying some of the concerns raised in the debate about “genocidal rape.” I conclude that the *Akayesu Judgment* demonstrates the complexity of the issue and illustrates that it need not be an either/or proposition but can be both.

II.

THE STATUS OF RAPE AS A CRIME UNDER INTERNATIONAL HUMANITARIAN LAW⁴¹

In this section, I explain the status of rape under international humanitarian law. Specifically, I address rape as a “grave breach,” rape as a violation of the laws and customs of war, and rape as a crime against humanity. As discussed

39. Landesman, *supra* note 13, at 125.

40. *Id.*

41. There are numerous good articles on the status of rape as a war crime. See, e.g., Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT’L L. 424 (1993). An exhaustive analysis of the topic is beyond the scope of this piece.

below in further detail, rape is prohibited by the law of armed conflict but is not specifically enumerated as a "grave breach" nor as a violation of the laws and customs of war. Rape has recently been defined as a crime against humanity in the statutes of the International Criminal Court as well as the International Criminal Tribunals for Rwanda and Yugoslavia.

A. *Grave Breaches, the Geneva Conventions and its Protocols*

The four Geneva Conventions⁴² form the core of humanitarian law or, as it is sometimes called, the law of armed conflict.⁴³ While rape has been interpreted as a war crime, it is not specifically enumerated as such in the Geneva Conventions and the subsequent Protocols. The Geneva Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons, namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war. Each Convention lists the particularly serious violations that qualify as "grave breaches" or war crimes.⁴⁴ The grave breaches or war crimes enumerated in the Geneva Conventions are subject to universal jurisdiction and persons committing, or ordering to be committed, any of the grave breaches of the Conventions shall be subject to penal sanctions.⁴⁵

According to the Geneva Conventions, grave breaches involve any of the following acts if committed against persons or property protected by the Conventions: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deportation or

42. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

43. *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808*, U.N. SCOR, 48th Sess., at 37, U.N. Doc. S/25704 (1993) [hereinafter *Secretary-General's Report*].

44. First Geneva Convention, *supra* note 42, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, *supra* note 42, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 174; Third Geneva Convention, *supra* note 42, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Fourth Geneva Convention, *supra* note 42, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

45. First Geneva Convention, *supra* note 42, art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, *supra* note 42, Article 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 174; Third Geneva Convention, *supra* note 42, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Fourth Geneva Convention, *supra* note 42, Article 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

transfer or unlawful confinement of a protected person, and taking civilian hostages.⁴⁶

Rape is explicitly prohibited by Article 27 of the Fourth Geneva Convention, which provides, in pertinent part, that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁴⁷ However, as stated above, rape is *not* listed as a “grave breach” or war crime in any of the four Geneva Conventions. As a consequence, rape is not listed as a grave breach in Article 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia which simply mirrors the Geneva Conventions.⁴⁸

Nonetheless, the International Committee of the Red Cross (ICRC), which played an influential role in drafting the Conventions, has interpreted the grave breach of “willfully causing great suffering or serious injury to body or health” to encompass rape.⁴⁹ Likewise, the United States Department of State has declared that it considers rape a war crime or a grave breach under customary international law and the Geneva Conventions and that it can be prosecuted as such.⁵⁰

Following the drafting of the Geneva Conventions, the ICRC widened the application of international humanitarian law to broaden the scope of protected persons.⁵¹ The 1977 Protocols I and II Additional to the Geneva Conventions of 1949, which pertain to the protection of victims of international and internal war crimes, respectively, were drafted as a result.⁵²

In Protocol I, rape is *not* listed as a crime constituting a grave breach.⁵³ Rape is, however, specifically prohibited by Article 76(1) of Protocol I, which states that “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”⁵⁴

Article 4(2)(e) of Protocol II prohibits “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and

46. See First Geneva Convention, *supra* note 42, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, *supra* note 42, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 174; Third Geneva Convention, *supra* note 42, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Fourth Geneva Convention, *supra* note 42, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

47. The Fourth Geneva Convention, *supra* note 42, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

48. Statute of 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, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827.

49. Meron, *supra* note 41, at 426-427; Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT'L L. 327, 336-337 (1995).

50. Meron, *supra* note 41, at 427.

51. Healey, *supra* note 49, at 345.

52. Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Conflicts, 1125 U.N.T.S. 609 [hereinafter, Protocol II].

53. Protocol I, *supra* note 52, art. 85, 1125 U.N.T.S. at 41 - 42.

54. *Id.* at art. 76(1), 1125 U.N.T.S. at 38.

any form of indecent assault.”⁵⁵ In sum, although rape has been interpreted as a war crime or “grave breach,” the treaties forming the foundation of the law of armed conflict, namely the Geneva Conventions along with its two Protocols, do not specifically list rape as such. Likewise, as discussed in the next section, although not explicitly enumerated as a violation of the laws and customs of war, rape can be so interpreted and one of the World War II war crimes tribunals explicitly listed rape as a violation of the recognized customs and conventions of war.

B. Violations of the Laws and Customs of War

The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land⁵⁶ and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.⁵⁷ The Nuremberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption, were by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws of customs of war.⁵⁸ The Nuremberg Tribunal also recognized that war crimes defined in Article 6(b) of the Nuremberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.⁵⁹

Rape is not explicitly enumerated as a violation of the laws and customs of war in the 1907 Convention. Under a broad interpretation of Article 46 of the Hague Regulations, which provides that, “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected,” rape could be construed as a crime against “family honour and rights.”⁶⁰ However, in practice it has seldom been so interpreted.⁶¹

The Nuremberg Charter⁶² lists the crimes that came within the jurisdiction of the Nuremberg Tribunal for which there was individual responsibility: 1) Crimes Against Peace, 2) War Crimes, and 3) Crimes against Humanity. Rape is not mentioned as a war crime or as a crime against humanity and none of the Nuremberg defendants were charged with rape as a war crime under customary international law.⁶³ In contrast, in the Tokyo Charter,⁶⁴ although rape similarly

55. Protocol II, *supra* note 52, at art. 4(2)(e), 1125 U.N.T.S. at 612.

56. Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. IV, 36 Stat. 2277, T.S. No. 539 (entered into force 26 Jan. 1910) [hereinafter 1907 Convention].

57. *Secretary-General's Report*, *supra* note 43, at 41.

58. *Id.* at 42.

59. *Id.*

60. Meron, *supra* note 41, at 425.

61. *Id.*

62. Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, art. 6.

63. Nicole Eva Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 409 (1998); Meron, *supra* note 41, at 425-26.

was not listed as a crime against humanity, it was listed as a violation of recognized customs and conventions of war and some Japanese military and civilian officers were found guilty of rape.⁶⁵ Although rape was not explicitly listed as a violation of the laws and customs of war (with the exception of the Toyko Charter), nor was listed as a crime against humanity in the Charters of Nuremberg and Tokyo, more current definitions of crimes against humanity include rape.

C. Crimes Against Humanity

Crimes against humanity were first recognized in the Tokyo and Nuremberg Charters as well as in Law Number 10 of the Control Council for Germany.⁶⁶ As stated above, rape was not mentioned as a crime against humanity in either the Nuremberg or Tokyo Charters. Although rape was not prosecuted at any of the domestic German trials, Control Council Law Number 10, a charter adopted by the four occupying powers in Germany for war crimes trials by their own courts in Germany, included rape in its list of crimes against humanity.⁶⁷ Control Council Law Number 10 provides: "*Crimes against Humanity*. 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."⁶⁸ Following this precedent, the Statutes of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the Rome Statute of the International Criminal Court, list rape as a crime against humanity.⁶⁹

Thus, as this Part has described, with respect to the status of rape as a war crime, rape is included in the recent definitions of crimes against humanity. Rape is not explicitly enumerated as a "grave breach" or a violation of the laws and customs of war. However, rape has been interpreted as such. In addition, rape can be an act of genocide.

64. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, amended Apr. 26, 1946, T.I.A.S. No. 1589.

65. Erb, *supra* note 63, at 410; Meron, *supra* note 41, at 426.

66. *Secretary-General's Report*, *supra* note 43, at 47.

67. Erb, *supra* note 64, at 409; Meron, *supra* note 41, at 426.

68. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50-55 (1946), art. II(1)(c).

69. See generally Statute of the International Criminal Tribunal for Yugoslavia, *supra* note 48; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, July 17, 1998, art. 7(1)(g), U.N. Doc. A/CONF.183/9th, (entered into force July 1, 2002), available at <http://www.un.org/law/icc/statute/rome.htm>.

III.

THE GENOCIDE CONVENTION AND RAPE AS A GENOCIDAL ACT

A. *The Genocide Convention*

Genocide and the acts through which genocide is committed are defined in the Convention on the Prevention and Punishment of the Crime of Genocide,⁷⁰ the first major human rights instrument adopted by the United Nations.⁷¹ The Genocide Convention was drafted in response to World War II and the atrocities committed by the Nazis.⁷² A Polish attorney, Raphael Lemkin, coined the term “genocide” to describe the destruction of a nation or of an ethnic group.⁷³ Lemkin “defined genocide as both the ‘mass killings of all members of a nation,’ and the ‘coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the group themselves.’”⁷⁴

According to Article I of the Genocide Convention, genocide is a crime under international law whether or not it occurs during war or peacetime.⁷⁵ Thus, genocide is a war crime when committed during war but it could also be described as an aggravated crime against humanity.⁷⁶ It differs, however, from the other crimes against humanity such as mass murder or racial and religious persecution, in that it requires a specific intent, *dolus specialis*, to exterminate a group.⁷⁷

Since crimes against humanity are punishable under customary international law and are, therefore, binding on all members of the international community, the prohibition on genocide, as a crime against humanity, is applicable to states which have not yet ratified the Genocide Convention.⁷⁸

The crime of genocide is defined in Article II of the Genocide Convention.⁷⁹ There must be an intention to destroy, in whole or in part, a national ethnic, racial or religious group through the commission of the following enumerated acts: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.⁸⁰ Rape is not explicitly enumerated as an act of genocide. However, as was seen in Rwanda, rape and other acts of sexual violence can be genocidal acts.

70. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951,, 78 U.N.T.S. 277. [hereinafter Genocide Convention].

71. Healey, *supra* note 49, at 364.

72. *Id.*

73. *Id.*

74. *Id.*

75. Genocide Convention, *supra* note 70, art. I, 78 U.N.T.S. at 280.

76. Healey, *supra* note 49, at 365.

77. *Id.*

78. *Id.* at 366.

79. 78 U.N.T.S. at 280.

80. *Id.*

B. Rape as a Genocidal Act

Rwanda acceded by legislative decree to the Genocide Convention on April 16, 1975.⁸¹ Thus, the crime of genocide existed in Rwanda in 1994 when the genocide against the Tutsis occurred.⁸² Although rape is not enumerated in the Genocide Convention, rape and other acts of sexual violence can be genocidal acts.⁸³ However, as stated above, establishing genocide requires the *dolus specialis* to destroy a national, ethnic, racial or religious group.⁸⁴ Acts such as rape and sexual violence do not constitute “genocidal acts” simply because they occur at the same time as or in the context of a genocide.⁸⁵ The requisite intent must be proven.⁸⁶ As a report by Human Rights Watch states,

In individual cases documented by Human Rights Watch/FIDH, survivors testified that their attackers enunciated their intent to destroy them and their people and characterized sexual violence as a means to achieve that destruction. One rape survivor told Human Rights Watch, “While they were raping me, they were saying that they wanted to kill all Tutsi so that in the future all that would be left would be drawings to show that there were once a people called the Tutsi.” Others recounted how their attackers said that rather than kill the women on the spot, they would leave them to die from their grief.⁸⁷

Therefore, the rapes that were committed in Rwanda were “genocidal rapes” not because they occurred during the Rwandan genocide but because, as the testimony of the survivors demonstrates, there were expressions of a specific intent to destroy the Tutsis by and through raping Tutsi women before, during and after the commission of the rapes.

The question that arose about genocidal rapes among legal scholars, was why the rapes that occurred in Bosnia received so much attention while rape and other acts of sexual violence that commonly occur in both internal and international armed conflicts received less attention. The fear expressed by one scholar is that what has now been termed “genocidal rape” will occlude rape that occurs regularly in situations outside of genocide and will occlude the gender aspect of rape.

IV.

THE DEBATE ABOUT GENOCIDAL RAPE

The two quotes juxtaposed below are from the writings of two scholars on opposite sides of the debate about genocidal rape.

What we sought to argue and insert into this debate is that you cannot treat genocidal rape as special. In terms of its impact on the women affected, there is no difference between genocidal rape and the most common form of rape in war, which is rape as booty, exemplified by the Japanese comfort women. These wo-

81. See Genocide Convention, Status of Ratifications, Reservations and Declarations, *available at* <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm>.

82. *Id.*

83. See SHATTERED LIVES, *supra* note 2, at 34.

84. Genocide Convention, *supra* note 70, 28 U.N.T.S. at 280.

85. See SHATTERED LIVES, *supra* note 2.

86. *Id.*

87. *Id.*

men were not kidnapped and hauled into sexual slavery in order to diminish or destroy their ethnicity; they were hauled off to be the prostitutes for the troops. The Japanese industrialized that practice in the Second World War, kidnapping thousands of Korean, Chinese, Philippino, and Dutch women to serve the sexual needs of their soldiers. Women were used as a way of keeping soldiers going, as a reward to them. Why is that not a crime against humanity based upon gender?⁸⁸

The result is that these rapes are grasped in either their ethnic or religious particularity, as attacks on a culture, meaning men, or in their sex specificity, meaning as attacks on women. But not as both at once. Attacks on women, it seems, cannot define attacks on a people. If they are gendered attacks, they are not ethnic; if they are ethnic attacks, they are not gendered. One cancels the other. But when rape is a genocidal act, as it is here, it is an act to destroy a people. What is done to women defines that destruction. Also, aren't women a people?⁸⁹

In short, one side of the debate is concerned with gender disappearing from "genocidal rape" while the other recognizes and deems important its intersectionality. The issue surrounding genocidal rape is whether an overemphasis on "genocidal rape" will result in the "elision of rape and genocide." That the recognition of rape as a violent crime perpetrated against women *qua* women will be occluded with this focus on "genocidal rape." The fear is that the focus on "genocidal rape" could result in the effacement of gender in the crime of genocidal rape—the effacement of rape as a crime of violence perpetrated against women *because* they are women.

Therefore, the concern with respect to the mass rapes that occurred in Bosnia, is that those rapes received so much attention as opposed to rapes that occurred in earlier armed conflicts, because of their association with ethnic cleansing. Because the *effect* of these rapes was that people fled their homes, women were forcibly impregnated, and the Croat and Muslim men were "humiliated" as part of the intent of the rapist to "assault the community as a matter of military strategy."⁹⁰ The problem with this, according to one legal scholar, is that the gendered nature of the crime of rape—that it is a crime perpetrated against women because they are women and not solely because they belong to a particular group—is obscured. In addition, there is also a fear that this focus on "genocidal rape" will result in the female victim of the rape becoming the object of the crime or that her subjectivity will be denied, for example, that the female victim will be viewed as the object of a crime that is ultimately or fundamentally perceived as a crime against a particular group, rather than against that individual woman.

For example, Copelon writes:

The elision of genocide and rape in the focus on "genocidal rape" as a means of emphasizing the heinousness of the rape of Muslim women in Bosnia is dangerous. Rape and genocide are each atrocities. Genocide is an effort to debilitate or

88. Rhonda Copelon, *Women and War Crimes*, 69 ST. JOHN'S L. REV. 61, 67 (1995).

89. MacKinnon, *supra* note 1, at 10.

90. Kalajdzic, *supra* note 3, at 479.

destroy a people based on its identity as a people, while rape seeks to degrade and destroy a woman based on her identity as a woman. Both are grounded in total contempt for and dehumanization of the victim, and both give rise to unspeakable brutalities. Their intersection in the Serbian (and, to a lesser extent, the Croatian) aggressions in Bosnia creates an ineffable living hell for women there. From the standpoint of these women, they are inseparable.

But to emphasize as unparalleled the horror of genocidal rape is factually dubious and risks rendering rape invisible once again. When the ethnic war ceases or is forced back into the bottle, will the crimes against women matter? Will their suffering and struggles to survive be vindicated? Or will condemnation be limited to this seemingly exceptional case? Will the women who are brutally raped for purposes of domination, terror, booty, or revenge in Bosnia and elsewhere be heard?⁹¹

What Copelon suggests is to “surface” gender in the midst of genocide.⁹² Copelon feared that the focus of genocidal rape would be on its effect on a group rather than on the women who were targeted because they are female, and who also happen to be members of a targeted group. Professor Copelon is concerned that an emphasis on genocidal rape would mean that rapes that occur outside of genocide would not get appropriate attention. Only when rape and other acts of sexual violence have a genocidal effect on an ethnic group, would these acts get attention.

On the other side of the debate, there are those, including Catharine MacKinnon and Jasminka Kalajdzic, who contend that it is important to recognize the particular *as well as* the generic in the crime of genocidal rape. MacKinnon understands that women are targeted for rape generally because they are women and that rape is violence against women. But she also understands that particular women from a specific group who are targeted for genocide are also targeted for genocidal rape. Thus, for both Kalajdzic and MacKinnon, it is important not to lose sight of the intersectionality between ethnicity and gender in genocidal rape. MacKinnon writes:

One result of this equalization of aggressor with aggressed-against is that these rapes are not grasped either as a strategy in genocide or as a practice of misogyny, far less as both at once, continuous at once with this ethnic war of aggression and with the gendered war of aggression of everyday life. This war is to everyday rape what the Holocaust was to everyday anti-Semitism. Muslim and Croatian women and girls are raped, then murdered, by Serbian military men, regulars and irregulars, in their homes, in rape/death camps, on hillsides, everywhere. Their corpses are raped as well. When this is noticed, it is either as genocide or as rape, or as femicide but not genocide, but not as rape as a form of genocide directed specifically at women. It is seen either as part of a campaign of Serbia against non-Serbia or an onslaught by combatants against civilians, but not an attack by men against women. Or, in the feminist whitewash, it becomes just another instance of aggression by all men against all women all the time, rather than what it is, which is rape by some men against certain women. The point seems to be to obscure, by any means available, exactly who is doing what to whom and why.⁹³

91. See generally Copelon, *supra* note 4, at 199 (emphasis added). For a discussion of these issues, see generally *id.* at 197-214.

92. *Id.* at 199.

93. MacKinnon, *supra* note 5, at 64-65.

Again, MacKinnon understands the intersectionality of “genocidal rape” and that it differs from acts of rape and sexual violence that occur outside of genocide. MacKinnon understands that it is important to recognize that genocidal rape is not just about a woman’s identity as a woman but is also about a woman’s identity in a particular group and that both are equally important and distinguishing. Kalajdzic also recognizes this point when she writes:

An overemphasis on gender to the exclusion of all other possible motivating factors ‘can obscure other characteristics of a woman’s identity that determine *which* women are raped.’ . . . Sexism and racism, therefore, operate in conjunction to determine which women are raped. Indeed, rape survivors are women *and* members of a given national, political, or religious group. Their identities as women cannot be separated from their membership in a particular race or religion. According to this school of thought, therefore, rape cannot be defined by gender alone, and some reliance on the community aspects of the crime must continue.⁹⁴

In sum, one side of the debate is concerned with gender disappearing from “genocidal rape” while the other recognizes and deems important its intersectionality. With the debate about genocidal rape in context, I will analyze it in light of the genocide in Rwanda, the establishment of the International Tribunal for Rwanda and the historic *Akayesu Judgment*.

V.

THE 1994 GENOCIDAL CAMPAIGN IN RWANDA,⁹⁵ THE INTERNATIONAL TRIBUNAL FOR RWANDA AND ITS HISTORIC *AKAYESU JUDGMENT*

A. *The 1994 Rwandan Genocide*

The killing of Tutsis started in 1990 after an attack was launched from Uganda by the Rwandan Patriotic Front (RPF), a group formed in 1979 by Tutsi exiles based in Uganda.⁹⁶ The killings started as an attempt by the then President of Rwanda, Habyarimana, to stop the efforts of the RPF to take over his government.⁹⁷ What touched off the genocidal campaign of 1994 against the Tutsis (and those considered to be sympathetic to them) was that President Habyarimana’s plane was shot down on April 6, 1994 on his way back from a peace conference that he had attended in Tanzania.⁹⁸ President Habyarimana was a Hutu and those close to him blamed the RPF for his death.⁹⁹ Actually, Habyarimana’s death was most likely a pretext for the genocide of both Tutsis and moderate Hutus who were in opposition to President Habyarimana, which had been planned for months.¹⁰⁰ The 1994 Rwandan genocide started before

94. Kalajdzic, *supra* note 3, at 477-78.

95. The facts herein are based upon facts found in *SHATTERED LIVES*, *supra* note 2, and the factual findings of ICTR in the *Akayesu Judgment*, *supra* note 6, at ch. 6.3.1, ¶ 496.

96. *SHATTERED LIVES*, *supra* note 2, at 12; *Akayesu Judgment*, *supra* note 6, at ch. 2, ¶ 93.

97. *Id.*

98. *SHATTERED LIVES*, *supra* note 2, at 13; *Akayesu Judgment*, *supra* note 6, at ch. 2, ¶ 106.

99. *SHATTERED LIVES*, *supra* note 2, at 13.

100. *Id.*

dawn on April 7, 1994 and continued up until July 18, 1994.¹⁰¹ The estimated total number of victims varies from 500,000 to 1,000,000 or more.¹⁰²

B. The International Tribunal for Rwanda

As a result of the events which took place in Rwanda during the spring of 1994, the Security Council of the United Nations established the International Tribunal for Rwanda in its Resolution 955 of November 8, 1994.¹⁰³ The Government of Rwanda requested the creation of the Tribunal because of its desire to avoid "the risk of being accused of administering an 'expeditious victor's justice;' its belief that genocide [is] a 'crime against humanity calling for collective efforts to prevent, stop and punish it;'" and its hope that a 'free and fair international tribunal would contribute to allay the fear of retribution . . . would facilitate much needed national reconciliation . . . and [is] indispensable in building a legal system based on the rule of law.'"¹⁰⁴

The International Tribunal for Rwanda consists of three Trial Chambers and an Appeals Chamber.¹⁰⁵ There are fourteen independent judges, no two of whom may be nationals of the same State.¹⁰⁶ Three judges each sit on the Trial Chambers and five in the Appeals Chambers.¹⁰⁷ The judges are elected by the United Nations General Assembly and represent, in accordance with Article 12(3)(c) of the Statute, the principal legal systems of the world.¹⁰⁸ The Statute stipulates that the members of the Appeals Chamber of the International Tribunal for Yugoslavia shall also serve as members of the Appeals Chamber of the International Tribunal for Rwanda.¹⁰⁹

Under the Statute, the International Tribunal for Rwanda has the power to prosecute persons responsible for 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 neighboring States, between January 1 and December 31, 1994.¹¹⁰ According to Articles 2 through 4 of the Statute relating to its subject matter jurisdiction, the International Tribunal for Rwanda has the power to prosecute persons who committed genocide as defined in Article 2 of the Statute, persons responsible for crimes against humanity as defined in Article 3 of the Statute and persons responsible for serious violations of Article 3 common to the Geneva Conventions of August 12, 1949 for the protection of victims of war, and of Additional Protocol II, a crime defined in Article 4 of the Statute.¹¹¹ Article 8 of the Statute provides

101. *Akayesu Judgment*, *supra* note 6, at ch. 2, ¶¶ 107, 111.

102. *Id.* at ¶ 111.

103. ICTR Statute, *supra* note 69.

104. See Rupa Bhattacharyya, *Establishing A Rule-Of-Law International Criminal Justice System*, 31 *TEX. INT'L J.* 57, 61-62, n.23 (1996).

105. ICTR statute, *supra* note 69, at art. 10.

106. *Id.* at art. 11.

107. *Id.*

108. *Id.* at art. 12(3)(c).

109. *Id.* at art. 12(2).

110. *Id.* at pmb1.

111. *Id.* at arts. 2, 3, 4.

that the International Tribunal for Rwanda has concurrent jurisdiction with national courts, over which it has primacy.¹¹² One of the most important cases coming out of the Tribunal involved Jean-Paul Akayesu, a powerful figure who used his position to both advocate and ignore countless acts of genocidal rape. The *Akayesu Judgment* was the first case to come out of an international criminal tribunal which recognized rape as an act of genocide.

C. The Akayesu Judgment

Akayesu was indicted variously for genocide, crimes against humanity, incitement to commit genocide, war crimes and "grave breaches." The indictment against Akayesu was submitted by the then Prosecutor for the Rwandan and Yugoslav Tribunals, Louise Arbour, on February 13, 1996 and was confirmed on February 16, 1996.¹¹³ The Prosecutor amended the Akayesu Indictment during the trial, in June 1997, to add three counts (13-15, Crimes Against Humanity based on the allegations of rape and sexual violence) and three paragraphs (10A, 12A and 12B) which are the paragraphs that include the allegations of rape and sexual violence.¹¹⁴

Rwanda is divided into eleven prefectures, each one of which is governed by a prefect.¹¹⁵ The prefectures are divided into communes, which are placed under the authority of bourgmestres.¹¹⁶ The bourgmestre is appointed by the President of the Republic, upon the recommendation of the Minister of the Interior.¹¹⁷ The bourgmestre is the most powerful figure in the commune.¹¹⁸

Akayesu was the bourgmestre of the Taba commune, prefecture of Gitarama, from April 1993 until June 1994.¹¹⁹ Prior to being Taba's bourgmestre, Akayesu was a teacher and a school inspector for Taba.¹²⁰ As bourgmestre, Akayesu was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect.¹²¹ Akayesu had exclusive control over the communal police, as well as any police put at the disposition of the commune.¹²² He was responsible for the execution of laws and regulations and the administration of justice, also subject to the prefect's authority.¹²³

Between April 7 and the end of June 1994, hundreds of civilians took refuge at the bureau communal of Taba.¹²⁴ The majority of the civilians who

112. *Id.* at art. 8.

113. *Akayesu Judgment*, *supra* note 6, at ch. 1.2(6).

114. *Id.*

115. *Id.* at ¶ 2.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at ch. 1.2, ¶ 3.

120. *Id.*

121. *Id.* at ¶ 4.

122. *Id.*

123. *Id.*

124. *Id.* at ch. 5.5.

sought shelter were Tutsi.¹²⁵ Tutsi women were regularly subjected to rape and other forms of sexual violence on or near the bureau communal and the civilian population was frequently murdered and/or beaten on or near the bureau communal premises.¹²⁶

There were fifteen counts in the Indictment against Akayesu.¹²⁷ Akayesu was charged with genocide, crimes against humanity (extermination, murder, torture, rape, other inhumane acts), incitement to commit genocide, violations of Common Article 3 to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II (murder, cruel treatment, outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault).¹²⁸ On the basis of the allegations of rape and sexual violence, described in paragraphs 12A and 12B of the Indictment, Akayesu was charged with Genocide, Complicity to Commit Genocide, Crimes Against Humanity (extermination, rape and other inhumane acts) and Violations of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of the Additional Protocol II (outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault).¹²⁹

The Indictment charged that, with respect to the killings, as the bourgmestre, Akayesu was responsible for maintaining law and public order in his commune. That responsibility notwithstanding, at least 2,000 Tutsis were killed in Taba between April 7 and the end of June 1994 while Akayesu was still in power.¹³⁰ According to the Indictment, the killings in Taba were openly committed and so widespread that Akayesu must have known about them.¹³¹ Although he had the authority and responsibility to do so, the Indictment alleged, Akayesu never attempted to prevent the killings of Tutsis in the commune in any way and never called for assistance from regional or national authorities to quell the violence.¹³² With respect to the acts of rape and sexual violence, the Indictment charged that Akayesu knew that acts of sexual violence, beatings, and murders were being committed and was at times present during their commission.¹³³ The Indictment further charged that Akayesu facilitated the commission of the sexual violence, beatings, and murders by allowing the sexual violence, beatings and murders to occur on or near the bureau communal premises.¹³⁴ The Indictment charged that, by virtue of his presence during the commission of the sexual violence, beatings, and murders and his failure to prevent these acts, Akayesu had encouraged these activities.¹³⁵

125. *Id.*

126. *Id.*

127. *Id.* at ch. 1.2.

128. *Id.*

129. *Id.*

130. *Id.* at ch. 1.2, ¶ 12.

131. *Id.*

132. *Id.*

133. *Id.* at ¶ 12(B).

134. *Id.*

135. *Id.*

Akayesu's defense with respect to the killings was that he did not commit, order or participate in any of the killings, beatings or acts of sexual violence alleged in the Indictment.¹³⁶ Akayesu conceded that genocide occurred in Rwanda and that massacres of Tutsis took place in the Taba Commune but he claimed that he was helpless, being outnumbered and overpowered, to stop them.¹³⁷ Akayesu claimed that he should not have had to have been a hero or to have laid down his life in a futile attempt to prevent killings and beatings.¹³⁸ Furthermore, he alleged that no acts of sexual violence took place at the Bureau Communal.¹³⁹ Akayesu pleaded not guilty to all the counts of the Indictment including the new counts, which were added when the Indictment was amended June 17, 1997.¹⁴⁰

Interestingly, before deciding whether or not Akayesu had committed genocide, the Rwandan Tribunal had to decide whether the Tutsis constituted a group protected against genocide, that is, a national, ethnic, racial or religious group.¹⁴¹ The Tutsis and the Hutus shared the same nationality, race and religion. The Tribunal defined an ethnic group as a group who shared a "common language or culture."¹⁴² The Trial Chamber noted that the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population.¹⁴³ The Tribunal, therefore found it necessary to search the *travaux préparatoires* of the Genocide Convention to discern the intent of the drafters.¹⁴⁴ In the opinion of the Tribunal, the intent of the drafters was to protect any stable and permanent group determined by birth, in a continuous and often irremediable manner.¹⁴⁵ According to the Tribunal, the Tutsis constituted such a "stable and permanent" group.¹⁴⁶

The Tribunal noted that the distinctions—Hutu, Tutsi and Twa—had been imposed on the Rwandan population by the Belgian authorities in the early 1930's.¹⁴⁷ It then became mandatory for every Rwandan to carry an identity card mentioning his or her ethnicity.¹⁴⁸ This remained the case until after the events in Spring 1994.¹⁴⁹ Those identity cards referred to "ubwoko" in Kinyarwanda or "*ethnie*" (ethnic group) in French, which referred to the designation of Hutu or Tutsi or Twa.¹⁵⁰ The Trial Chamber also noted that all of the Rwandan witnesses who appeared before it answered spontaneously and without hesita-

136. *Id.* at ch. 1.4.2, ¶ 30.

137. *Id.*

138. *Id.* at ¶ 31.

139. *Id.* at ¶ 32.

140. *See id.* at ¶ 29.

141. *Id.* at ch. 6.3.1, ¶ 499.

142. *Id.* at ¶ 513.

143. *See id.* at ch. 5.1, ¶ 170.

144. *Id.* at ch. 6.3.1, ¶ 511.

145. *See id.* at ¶¶ 511, 516.

146. *Id.* at ch. 7.8, ¶ 702.

147. *Id.* at ch. 2, ¶ 83.

148. *Id.*

149. *Id.*

150. *Id.* at ch. 5.1, ¶ 170, ch. 7.8, ¶ 702.

tion to questions put by the Prosecutor regarding their ethnic identity.¹⁵¹ Furthermore, the Rwandan Constitution and laws in place during 1994 referred to Rwandans by their ethnic group.¹⁵² Moreover, customary rules existed in Rwanda which, followed patrilineal lines of heredity in determining membership in an ethnic group.¹⁵³ Lastly, the Tutsis were perceived to be a distinct, separate, stable, and permanent group and were targeted for killing on that basis.¹⁵⁴ Therefore, the Rwandan Tribunal found that the categorization of Hutu, Tutsi and Twa, albeit imposed on the Rwandan people, was embedded in Rwandan culture by the time of the events of Spring 1994. So although the Tutsi and Hutu ethnicities were to some extent a product of choice and perception rather than immutable features, either individually as a group or imposed by an outsider, the Tribunal found that the Tutsis constituted a group that was intended to be protected against genocide.¹⁵⁵

Akayesu's trial on the merits began on January 9, 1997 and was adjourned on March 26, 1998 for deliberation on the judgment by the Chamber.¹⁵⁶ There was a total of sixty days of hearings.¹⁵⁷ The judgment in the Akayesu case was rendered September 2, 1998. The Trial Chamber found Akayesu guilty of genocide, crimes against humanity (extermination, murder, torture, rape, and other inhumane acts), and direct and public incitement to commit genocide.¹⁵⁸

With respect to the allegations of rape and sexual violence, Akayesu was found guilty of genocide and crimes against humanity (rape and other inhumane acts).¹⁵⁹ The Trial Chamber found Akayesu guilty of genocide under Articles 2(2)(a) and (b), killing and inflicting serious bodily and mental harm on members of said group.¹⁶⁰ As a result, the *Akayesu Judgment* is an extremely important decision in the international law on rape and acts of sexual violence in armed conflict as well as in recognizing rape as an act of genocide. The

151. *Id.*

152. *Id.* at ch. 5.1, ¶ 170.

153. *Id.* at ¶ 171.

154. *Id.*

155. See Lori Fisler Damrosch, *Genocide and Ethnic Conflict*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 256, 261 (David Wippman, ed., 1998), wherein Professor Damrosch discusses this idea of what constitutes a national, ethnical, racial or religious group, as such, and explains, using the Kurdish situation in Iraq as illustration, that

[n]onetheless, it would be misleading to view the Genocide Convention as addressed solely to violence against groups defined exclusively on the basis of immutable characteristics such as the color of one's skin. Admittedly, an undertone of this philosophy runs through certain aspects of the *travaux préparatoires* . . . But the protections of the Genocide Convention are not restricted only to groups that are determined by some objective condition or accident of birth. Indeed, the convention protects ethnical groups even though (and perhaps because) ethnicity is to some extent a matter of choices and perceptions rather than immutable features. These choices and perceptions can emanate from individuals and groups, or they can be imposed on individuals and groups by outsiders such as the state."

156. *Akayesu Judgment*, *supra* note 6, at ¶¶ 17, 28.

157. *Id.* at ¶ 28.

158. *Id.* at ch.8.

159. *Id.* at ch. 7.8, ¶¶ 696, 697, 707, 734.

160. *Id.* at ¶ 734.

Akayesu Judgment also substantially contributed to the clarification of the debate about genocidal rape.

VI.

HOW THE INTERNATIONAL TRIBUNAL FOR RWANDA, IN ITS *AKAYESU JUDGMENT* ADDRESSES AND CLARIFIES SOME, IF NOT ALL, OF THE CONCERNS RAISED IN THE DEBATE ABOUT GENOCIDAL RAPE

The *Akayesu Judgment* is the first time that a tribunal has defined rape as a genocidal act. The *Akayesu Judgment* is encouraging because it clarifies the debate about the “overemphasis” on genocidal rape. The International Tribunal for Rwanda recognized: 1) How sex worked to destroy a people; 2) The intersectionality of the “ethnicized” rape and the gendered nature of the crime of genocidal rape; and 3) The subjectivity of the rape victim in the crime of genocidal rape.

First, the Tribunal acknowledged in its *Akayesu Judgment*, through its definition of rape and through its finding that rape can be an *actus reus* of genocide, that it viewed rape, not as simply or purely sexual in nature, but as a tool of war, as a violent act perpetrated against a member of a group with the intent of destroying that group.

Professor Katharine Franke argues in her article, *Putting Sex to Work*,¹⁶¹ that overemphasizing the sexual, (understood as erotic) in certain behavior may result in the occlusion of the way in which sex mediates other social relations of power.¹⁶² Particularly with respect to sex crimes such as rape, Franke regards the treatment of sex-based violence by the Prosecutor of the Yugoslav international criminal tribunal (who is also the Prosecutor of the Rwandan tribunal) as a good example.¹⁶³ According to Franke,

What the . . . Prosecutor has devised, in effect, is a strategy to evaluate on a case-by-case basis what role sex-related violence plays in the context of violations of international humanitarian law, in so far as it “shock[s] the conscience of humankind to such a degree [that it has] an international effect.” Rather than rely upon special laws that isolate rape and/or sexual assault as a privileged kind of injury, the Tribunal’s Prosecutor and judges have chosen to tailor the construction of these crimes to the way in which sex-related violence figures in the physical or mental destruction of a people or person.¹⁶⁴

The International Tribunal for Rwanda in its *Akayesu Judgment* recognized how “sex worked” to destroy a people. By interpreting the enumerated acts of genocide in the Genocide Convention to include acts of rape, the Tribunal acknowledged that “sex” can cause “serious bodily or mental harm” to an individual and that “sex” can kill and be used to destroy a people.

Contrary to the historical definition or characterization of rape—as a wrong against men, against the woman’s husband, father, brother, community, and nation, or even more recently in the Fourth Geneva Convention as an attack on a

161. *Supra* note 7.

162. *Id.* at 1141.

163. *Id.* at 1163-64.

164. *Id.* at 1177.

woman's honor and modesty—the International Tribunal for Rwanda in *Akayesu* “properly” defined rape.¹⁶⁵ It defined rape as a form of aggression.¹⁶⁶ It likened rape to torture and it characterized rape as a violation of personal dignity.¹⁶⁷ It also defined rape as a physical invasion of a sexual nature.¹⁶⁸

In keeping with this definition of rape, the Tribunal first recognized the violent and destructive nature of acts of rape and sexual violence perpetrated against women *qua* women, and found 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. Indeed rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm . . . These rapes resulted in the physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.¹⁶⁹

Accordingly, the International Tribunal for Rwanda demonstrated that it understood how sex, during the 1994 genocidal campaign in Rwanda, worked to destroy a people.

Second, the Tribunal both recognized the intersectionality of the crime of genocidal rape and managed to “surface gender in the midst of genocide.” It recognized that Tutsi women were targeted both because they were Tutsi (and that Hutu women were targeted because they were married to Tutsi men) and because of the beliefs and opinions held by Hutus about Tutsi women *as* women. The Tribunal understood that Tutsi *women* were raped because the Hutu believed them to have been dangled before the Hutus as seductress-spies, enemies of the state—unattainable, inaccessible and sexually intriguing *women* who thought themselves better than Hutu women and who believed themselves to be too good to marry Hutu men. And for that they were targeted on the basis of *both* their ethnicity *and* their gender.¹⁷⁰

Thus, the Tribunal stated:

The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the Chamber was told, for example, that before 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

165. Kalajdzic, *supra* note 3, at 465 (stating that rape is “properly” defined as a “sexual invasion of the body by force, an incursion into the private, personal inner space without consent—in short, an internal assault . . . and a hostile, degrading act of violence.”).

166. *Akayesu Judgment*, *supra* note 6, at ch. 7.7 ¶ 687.

167. *Id.*

168. *Id.* at ¶ 688.

169. *Id.* at ch. 7.8, ¶ 731.

170. SHATTERED LIVES, *supra* note 2, at 2, 16-19.

her on the ground and got on top of her, “let us now see what the vagina of a Tutsi woman takes [sic] like”. As stated above, Akayesu himself, speaking to the Inter-ahamwe who were committing the rapes, said to them: “don’t ever ask against [sic] what a Tutsi woman tastes like”. This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi group—destruction of the spirit, the will to live, and of life itself.¹⁷¹

Lastly, the International Tribunal for Rwanda recognized the subjectivity of the victims of the crime of genocidal rape. It recognized that although the intent of the act of genocidal rape is to destroy a particular group, the effect of the act is the infliction of serious injury and harm, what the Tribunal recognized as possibly one of the worst ways of inflicting harm upon individual Tutsi women, thus advancing the destruction of the entire group.¹⁷²

VII.

CONCLUSION

Rape, although committed in internal and international armed conflicts throughout history, is not explicitly enumerated as a “grave breach” or a war crime in the conventional law of armed conflict. Recently, however, rape has been defined as a crime against humanity. The Genocide Convention does not include rape as one of the listed acts of genocide. However, as evidenced by the events in Bosnia and Rwanda, rape and other acts of sexual violence can be used to commit genocide.

A debate arose around “genocidal rape” in which scholars took opposing positions. One side argued in effect that rape as an act of genocide should not receive special treatment and that it should not be specially denominated. The other side contended that genocidal rape is different from rape that occurs outside of a genocide and that the international community should acknowledge a woman’s gender identity along with her identity as a member of a particular national, ethnic, racial or religious group. Although the Rwandan genocide had occurred at the time that most of the legal scholarship about the debate on genocidal rape had been written, it was not until the *Akayesu Judgment* that there was analysis and discussion of how the mass rapes committed in Rwanda constituted acts of genocide or genocidal rapes. By so analyzing and discussing genocidal rape in the *Akayesu Judgment*, the International Tribunal for Rwanda provides some clarity to the debate about genocidal rape. For example, in finding and defining genocidal rape, the Tribunal recognized how rape and sexual violence worked to destroy the Tutsis. Second, it recognized the intersectionality of genocidal rape. And, lastly, the International Tribunal for Rwanda acknowl-

171. *Akayesu Judgment*, *supra* note 6, at ch. 7.8, ¶ 732.

172. *Id.* at ¶ 733. The tribunal stated the following:

[I]n this respect, it appears clearly to the Chamber that the 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 individual members in the process.

Id.

edged that, although the group is a focal concern of the crime of genocide, genocidal rape is one of the worst ways of inflicting harm and injury on an individual member of that group, here, Tutsi women.

In this respect, the *Akayesu Judgment* (as well as the Nyiramasuhuko case, which hopefully will build upon the *Akayesu Judgment*) is an important addition to the debate about genocidal rape. Hopefully, the *Akayesu Judgment* along with the Nyiramasuhuko case will be instrumental to future cases because they demonstrate the complexity of the issue since oversimplification itself is an assault. Therefore, MacKinnon, who has been viewed at times as a radical voice, had her description of genocidal rape affirmed by the *Akayesu Judgment*.