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Prosecuting Rape as Genocide: An Analysis of the Legal Framework and Challenges in International Law

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Prosecuting Rape as Genocide: An Analysis of the Legal Framework and Challenges in International Law

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Abstract

Rape can be used to annihilate, control, and humiliate populations. Mass rape can have genocidal intent. Yet, thus far, the legal definition of genocide has failed to codify rape. These severe limitations in the definition of genocide create legal impunity and impede the rehabilitation of rape survivors. This failure also results in legal challenges, including the lack of basis to distinguish between rape during war and genocide. This paper seeks to provide readers with sufficient background to understand the legal challenges currently preventing the prosecution of rape as genocide. After presenting this information, the paper details past courts that have successfully been able to prosecute rape as genocide, as well as examples of historical failures to do so. Finally, using the background material and past precedents from cases, this paper will strive to legally distinguish between events that carry the impact of genocidal rape and those that can be prosecuted as such.

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Introduction

During the 3-month Rwandan genocide, soldiers raped between 100,000 to 250,000 women.[1] In the first two weeks of April 2021, there were 400 reports of rape committed by Russian soldiers against Ukrainian civilians.[2] In Myanmar, a UN investigation reported that 52% of Rohingya women were raped or subjected to sexual violence during the genocide.[3] Each of these events has been deemed a genocide, without legal consideration of the role that rape played.

Rape is a ubiquitous weapon of war. Not all rape in war is genocidal, but when systematic rape is used against individuals to intentionally tear apart a community, it conforms to the formal definition of genocide, which occurs when specified acts, including "Causing serious bodily or mental harm to members of the group," are "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[4] And yet, as will be discussed, for a range of reasons, rape is codified in international law only as a crime against an individual, not also against her community. This fails to capture the significance of rape as an instrument of genocide, creates legal impunity against charges of genocide when rape is used in this way, minimizes the

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[1] Sara Meger, "Sexual Violence as an Element of Genocide," in *Rape Loot Pillage: The Political Economy of Sexual Violence in Armed Conflict Rape Loot Pillage: The Political Economy of Sexual Violence in Armed Conflict* (Oxford Academic, 2016), 115–37.
[2] Mia Jankowicz, "Ukraine Says It Received More than 400 Reports of Sexual Violence, Including Rape, by Russian Soldiers within 2 Weeks," *Business Insider*, April 27, 2022, https://www.businessinsider.com/ukraine-says-400-sexual-violence-rape-cases-russia-troops-2022-4.
[3] Christa Stewart, "With Rape and Violence Rife, Where Is Justice for Rohingya Women?," March 8, 2018, https://www.fairobserver.com/region/asia_pacific/rohingya-genocide-rape-crimes-against-humanity-myanmar-asia-pacific-news-15200/.
[4] "Convention on the Prevention and Punishment of the Crime of Genocide" (United Nations, January 12, 1951).

suffering of women from this tactic, suggests that each individual woman's rape is an individual assault, even when rape is used systematically against her community, and thus represents a failure of international law. This also renders international law unprepared to confront an instance in which only mass rape, and no other tactics of genocide, is used to annihilate a population. The lack of prosecution also limits the action that international and domestic courts can take against perpetrators, setting a precedent that legal systems do not take rape seriously and worsening the long-term impacts of rape against women.

This paper will be organized as follows: the subsequent chapter will provide the necessary background to understand the developments of rape in international law and genocide, respectively. The third chapter will consider the prior scholarly arguments for the inclusion of rape as a form of genocide and its counterarguments. The fourth chapter will analyze prosecutions at former international tribunals for the Bosnian and Rwandan genocides, during which rape and genocide were considered separately, then in conjunction. The fifth chapter will analyze similar prosecutions at courts established after the ICTY and ICTR. The sixth chapter will distinguish between events of rape as an instrument of war compared to genocide. Last, this thesis will conclude with modern-day examples of rape as a weapon of genocide to exemplify that this is a long-lasting issue that must be addressed.

Chapter I: Background

Rape and International Law

Rape is now recognized as a violation of international humanitarian law (IHL) and international criminal law (ICL). However, rape has long been dismissed as a private event, an individual crime, even when committed systematically during war. Military commanders and civilian leaders, almost entirely men, have long tended to consider rape an inevitability and minimized its significance. The Encyclopedia Britannica's entry on rape as a weapon of war states, starkly: "The rape of women by soldiers during wartime has occurred throughout history. Indeed, rape was long considered an unfortunate but inevitable accompaniment of war—the result of the prolonged sexual deprivation of troops and insufficient military discipline."[5] Dismissing rape as a private incident failed to criminalize it and change patriarchal norms.

The first codified criminalization of rape occurred during the American Civil War. President Abraham Lincoln enacted the Lieber Code, which prohibited the use of rape during conflict and was the first legal codification of rape.[6] The Lieber Code subsequently informed Article 46 of the Fourth Hague Convention of 1907, which states that "family honour and rights [...] must be respected."[7] The phrase "family honour" indirectly refers to rape and alludes to the protection of women.[8] The ambiguous

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[5] Anne Barstow, "Rape as a Weapon of War," in *Encyclopedia Britannica*, n.d.
[6] Crystal Feimster, "Rape and Justice in the Civil War," *New York Times*, April 25, 2013, https://archive.nytimes.com/opinionator.blogs.nytimes.com/2013/04/25/rape-and-justice-in-the-civil-war/.
[7] Howard S Levie, ed., "1907 HAGUE CONVENTION IV WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND (WITH ANNEXED REGULATIONS) (18 October 1907)," n.d.
[8] Ibid.

language seeks to protect women without directly acknowledging that women face disproportionate danger during war. By placing a woman's societal position in the context of her family, this initial prohibition of rape already undermines her autonomy. Women are considered proxies for male relatives, so referring to a woman's suffering as associated with "family honor" allows her suffering to be easily packaged for men to accept.

After World War II, France, the Soviet Union, the United Kingdom, and the United States established a supranational court that incorporated several countries' legal systems called the International Military Tribunal of Nuremberg, Germany to prosecute Nazis.[9] These prosecutions presided over determinations of guilt for the egregious crimes committed during World War II. The Nuremberg Principles created the basis for crimes against peace, crimes against humanity, and war crimes.[10] However, the Principles fail to mention rape or sexual violence in the prosecutorial standards for the four crimes despite the systematic use of rape during the war. Encyclopedia Britannica describes the use of rape as "gruesome," since "both Allied and Axis armies committed rape as a means of terrorizing enemy civilian populations and demoralizing enemy troops."[11] The second international tribunal for World War II was the International Military Tribunal for the Far East, which tried personnel directly involved in the infamous Rape of Nanjing. Although

[9] Judge Philippe Kirsch, "Applying the Principles of Nuremberg in the ICC" (Keynote Address at the Conference "Judgment at Nuremberg" held on the 60th Anniversary of the Nuremberg Judgment, Washington University, St. Louis, September 30, 2006).
[10] "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" (1950).
[11] Barstow, "Rape as a Weapon of War."

rape was considered a crime committed by higher-ranked military commanders, it was not considered in prosecution.[12]

After these tribunals, it would take another five years before rape was codified. In the Article 27 of the Geneva Convention of 1949, rape was formally criminalized in the terms: "women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."[13] Article 27's phrasing reified that rape was associated with a woman's honor rather than a "physical violation of a person;" this is "a patriarchal understanding of the crime that fails to take into account the physical integrity of a woman as a person."[14] Additionally, violations of these conventions are considered war crimes and can be prosecuted as such, but they are focused on individual crimes, rather than crimes against communities.

By the early 1990s, IHL had explicitly prohibited the infliction of sexual violence during international armed conflict.[15] This led to more national and international courts undertaking the prosecution of sexual violence. In the 1990s, the Bosnian and Rwandan genocides unfolded and received significant attention. The international community was adamant that courts with jurisdiction over these grave crimes should be established. In response, the United Nations Security Council created ad hoc tribunals to prosecute the

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[12] Ibid.
[13] "THE GENEVA CONVENTIONS OF 12 AUGUST 1949" (1949).
[14] Lika Gegenava, "The Evolution of the Legal Definition of Rape," Columbia Undergraduate Law Review, August 22, 2021, https://www.culawreview.org/journal/the-evolution-of-the-legal-definition-of-rape.
[15] Gloria Gaggioli, "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law," *International Review of the Red Cross* 96, no. 894 (2014): 503.

crimes that were committed in each country.[16] In 1995, the UNSC enacted Resolution 808/827 that established the International Criminal Tribunal of the former Yugoslavia.[17] However, there was no criminal statute for the court to act in accordance with; this was left to be determined by the UN Secretary-General, who encouraged governments and international human rights organizations to submit proposals for draft statutes.[18] Therefore, this was a unique opportunity to shape international law and set a precedent for future prosecutions, including the prosecution of rape as a war crime, a crime against humanity, and as genocide.

While the proceedings at these ad hoc tribunals were underway, the UN continued the process to convene a conference to implement the Rome Statute to establish an international court with constant jurisdiction over the crimes. In 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court created the Rome Statute of the International Criminal Court.[19] The Rome Statute officially established the ICC as a permanent institution that "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern."[20] This document also declared that the court shall have power to prosecute

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[16] "UN International Law Documentation: Courts & Tribunals," United Nations: Dag Hammarskjöld Library (United Nations. Dag Hammarskjöld Library), accessed April 20, 2023, https://research.un.org/en/docs/law/courts.
[17] Daniela de Vito, Aisha Gill, and Damien Short, "Rape Characterised as Genocide," *International Journal of Human Rights* 6, no. 10 (June 2009): 29–53.
[18] de Vito, Gill, and Short.
[19] "Rome Statute of the International Criminal Court and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court," vol. 1 (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome: United Nations, 2002).
[20] Ibid.

genocide, crimes against humanity, war crimes, and crimes of aggression. In the Rome Statute, rape is declared an *actus reus*, that is, a constituent element, of crimes against humanity and war crimes.[21] This formal declaration of rape under international law was an unprecedented step towards ensuring women's rights are protected and codified.

IHL and ICL have made great strides towards implementing rape into international law; however, there are still difficulties in proving rape as a crime during war, much less as genocide. The first issue is in the inability to identify a physical perpetrator; the second and more critical in cases of genocide, is the inability to charge whoever who had indirect responsibility for the crime, that is, the officer or leader who allowed or even encouraged the systematic commission such crimes. The ad hoc tribunals of Rwanda and Yugoslavia distinguished this concept of direct and indirect responsibility.[22] Courts could prosecute direct perpetrators of rape as well as individuals who were responsible for employing rape as a strategy.

Recent prosecutions have put forth a new perspective on prosecuting rape as a crime. Therefore, as courts are more willing to challenge patriarchal norms, now is the time to implement rape as an act of genocide. Article II of the Genocide Convention states:

> "Genocide 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;

[21] "Rome Statute of the International Criminal Court and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court."
[22] "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia" (1993).

(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."[23]

Genocide has two main thresholds that must be proven for prosecution: *the actus reus* and the *mens rea*. The *actus reus* is the physical element, which constitutes the acts that occurred for the event to be considered genocide.[24] The *mens rea* is the mental element, which is the intent of the act.[25] The *actus reus* of genocide is governed by the five subsections of Article II in the Genocide Convention. These criminal acts require proof of the act and proof of the result.[26] To prosecute rape as genocide, an individual must contribute to specific acts while having specific intent. That is, the target of destruction must be a group, or even a part of a group, but not its individual members. The *mens rea* is the most difficult component to prove in genocide in general and, specifically, when rape is used as a means of genocide.

Importantly, every crime has an intent, a *mens rea,* but genocide has a *dolus specialis,* or special intent, making genocide a unique crime.[27] For a crime to be considered genocide, the victims need to be targeted because they are a member, or the perceived member, of one of the four protected groups (national, ethnic, racial or religious), and they must be targeted with the intent to destroy the group. In the

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[23] "Convention on the Prevention and Punishment of the Crime of Genocide."
[24] William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2009), 176.
[25] William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2009).
[26] Schabas, 176.
[27] "Genocide," United Nations Office on Genocide Prevention and the Responsibility to Protect, n.d., https://www.un.org/en/genocideprevention/genocide.shtml.

prosecution of genocide, the *dolus specialis* has a high burden of proof.[28] Prosecutors must use evidence, including testimonies and official documents, to prove the *dolus specialis*.[29] Prosecuting genocide comes with unique challenges that pertain to providing sufficient, undeniable evidence of an individual's mental state, or *dolus specialis*.

Conceptualization of "Genocide"

Genocide was initially defined by Raphael Lemkin, a Polish lawyer. It has been discussed, negotiated, and codified as including a number of physical components used to achieve the outcome of annihilating the existence of an entire group.[30] Lemkins' intentions, while coining the term, matter a great deal to the failure of international law, thus far, to include rape as a means of genocide. By 1933, Lemkin had seen two tragedies unfold where marginalized individuals were targeted for being members of that population: the Armenian genocide and the beginnings of the Holocaust.[31] After realizing Hitler's objectives, and given his own concern over the failure to prosecute the Ottoman leaders responsible for the Armenian genocide, Lemkin was inspired to coin a term that defined this unique mass atrocity.[32] He thought that the solution to preventing the annihilation of populations was through international law. Initially, he suggested the

[28] William Schabas, "The Mental Element or Mens Rea of Genocide," in *Genocide in International Law* (Cambridge University Press, 2009), 260.
[29] Ibid.
[30] "Convention on the Prevention and Punishment of the Crime of Genocide."
[31]"RAPHAEL LEMKIN: A Brief Biographical Sketch" (Pacific Lutheran University, n.d.), https://www.plu.edu/social-sciences/wp-content/uploads/sites/55/2015/12/lemkin-bio.pdf.
[32] Ibid.

terms “barbarism” and “vandalism” as new international crimes.[33] Barbarism was the persecution of any ethnic, social, or religious group; vandalism was the destruction of the art and culture of a particular group.[34] Lemkin proposed an internationally binding document that codified barbarism and vandalism at the 1933 League of Nations Fifth International Conference but was promptly rejected.[35] This was Lemkin’s first attempt at creating a universal standard prohibiting these kinds of mass atrocities. At the core of these concepts was a nefarious crime that targeted a particular marginalized nationality with the greater purpose and intention, or *mens rea*, of destruction.

Lemkin then introduced the neologism “genocide.” In 1944, Lemkin published his book *Axis Rule in Occupied Europe,* where the term genocide first appeared.[36] Genocide was a revolutionary word because it explained a tragic phenomenon that has occurred throughout history yet remained nameless. Lemkin derived the term from the Greek word *genos* for race, family, or tribe, and the Latin word *cide* for kill.[37] His definition expanded beyond the physical annihilation of a population; he explained that there was a social process of destroying a population. This social process meant that genocide did not have to be quick nor violent; its objective could be to spur “the disintegration of the political and social institutions [..] and the destruction of the personal security, liberty, health,

[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] “Genocide.”
[37] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, 1944), 81.

dignity, and even the lives of the individuals belonging to such groups."[38] Lemkin described how individuals could be targeted through attacks on personal health and freedom, indicating the breadth of the acts that could constitute genocide. The key is that genocide targets the individual as well as the group; therefore, seeks to simultaneously bolster individual and group rights.[39] He defined genocide as having two phases: "the destruction of the national pattern of the oppressed group" and "the imposition of the national pattern of the oppressor."[40] Herein lies Lemkin's argument that destroying the social relations and order of a group constitutes a genocidal event.[41] In these two phases, Lemkin mentions this "national pattern," which does not necessarily have to be killing. Thus, genocide seeks to define the targeting of the social processes of a particular group, which can take forms beyond killing.

In 1946, the United Nations first recognized genocide as a crime under international law in resolution A/RES/96-1.[42] This resolution recognized the precedent set by the Nuremberg Trials and represented the first introduction of genocide into the international legal system. Finally, genocide was formally codified in the 1948 Convention on the Prevention of Punishment and the Crime of Genocide. [43] The definition evolved through a process of negotiation between states such that the scope of

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[38] Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, 81 and 82.
[39]de Vito, Gill, and Short, "Rape Characterised as Genocide.""
[40] Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, 79.
[41] Mohammed Abed, "CLARIFYING THE CONCEPT OF GENOCIDE," *Metaphilosophy* 37, no. 3/4 (2006): 308–30.
[42] "The Crime of Genocide," Resolution (General Assembly: United Nations, 1946).
[43] "Convention on the Prevention and Punishment of the Crime of Genocide."

the legal definition of genocide is now far narrower than Lemkin initially intended.[44] In Lemkin's theorization, genocide was a vast concept that described how marginalized nationalities were targeted through the destruction of their social processes. Lemkin's definition thus included several acts that could constitute genocidal intent, which the legal definition of genocide now fails to include. Though Lemkin's initial conception of the term was admittedly vague, the legal one is arguably too constrained, creating discontinuity between acts that can aggregate to genocide and the acts that can be prosecuted as such. This is a particular issue when actions that should constitute genocide have not formally been declared a codified act of genocide.

Coexistence of Rape as Genocide and as a Crime against Humanity

Alongside genocide, a crime against humanity is a universally recognized grave crime. Crimes against humanity initially gained prominence through the Nuremberg Charter with no record of where the term originated.[45] Robert Jackson, the chief U.S prosecutor for Nuremberg, and Hersch Lauterpacht, a British lawyer, allegedly selected the term in collaboration.[46] The Nuremberg Charter asserts that the term "humanity" refers to humanness requiring protection from the nature of mankind.[47] The modern-day, codified definition, per the Rome Statute, states:

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[44] Mark Drumbl, "Genocide: The Choppy Journey to Codification," in *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Torkel Opshal, 2018), 609–36.
[45] David Luban, "A Theory of Crimes Against Humanity," *Georgetown Law* 29 (2004): 85–167.
[46] Ibid.
[47] Ibid.

> "For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[48]

Compared to the definition of genocide, the acts that can constitute a crime against humanity are far broader. Crimes against humanity also require a lower threshold of evidence to prosecute, as the individual need not have a *dolus specialis* when committing the crime. Lauterpacht encouraged the use of the term because he was concerned that genocide would fail to protect individuals, instead subsuming them into a larger group.[49] Therefore, there existed a tension between Lauterpacht and Lemkin,

[48] "Rome Statute of the International Criminal Court and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court."
[49] Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity."*

which has bred contrast between the terms of crimes against humanity and genocide.[50] However, early conflicts have demonstrated that genocide and crimes against humanity can coexist, hence protecting the group and its constituent individuals. The Armenian Genocide is an example of this coexistence.[51]

The Armenian genocide was a particularly unique event in the 20th century because it fulfilled many of the legal thresholds for both crimes against humanity and genocide but was declared as both ex post facto. From 1915 to 1917, between 200,000 to 800,000 Armenian civilians were massacred in Turkey.[52] At the onset of the genocide, France, Great Britain, and Russia issued a declaration to condemn the Ottoman Empire for its actions against the Armenians, referring to the events as "new crimes against humanity and civilization."[53] This was the first mention of crimes against humanity in modern history. In 1919, at the Paris Peace Conference, the Inter-Allied Commission sought to prosecute the Ottoman officials under the 1907 Hague Convention's "laws of humanity."[54] The Commission proposed adopting a new category of war crimes and invoked this concept of humanity.[55] In March 2019, the Commission released a report specifying particular violations of international law that the Turks committed, including:

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[50] Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (Vintage Books, 2017).
[51] Luban, "A Theory of Crimes Against Humanity."
[52] Mahmoud Cherif Bassiouni, "Legal Nature," in *Crimes against Humanity* (Cambridge University Press, 2011), 1.
[53] Vahakn N Dadrian, "The Armenian Genocide: Review of Its Historical, Political, and Legal Aspects," n.d., 178.
[54] Cherif Bassiouni, "Legal Nature," 2.
[55] Aran Kuyumjian, "The Armenian Genocide: International Legal and Political Avenues for Turkey's Responsibility," *Revue de Droit de l'Université de Sherbrooke* 41, no. 2 (2011): 256.

> "systematic terror, murders and massacres, dishonoring of women, confiscation of private property, pillage, seizing of goods belonging to the communities, educational establishments, and charities; arbitrary destruction of public and private goods; deportation and forced labor; execution of civilians under false allegations of war crimes; and violations against civilians and military personnel."[56]

This list of crimes encompasses the initial formulations of crimes against humanity in international law. Even though the Paris Conference began to explore new principles of international law, the Allied powers lacked sufficient will to prosecute the perpetrators of the massacre.[57] Therefore, Ottoman leaders were not held culpable for the crimes they committed against Armenian Christians. The Armenian massacre represents the first invocation of crimes against humanity.

The massacre was also declared a genocide, ex post facto. Once the definition of genocide was codified, international human rights lawyers and the UN reflected on the Armenian massacre and declared it a genocide in 1985.[58] They deemed that the *actus reus* and *dolus specialis* of genocide had been fulfilled. Ironically, part of the rationale for this recognition had to do with the extensive use of rape against Armenian women. [59] Leslie Davis, an American diplomat, described genocidal events in his memoir. Davis' assistant took him to a site where he "witnessed the naked corpses of women that had been violated to death. The remaining surviving women were forced into harems, were

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[56] V. N. DADRIAN in Kuyumjian, "The Armenian Genocide: International Legal and Political Avenues for Turkey's Responsibility," 256.
[57] Kuyumjian, 268.
[58] Kuyumjian, 272.
[59] Jeremiah Harrelson, "Genocide and the Rape of Armenia," *University of St. Thomas Journal of Law and Public Policy* 4, no. 2 (Spring 2010): 163–80.

raped, and forced to bear the children of their Muslim aggressors."[60] The Turks would systematically kill the men and then subject the women to torture and rape.[61] These events sought to intentionally annihilate a group, which fulfills the physical and mental elements of genocide. Additionally, forcibly impregnating women so they would give birth to Ottoman children further fulfills particular intent of annihilating a group through rape. Yet the determination of genocide was made based on the sheer number of individuals killed, as this was considered sufficient evidence for genocide's special intent requirement.[62] The rapes and other abuses were not formally considered in the designation. Regardless, the Armenian Genocide is a case study of the first event in modern history that was declared both a genocide and crime against humanity. Often, when an event is declared genocide, the acts that occur can be declared crimes against humanity, as crimes against humanity transpire during a genocide.[63]

[60] Kuyumjian, "The Armenian Genocide: International Legal and Political Avenues for Turkey's Responsibility," 275.
[61] Harrelson, "Genocide and the Rape of Armenia."
[62] Kuyumjian, "The Armenian Genocide: International Legal and Political Avenues for Turkey's Responsibility," 278.
[63] Kuyumjian, 253.

Chapter II: Literature Review

Rejecting Rape as Genocide

There is a genre of academic literature that criticizes the conceptualization of rape as an act of genocide, claiming that classifying rape as genocide fails to bolster individual women's rights. For example, Rhonda Copelon, a human rights lawyer, believes that classifying rape under genocide diminishes the act of rape against an individual woman. She writes that "the elision of rape and genocide in the focus on 'genocidal rape'" is "dangerous."[64] Copelon further explains that rape is only a cause for concern during genocide, hence considering rape as an act of genocide will deny concern for rape beyond genocidal violence.[65] She asserts that "rape is a sexualized violence that seeks to destroy a woman based on her identity as a woman."[66] She fears that, by including rape as an act of genocide, society will fail to adequately understand the nefariousness of rape, diminishing the experiences of women who face this crime. In addition, she believes that this will impact the understanding of rapes that occur outside of genocide. She believes that women will become "objects of genocide," which will "[mask] the experiences and injuries that women as individuals undergo and sustain."[67] Hence, women would then be

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[64] Rhonda Copelon, "Gendered War Crimes: Reconceptualizing Rape in Time of War," in *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, 1995), 199.
[65] Rhonda Copelon, "Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law," *Hastings Women's Law Journal* 5, no. 2 (June 1, 1994): 246, : https://repository.uchastings.edu/hwlj/vol5/iss2/4.
[66] Copelon, "Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law," 246.
[67] Psymhe Wadud, "Symposium on Bangladesh Genocide and International Law: Genocidal Rape and Intersectional Harms," *Cambridge International Law Journal* (blog), May 26, 2022, http://cilj.co.uk/2022/05/26/symposium-on-bangladesh-genocide-and-international-law-rape-as-an-actus-reus/.

further marginalized and silenced, reducing them to members of a particular group rather than autonomous individuals.

Copelon's arguments consider the broader concept of an individual's autonomy, specifically an individual who was raped. Rape has prior been considered a crime against an individual, while genocide is a crime that was committed against a group.[68] Hence, there is a disconnect between the conceptualizations of genocide and rape that have prevented them from coexisting thus far. If rape is to be subsumed under genocide, Daniela De Vito writes, "this area of accommodation can never involve an equal share of the space, for genocide will always need to occupy the majority of the surface area as its key concern is the survival of human groups."[69] Hence, some scholars believe that, due to the individual component of rape, rape and genocide should not be considered in conjunction with genocide. The survivor herself may find this association to be of concern. However, Copelon does eventually concede that "from the standpoint of [the survivors, rape and genocide] are inseparable."[70]

Rosalind Dixon, a legal scholar, defends the omission of rape as genocide during the Kunarac judgment at the International Criminal Tribunal of Yugoslavia. She argues that classifying rape as a means of genocide fails to consider how the woman's own community isolates her after her rape.[71] The woman is harmed by the opposing

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[68] Daniela De Vito, "Rape as Genocide: The Group/Individual Schism," *Human Rights Review* 9361–378 (2008): 364.
[69] Ibid.
[70] Charli Carpenter, "Surfacing Children: Limitations of Genocidal Rape Discourse," *Human Rights Quarterly* 22, no. 2 (May 2000): 437.
[71] Rosalind Dixon, "Rape as a Crime in International Humanitarian Law: Where to From Here?," *European Journal of International Law* 13, no. 3 (2002): 703.

community and her own, which fails to be adequately understood if rape and genocide are considered in conjunction. International law has yet to reconcile the violence against women at the hands of her community, and including sexual violence in indictments of crimes against humanity and war crimes fails to adequately assess this second level of victimization, according to Dixon.[72]

Arguing Rape as Genocide

However, other scholars contend that rape during genocide targets an intersectionality of identities. Hence, rape should be conceptualized as an element of genocide to understand the complexities of this intersectional targeting. The terms "tactical rape" and "strategic rape" have long been discussed by feminist scholars.[73] These terms consider rape that has been used to terrorize and punish enemy populations during war. Since military culture is particularly dominated by masculinity, men seek to assert their strength by diminishing femininity through rape.[74] During armed conflict, tactical rape be used as a means of forced impregnation[75], psychological warfare, and humiliation.[76] Tactical or strategic rape is often used during large-scale military campaigns, including incidents of ethnic cleansing.

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[72] Dixon, 704.
[73] Janet Benshoof, "The Other Red Line: The Use of Rape as an Unlawful Tactic of Warfare," *Global Policy Volume* 5, no. 2 (May 2014): 146–58.
[74] Ibid.
[75] Note: Forced impregnation is contentiously considered as an act of genocide. However, there is concern that classifying forced impregnation as an affront to women undermines the rights of the children borne from rape. This paper will not address this sub-argument.
[76] Benshoof, "The Other Red Line: The Use of Rape as an Unlawful Tactic of Warfare."

There are a few main views on conceptualizing rape as genocide, but this literature review will explore rape during ethnic violence as an initial framework. Akbar Ahmed argues that rape results in the woman being "twice punished: by the brutality of the act and by the horror of her family."[77] He asserts that "rape as a fine line divides one group from the other; the state, through its forces, becomes the rapist, raping its own citizens."[78] Ahmed asserts that rape has a particular cultural and political meaning that exposes its survivor to a unique vulnerability. Hence, this places women in a position of powerlessness, which is its intent.

Similarly, Arjun Appardurai, an American anthropologist, explains that:

> "Rape [during ethnic violence] is not only tied up with special understandings of honor and shame, and a possible effort to abuse the actual organs of sexual (and thus ethnic) reproduction, but is additionally the most violent form of penetration, investigation, and exploration of the body of the enemy.[79]

Appardurai's analysis of rape expands to an understanding of the "penis in ethnocidal rape [...] as an instrument of degradation, of purification, and of a grotesque form of intimacy with the ethnic order."[80] Rape, as a tool of ethnic violence, has an intimacy that targets a woman by reifying her physical powerlessness. Thus, the woman's sexual organ becomes a proxy for the community and its inability to protect itself. Concepts of society's motherhood and honor are violated through the act of rape, rendering the

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[77] Akbar Ahmed, "'Ethnic Cleansing:' A Metaphor for Our Time," in *Genocide: An Anthropological Reader* (Blackwell Publishers, 2002), 226.
[78] Ibid.
[79] Arjun Appadurai, "Dead Certainty: Ethnic Violence in the Era of Globalization," in *Genocide: An Anthropological Reader* (Blackwell Publishers, 2002), 295.
[80] Ibid.

community helpless. These scholars argue that rape has power in ethnic violence, but these arguments, in conjunction with others, expand to rape as a weapon of genocide.

Beverly Allen wrote about "genocidal rape" in her 1996 book, *Rape Warfare*. She coined the term to describe the actions of the Serbian armed forces who used rape as an intentional genocidal policy against Bosniak women during the Bosnian genocide.[81] This is also the first time that rape and genocide began to be considered jointly. Her conceptualization of "genocidal rape" posits that the "Serb policy [erased] the victim's cultural identity and [treated] her as nothing more than a kind of biological box" during the Bosnian genocide.[82] Women are considered a man's possession, therefore a woman's rape is perceived as an affront to the men in her vicinity, instead of the woman.[83] Rape is seldom centered around the woman – when speaking about rape survivors the language is usually "she was raped" rather than "a man raped her." The passive voice enables the perception of a woman being a man's possession and, thus, rendering the woman a reproductive vessel. Therefore, rape during war is considered a weapon against men who seek to harm one another by using the woman's body, which is inherently patriarchal. There emerges the crucial reason for codifying genocidal rape. The international community must emphasize a woman's autonomy and shift the burden of acquiring justice away from individual survivors.

Robin May Schott writes about the three conceptualizations of rape as a weapon of genocide in her article "'What is Sex Doing in Genocide? A Feminist Philosophical

[81] Beverly Allen, *Rape Warfare* (University of Minnesota Press, 1996), 63.
[82] Allen, 87.
[83] Allen, 96.

Response."[84] She explains that first, there is the theory that sexual violence is akin to any other physical act of genocide.[85] Second, "sexual violence is a coordinate of genocide," positing that understanding sexual violence during genocide is vital in understanding the female experience.[86] Third, sexual violence is an integral weapon during genocide.[87] Each theory posits that rape should be considered during genocide prosecution, but the nuances shift the purpose of rape in the conflict.

Martin Shaw and James E Walker argue that rape is a tool used to perform a larger goal.[88] During a "Genocide: Contemporary philosophical and sociological perspectives" workshop, Shaw asserted that "genocide seeks out all vulnerabilities' and sexual violence may be a form of vulnerability in a specific context."[89] In his book *What is Genocide*, Shaw further explains that the omission of rape in the Genocide Convention was a function of "the inability of mid-century male authorities to recognize the significance of genocide for violence against women."[90] Part d of Article II of the Genocide Convention prohibits "imposing measures intended to prevent births in the group.[91] Hence, the writers of the Convention were aware of the inherently gendered

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[84] Robin May Schott, "'What Is the Sex Doing in the Genocide?' A Feminist Philosophical Response," *European Journal of Women's Studies* 22, no. 4 (2015): 397–411.
[85] Schott, 398.
[86] Ibid.
[87] Ibid.
[88] Bailey Fairbanks, "Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda," *Historical Perspectives: Santa Clara University Undergraduate Journal of History* 23, no. 13 (n.d.): 2019.
[89] Shaw in Schott, "'What Is the Sex Doing in the Genocide?' A Feminist Philosophical Response," 400.
[90] Martin Shaw, *What Is Genocide*, Second (Polity, 2015), 42.
[91] "Convention on the Prevention and Punishment of the Crime of Genocide."

nature of violence that occurs during genocide.[92] However, they failed to include rape as a physical element of genocide itself, failing to acknowledge the nature of gendered crimes and separate the woman from her role as a child-bearer.

Catharine A. MacKinnon and Kelly Dawn Askin provide an argument for genocidal rape that most successfully contributes to the prosecution and codification of rape as a weapon of genocide. They proclaim that rape is intrinsic to genocide, in alignment with Schott's third point.[93] MacKinnon asserts that rape is genocidal and can often be more detrimental than other acts of genocide.[94] In her analysis, she explains that the investigation of rape as a weapon of genocide will not minimize the traumatic impact of other sexual assaults, instead, it is scrutinizing a commonly used strategy during genocide.[95] Mackinnon writes that:

> "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 to be seen and heard and watched and told to others: rape as a spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide."[96]

Systematic rape during genocide has a specific intent and outcome that seeks to annihilate a population. MacKinnon extends her argument to consider genocide prosecution, acknowledging that international law's understanding of rape changes after every trial.[97] As a result, MacKinnon's description of rape as genocide was used in the

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[92] Shaw, *What Is Genocide*, 42.
[93] Shaw, *What Is Genocide*, 42.
[94] Ibid.
[95] Ibid.
[96] Catharine MacKinnon, "Rape, Genocide, and Women's Human Rights," in *Genocide and Human Rights* (Routledge, 2007), 11.
[97] de Vito, Gill, and Short, "Rape Characterised as Genocide."

judgement during the landmark trial at the International Criminal Tribunal of Rwanda trial where prosecutors charged an individual with rape as an act of genocide.[98]

Mackinnon's argument can be applied to three legally declared genocides: the Holocaust, the Bosnian genocide, and the Rwandan genocide. During the Holocaust, rape was not used on a systemic level, instead, it was used on an ad hoc and opportunistic basis.[99] Zoe Waxman states that "in the Holocaust, rape was not absent but neither was it endemic, much less a key instrument of genocide."[100] Individual soldiers would rape women and humiliate them by forcing them to remove their clothing before entering concentration camps.[101] Men, who rape during genocide, rape to destroy members of a particular group, not because of individual, or opportunistic, desire.[102] The use of rape during the Holocaust was not on a systemic level to destroy the group, hence, given the available evidence, rape could not have been prosecuted as a physical element of genocide.

In contrast, top-ranking military commanders encouraged the use of rape during the Bosnian genocide. Women were forced into rape camps where they were held until they were impregnated.[103] One woman stated that she was held in a rape camp with 1,800 women.[104] She was given a number, and when the military officers called her number,

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[98] Fairbanks, "Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda," 112.
[99] Zoe Waxman, "An Exceptional Genocide?," in *Genocide and Gender in the Twentieth Century* (Bloomsbury, 2015), 109.
[100] Waxman, 108.
[101] Waxman, 109.
[102] Ibid.
[103] Dorothy Thomas and Regan Ralph, "Rape in War: Challenging the Tradition of Impunity," *The Johns Hopkins University Press*, 1994.
[104] Waxman, "An Exceptional Genocide?," 113.

she would have to follow them, and they would rape her.[105] Women were then denied abortions and forced to give birth to children who would be ostracized from society because their patrilineal descent labelled them as Serbian.[106] The intent of this strategy was to destroy Muslim communities and ensure they flee.[107] During the Bosnian genocide, rape was a military initiative during which Bosnian Serb nationalists would repeatedly rape non-Serbian women.[108] This strategy fulfills the *dolus specialis* of genocide, as it was used in conjunction with military action of ethnic cleansing.

Similar to Bosnia, in Rwanda, rape was used as a strategy to annihilate the Tutsi population. The Hutu extremists targeted the minority Tutsi population and used rape as a means of destruction. Women were raped by the *Interahamwe*, civilians, and soldiers of the Rwanda Armed Forces (FAR).[109] There were explicit military commands to terrorize the Tutsis by raping women.[110] The violent nature of the rapes prevented Tutsi women from giving birth in the future, as women were raped with spears and sharp objects.[111] The *Interahamwe* was also responsible for brutal acts of dehumanization against women, including mutilating women's breasts and vaginas, pouring acid on women's vaginas, and cutting open a pregnant woman's womb.[112] These acts consisted of undeniable special intent to destroy a population through rape, as women became proxies for the

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[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Binaifer Nowrojee, Dorothy Thomas, and Janet Fleischman, *Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath* (New York: Human Rights Watch, 1996).
[110] Ibid.
[111] Ibid.
[112] Ibid.

Tutsi community and its suffering. This paper will next further explore the military tribunals borne out of the Bosnian and Rwandan genocides.

Chapter III: Prosecutions at the ICTY and ICTR

This chapter discusses the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), which were ad hoc criminal courts that were established in the aftermath of 1990s' genocides. Both courts considered landmark cases that were essential in moving international criminal law (ICL) forward. The ICTY was significant because it deliberated on several genocide cases and was the first court to charge rape as a crime against humanity. The ICTR, which was established a few years later, also considered several cases of genocide and was the first to prosecute a case of rape as an act of genocide. This chapter will provide details on each of these cases and consider their influence on the creation of the Rome Statute and the codification of rape in ICL.

Both the ICTR and ICTY set the necessary precedents for the prosecution of genocide, war crimes, and crimes against humanity, as well as defining which acts could be considered the physical acts of each crime. There are a few notable cases from the ICTR and ICTY that this chapter will outline.

Introduction to the ICTY

The Bosnian war lasted from 1992-1995 during which time over 100,000 people were killed.[113] During the collapse of Yugoslavia, after the Cold War, several ethnic groups began fragmenting, and Bosnia was recognized as an independent state by the

[113] Hanna Duggal, "Infographic: 30 Years since the Bosnian War," n.d., https://www.aljazeera.com/news/2022/4/6/infographic-30-years-since-the-bosnia-war-interactive.

United States and the European Economic Community in April 1992.[114] From then, Bosnian Serbs began their attacks on Bosnian Croats and Bosnian Muslims (Bosniaks), backed by forces from the newly formed Republic of Serbia. From 1992 to 1995, the troops killed 11,000 people in Sarajevo alone.[115] The Serbian forces predominantly targeted Bosniak Muslims, attempting to ethnically cleanse the population and using brutal methods. As described in the previous chapter, women and girls were forcibly impregnated, thrown into rape camps and brothels, and were systematically raped.[116]

In 1993, UN Security Council Resolutions 808 and 827 established the ICTY to prosecute war crimes that occurred during the conflict in the Balkans.[117] This was the first international tribunal since the Nuremberg and Tokyo trials and sought to further codify international norms to prosecute grave crimes. Resolution 827 stipulated that the Tribunal's judiciary should propose the Rules and Procedures based on suggestions they received from states.[118] The Tribunal set its Rules of Procedure and Evidence in February 1994.[119] The court adopted a largely common law approach, which is espoused by Anglo-American states.[120] Since a similar legal system was employed in the Nuremberg trials, lawyers believed that maintaining these procedures would ensure continuity in ICL.[121]

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[114] Ibid.
[115] Sumantra Bose, "Bosnia - Herzegovina," in *Encyclopedia Princetoniensis*, accessed April 21, 2023, https://pesd.princeton.edu/node/201.
[116] Thomas and Ralph, "Rape in War: Challenging the Tradition of Impunity."
[117] "About the ICTY," International Criminal Tribunal for the former Yugoslavia, accessed April 21, 2023, https://www.icty.org/en/about.
[118] "The Practical Guide to Humanitarian Law," *Medecins Sans Frontieres*, n.d.
[119] Ibid.
[120] Megan Fairlie, "The Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Process Deficit," *International Criminal Law Review* 4 (2004): 243–319.
[121] Fairbanks, "Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda," 112.

However, the common law system includes specifications that largely benefit the accused and provide them with more rights.[122] Considering these are individuals who allegedly committed some of the gravest crimes, this was a controversial decision. Additionally, in accordance with common law rules, witnesses are subjected to cross-examination and re-examination by the defense.[123] This is particularly difficult for survivors of rape, as it can be painful for them to face cross-examination. However, the Statute does still draw on elements of civil law rules and procedures, including specific rules of evidence.[124]

However, this hybrid Statue has drawbacks. In common law legal systems, precedents can be used to decide currently deliberated cases, which differs from civil law ordinances about final judgments.[125] Therefore, the Rules and Procedures adopted by the ICTY have two main issues with respect to prosecuting rape as genocide: the rather strict obeisance to common law rules in assisting the accused and the choice to include civil law rules that make future adoption of the procedures ambiguous.

Despite these caveats, the ICTY Statute still transformed approaches to criminal prosecution, retaining the necessary foundations of IHL, as outlined in the Hague Conventions and the Geneva Conventions, and ICL, as outlined in the Nuremberg and Tokyo Trials.[126] The Statute stipulates two legal avenues for prosecution. The first is

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[122] Fairlie, "The Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Process Deficit," 290.
[123] Ibid.
[124] Fairlie, "The Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Process Deficit," 254.
[125] Joseph Dainow, "The Civil Law and the Common Law: Some Points of Comparison," *The American Journal of Comparative Law* 15, no. 3 (1966): 425 and 427, https://doi.org/10.2307/838275.
[126] Fairlie, "The Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Process Deficit," 93.

individual responsibility and the second is superior responsibility. Article 7 of the ICTY Statute contains specific provisions about the concept of superior responsibility, declaring that superiors can be held culpable if their subordinates are committing acts that constitute genocide. Article 7 states that:

> "[The] subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[127]

This article ensures that individuals who are in a position of power are held responsible for their crimes. For example, if an individual soldier committed an act of killing, but was given this order by a superior, the superior will still be held responsible. Article 7 also allows for a superior to be liable for acts committed by a subordinate that the superior failed to prevent. For example, if a superior is aware of genocidal acts being committed but failed to stop the subordinate from executing these plans, the superior can be prosecuted for genocide. Hence, this broadens the charges that can be brought forth against a superior, which is demonstrated in the cases of genocide which were prosecuted at the ICTY.

Prosecuting Genocide at the ICTY

This section will evaluate the ICTY trial against Radovan Karadzic. The case provides an example of how the prosecution can provide evidence of an individual's

[127] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, 6.

mental state, and thus, intent. The case also demonstrates the basis for proving individual and superior responsibility for genocidal acts.

Karadzic was prosecuted for genocide during the Srebrenica Massacre but acquitted of genocide charges in other municipalities.[128] Therefore, the prosecution deemed that the accused contributed to genocidal acts with special intent only during the Srebrenica Massacre. The prosecution meticulously organized the argument to demonstrate that, first, the Bosniak Muslims were a protected group per the Genocide Convention.[129] Second, the act of genocide occurred using the acts of "killing" and "causing serious bodily or mental harm to members of the group."[130] Third, Karadzic's participation in the Srebrenica Joint Criminal Enterprise (JCE) demonstrated his genocidal mental state.[131] As a member of the JCE, the prosecution could prove the existence of a common plan to annihilate the Bosniak Muslims to which Karadzic contributed.[132]

Since the individual's mental state is difficult to prove, the prosecution had to demonstrate that he intended to commit genocide with sufficient evidence. Thus, the judgement determined that facts and circumstances can be used to establish intent. For example, attacks on cultural or religious property cannot be deemed as an act of genocide

[128] Prosecutor v. Radovan Karadzic, Trial Chamber, No. Case IT-95-5/18-T (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 March 24, 2016).
[129] Prosecutor v. Radovan Karadzic, Trial Chamber, 2386.
[130] Ibid.
[131] Ibid.
[132] Prosecutor v. Radovan Karadzic, Trial Chamber, 208.

themselves, but they can be considered as evidence of intent to destroy a group.[133] The Bosnian Serbs committed such acts against Bosniak properties.[134] And they did so under the leadership of Radovan Karadzic, hence this was presented as evidence of Karadzic's genocidal mental state.

Karadzic was considered individually responsible for these crimes and was also charged under the article on superior responsibility. The prosecution proved that, as Srebrenica fell, Karadzic made decisions to forcibly remove and then kill Bosniak Muslim men and boys.[135] Therefore, his contributions to the JCE were sufficient evidence of his culpability under the ICTY Statute on individual criminal responsibility.[136] Karadzic claimed that he lacked knowledge of his subordinates' genocidal actions, but, since Karadzic had *de jure* authority, meaning he had authority over his subordinates, he was still culpable per the article on superior responsibility.[137] The prosecution deemed that "he failed to take necessary and reasonable measures to punish the commission of genocide, murder, extermination, and killing as an underlying act of persecution."[138] These were the underpinnings of the prosecutions' arguments against the accused.

The findings from the Karadzic case have three takeaways. First, the "intent to destroy" clause must be demonstrated by the accused's special intent, and this intent needs to be towards a specific group. Therefore, regardless of the act being prosecuted,

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[133] Ibid.
[134] "The Fall of Srebrenica and the Failure of UN Peacekeeping," *Human Rights Watch* 7, no. 13 (October 15, 1995): 1–80.
[135] Prosecutor v. Radovan Karadzic, Trial Chamber, 208.
[136] Prosecutor v. Radovan Karadzic, Trial Chamber, 2029.
[137] Prosecutor v. Radovan Karadzic, Trial Chamber, 208.
[138] Prosecutor v. Radovan Karadzic, Trial Chamber, 2476.

the aggregated evidence must demonstrate that there was a specific intent on both these dimensions. Second, to prove a genocidal mental state, the prosecution can use any event that intends to destroy the group, even if it is not enumerated as a physical element in the formal definition of genocide. In this case, the destruction of cultural or religious property was provided as evidence to demonstrate that Karadzic had a specific intent behind his actions. Third, superior responsibility is particularly pertinent to genocide prosecution, as it demonstrates that an accused cannot avoid consequences if they did not commit the act themselves. This is the same legal argument that was used in Prosecutor v Akayesu, an ICTR case that will be discussed later in this chapter.

The Karadzic case considers an individual who was prosecuted for the crime of genocide because he partook in its planning and execution. The prosecution proved the act of genocide occurred using instances of killing and causing serious bodily or mental harm. Therefore, we can extrapolate the way that the prosecution laid out its argument for killing as an act of genocide to a potential legal argument for rape as an act of genocide. Notably, the Chamber deemed that "the determination of whether there was evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold."[139] Therefore, genocide need not be determined by the number of people killed, but, rather, why the individuals were killed. Elaborating on this, the judgment writes that "murder as an act of

[139] Prosecutor v. Radovan Karadzic, Appeals Chamber, No. Case IT-95-5/18-AR98bis.1 (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 July 11, 2013).

genocide requires proof of the result."[140] Therefore, when it comes to rape, the number of women who were raped matters less, rather it is the intent used when men raped these women. Hence, the rhetoric that combatants use when raping women is more important than the number of women raped, underscoring the importance of intent.

Additionally, to determine this intent, the prosecution can use facts and circumstances beyond the codified acts of genocide. As outlined in the Karadzic judgement:

> "Factors that are relevant [to analyzing intent] may include, but are not limited to, the general context, the scale of atrocities, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy. Display of intent through public speeches or in meetings may also support an inference as to the requisite specific intent."[141]

A genocidal mental state can be ascertained by circumstances, including rhetoric, the existence of a plan, or the evidence of systematic killing. Therefore, genocide cases that include any physical element can determine genocidal mental state without necessarily using the acts themselves. And finally, if the Karadzic case, and the findings with respect to killing are used as precedent, each individual rapist need not be prosecuted, for their leader to be charged with genocide based on the rapes if he instigated or failed to prevent them. The next section of this chapter will evaluate a landmark ICTY case that prosecuted sexual violence as a crime against humanity.

ICTY: Prosecutor v. Kunarac, Kovač, and Vuković

[140] Prosecutor v. Radovan Karadzic, Trial Chamber, 205.
[141] Prosecutor v. Radovan Karadzic, Trial Chamber at 209.

Prosecutor v. Kunarac, Kovač, and Vuković was a significant ICTY case that prosecuted sexual violence and rape. This case is particularly relevant because it marked the first time that rape was prosecuted as a crime against humanity - an unprecedented step for women's rights in international criminal law.[142] The three prosecuted individuals were responsible for crimes that occurred when the municipality of Foča was overtaken by Bosnian Serbs. The takeover of Foča began in April 1992, but Bosnian Serbs had been preparing technical equipment to invade prior to this.[143] After the invasion, Bosniak Muslims were expelled, raped, killed, tortured, and kept in detention centers.[144] Amongst these forces were three individuals who would become the first individuals prosecuted for rape as a crime against humanity.

The first defendant Dragoljub Kunarac was the commander of a special reconnaissance unit, which was a subdivision of the Foča Tactical Group of the Bosnian Serb Army.[145] He was charged with several counts of torture and rape as crimes against humanity.[146] He had repeatedly raped several women and held them in detention centers. After raping one Bosnian Muslim woman, Kunarac said "that she should enjoy being 'fucked by a Serb,'" further saying that "she would now carry a Serb baby and would not know who the father would be."[147] The second defendant Radomir Kovač was charged

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[142] Doris Buss, "Prosecutor Mass Rape: Prosecutor V. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic," *Feminist Legal Studies* 10 (2002): 91.
[143] "Bosnia and Hercegovina: A Closed Dark Place," *Human Rights Watch* 10, no. 6 (July 1998), https://www.hrw.org/legacy/reports98/foca/#_1_5.
[144] Ibid.
[145] "Case Information Sheet: Kunarac, Kovac and Vukovic" (International Criminal Tribunal for the Former Yugoslavia, n.d.).
[146] Ibid.
[147] Dragoljub Kunarac in Buss, "Prosecutor Mass Rape: Prosecutor V. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic," 94.

with counts of enslavement as a crime against humanity and rape as a crime against humanity and violation of the customs of war.[148] He held two women against their will and repeatedly sexually assaulted them; he eventually sold them to unidentified soldiers.[149] He was also charged for raping several women.[150] The third defendant was Zoran Vuković; he was charged with torture as a crime against humanity and as a violation of laws or customs of war and rape as a crime against humanity and as a violation of laws or customs of war.[151] Vuković and another soldier took a 15-year-old girl to an apartment and raped her.[152] Notably, each defendant was charged with rape as a crime against humanity; this can be referenced in subsequent cases.

The trial to prosecute Kunarac, Kovač, and Vuković began on March 20, 2000. In each case, the court determined that the individual acts of rape that each soldier committed constituted a crime against humanity. The Tribunal determined that each soldier committed these crimes with the intent to expel Bosniak Muslims from the Foča municipality.[153] Each of the charges was brought in accordance with the ICTY Statute article on individual criminal responsibility and superior responsibility. The soldiers were either present while other individuals were committing acts of rape or committing them themselves, which the court deemed sufficient intent for rape as a crime against humanity. The soldiers were targeting women because they were members of the Bosniak

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[148] "Case Information Sheet: Kunarac, Kovac and Vukovic."
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Buss, "Prosecutor Mass Rape: Prosecutor V. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic," 94.

Muslim group, so the rapes they committed could be considered a crime against humanity because the act occurred during a widespread attack.

Prior to this case, rape was considered a crime of honor and was not considered in prosecution. JH Short quotes Kristen Boon saying that "acts of sexual violence were commonly 'designated as moral crimes and outrages on honor, a classification that tended to focus on perceived violations of the victim's honor or dignity, rather than the physical and mental trauma brought about by an assault.'"[154] Due to pressure from women's advocacy groups, the judges were more willing to consider sexual violence and rape as a means of ethnically cleansing the Bosnian Muslim community.[155] Feminist activists strongly advocated for such an indictment to set a reference point regarding the use of rape in war.[156] The case set a precedent for the international prosecution of sexual violence. Though genocide charges were not pursued, this was still a significant step in acknowledging sexual violence as an international crime.

Introduction to the ICTR

From January 1, 1994 to December 31, 1994, between 800,000 and 1,000,000 people of the Tutsi population were killed by the majority Hutu population in Rwanda.[157]

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[154] Kristen Boon in Jonathan M H Short, "Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court," *Michigan Journal of International Law* 8 (2003): 508.
[155] Heidi Nichols Haddad, "Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals," *Human Rights Review* 12 (2011): 109.
[156] Buss, "Prosecutor Mass Rape: Prosecutor V. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic," 95.
[157] "The Genocide," United Nations International Residual Mechanism for Criminal Tribunals, n.d.

The genocide was carried out with precision. Lists of government opponents were handed to militias, who then carried out mass killings.[158] The brutality was systematic, and the Hutu forces used the radio as a tool to further the message of genocide.[159] Rape was used as a means of genocide and crimes against humanity. As referenced in the literature review of this paper, women were raped and intentionally infected with HIV, making this sexually transmitted disease a biological weapon of war.[160] These perpetrators also used sexual torture, mutilation, and enslavement as means of genocide against women and girls.[161] This was a strategy used by the Hutu extremists to destroy the Tutsi community.[162] Those responsible for the crimes were largely Hutu extremists who were soldiers, gendarmes, *Interahamwe*, and even civilians.[163]

As a result of these atrocities, UN Resolution 955 established the International Criminal Tribunal for Rwanda.[164] In conjunction with the ICTY, the court also established a legal system for future international criminal systems. Since the ICTR was established after the ICTY, the Statutes are remarkably similar. The ICTR Statute includes the same stipulations about superior responsibility and intent. The ICTR successfully tried and charged several individuals for crimes against humanity, genocide, and war crimes. Additionally, since rape was used pervasively through the Rwandan genocide, it was

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158 "Rwanda Genocide: 100 Days of Slaughter," April 4, 2019.
159 Ibid.
160 Katya Kolluri, "The Rwandan Genocide: Rape and HIV Used as Weapons of War," *Global Justice Center* (blog), July 18, 2018, https://globaljusticecenter.net/blog/937-the-rwandan-genocide-rape-and-hiv-used-as-weapons-of-war.
161 Jennie Burnet, "Rape as a Weapon of Genocide: Gender, Patriarchy, and Sexual Violence in the Rwandan Genocide," *Anthropology Faculty Publications* 13 (2015).
162 Ibid.
163 "The Genocide."
164 "Resolution 955," Resolution (United Nations, November 8, 1994).

addressed during several ICTR trials with rape even being prosecuted as a means of genocide and under the article of individual responsibility, separately.

ICTR: Prosecution v Akayesu Genocide

The first prosecution of genocide at the ICTR was the case against Jean-Paul Akayesu. This was also the first case to prosecute rape as an act of genocide. Jean-Paul Akayesu was the mayor of the Taba commune, a town in Rwanda. As mayor or *bourgmestre*, he was responsible for maintaining public order and had control over the local police.[165] With his orders, 2,000 people were killed in Taba.[166]

The prosecution alleged that Akayesu had knowledge of the killings, since he was in a position of power, and failed to prevent them from happening.[167] The prosecutor further elaborated that Akayesu's position in the town meant that he had particular power over the police.[168] This falls under the ICTR Statute article on superior responsibility. Similar to the Karadzic case, Akayesu did not murder anyone himself, instead, he was responsible for allowing these killings to occur despite having the power to prevent them. He was found guilty of one count of genocide and incitement to commit genocide.[169]

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[165] Joe Meegan, "Jean-Paul Akayesu Case," *London School of Economics Centre for Women, Peace, Security* (blog), June 3, 2016, https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/jean-paul-akayesu-case/.
[166] Ibid.
[167] The Prosecutor Versus Jean-Paul Akayesu, No. Case No. ICTR-96-4-T (International Criminal Tribunal for Rwanda September 2, 1998).
[168] Ibid.
[169] Diane Amann, "Prosecutor v. Akayesu. Case ICTR-96-4-T," *The American Journal of International Law* 93, no. 1 (January 1999): 195–99.

Rape

Akayesu was convicted for genocide based on charges of rape and sexual violence that the prosecution leveraged. There were a few steps that had to be achieved for this prosecution to be feasible: first, Akayesu's intent to commit genocide had to be proven. Second, his complicity in rape had to be demonstrated with sufficient evidence. The prosecution successfully demonstrated that the defendant had genocidal intent. Countless women were raped under Akayesu's preview and with his encouragement. He had the knowledge of sexual assaults against civilians and failed to act on this knowledge to prevent them.[170] Initially, Akayesu denied that rape occurred under his purview.[171] However, several witnesses testified that Akayesu was at the scene of the rapes and had the power to prevent the crimes. One witness, Witness JJ, was dragged into the bureau's communal compound and was raped by three men. She heard Akayesu telling the Interahamwe "Never ask me again what a Tutsi woman tastes like… Tomorrow they will be killed."[172] This was a ubiquitous experience for women who were raped by the Interahamwe under Akayesu's purview.

The case demarcated the first time that sexual violence was considered a tool of genocide, which is an unprecedented step for women's rights. The court also broadened the legal definition of rape and sexual violence to include coercion.[173] The ICTR defined sexual violence and rape in paragraph 688 as:

> "any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the

[170] Ibid.
[171] Ibid.
[172] Amann, "Prosecutor v. Akayesu. Case ICTR-96-4-T."
[173] Ibid.

> human body and may include acts which do not involve penetration or even physical contact … coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal."[174]

The definition of rape and sexual violence demonstrated the court's willingness to engage with issues that bolstered women's rights. In the case judgment, the Prosecutor said that:

> "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 murders, Jean Paul Akayesu encouraged these activities."[175]

The key takeaway from this judgment is that Akayesu fulfilled the special intent required to commit genocide, and he used rape as an act to fulfill this. Initially, rape was not among the charges brought forth against Akayesu.[176] It was only after the only female judge, Judge Pillay, advocated for women's rights that the prosecution changed the indictment.[177] Since Akayesu knew the ethnicities of the women being raped, rape could constitute genocide. This case sets a reference point that if a woman is raped because of her race, ethnicity, nationality, or religion, with the intent to destroy the group then her rape is genocidal because it was carried out with this intent. This poses the question of why this has not been applied to subsequent judgments.

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[174] Amann, "Prosecutor v. Akayesu. Case ICTR-96-4-T."
[175] The Prosecutor Versus Jean-Paul Akayesu, 169.
[176] Amann, "Prosecutor v. Akayesu. Case ICTR-96-4-T."
[177] Ibid.

ICTR: Prosecutor v. Pauline Nyiramasuhuko

On June 10, 2011, Pauline Nyiramasuhuko was convicted for genocide and rape as a crime against humanity. Nyiramasuhuko was a significant political figure and a member of the *Mouvement révolutionnaire national pour la démocratie et le développement* (MRND).[178] She worked closely with Interim Prime Minister Jean Kambanda who pled guilty to charges of genocide at the ICTR, and he consulted her with the initial genocide plans.[179] Therefore, she was aware of these plans.. She was also responsible for making the largely peaceful town of Butare, which was previously Tutsi-led, a nightmare.[180] She ordered that Tutsi refugees who were at the Butare *préfecture* office be raped and killed.[181] She and her son, Arséne Shalom Ntahobali, were responsible for abductions, rape, and murder.[182] This was a particularly momentous case because she was the first woman to ever be convicted of genocide and rape as a crime against humanity.[183] Nicole Hogg and Mark Drumbl wrote:

> [Nyiramasuhuko] is the ICTR's only female accused. She is, moreover, the only woman tried and convicted by an international tribunal for the specific crime of genocide and the only woman tried and convicted by an international tribunal for rape as a crime against humanity.[184]

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[178] Mark Drumbl, "She Makes Me Ashamed to Be a Woman: The Genocide Conviction of Pauline Nyiramasuhuko, 2011," *Michigan Journal of International Law* 34, no. 3 (Spring 2013): 559–603.
[179] Ibid.
[180] Drumbl, "She Makes Me Ashamed to Be a Woman: The Genocide Conviction of Pauline Nyiramasuhuko, 2011," 568.
[181] Ibid.
[182] Ibid
[183] Ibid.
[184] Nicole Hogg and Mark Drumbl, "Women as Perpetrators: Agency and Authority in Genocidal Rwanda," in *Genocide and Gender in the Twentieth Century*, ed. Amy Randall (Bloomsbury Academic, 2014), 199.

Even though prosecuting a woman for genocide was considered pivotal, the prosecution failed to follow the precedent set by the Akayesu judgement. Prosecutors held Nyiramasuhuko responsible for genocide and rape as a crime against humanity, but not genocidal rape. She used her power in the militia to order soldiers to rape women. Therefore, this case represents a failure of the ICTR, as they were unable to hold Nyiramasuhuko accountable for her actions.[185] Considering the similarity, Nyiramasuhuko should have been prosecuted under the same jurisprudence of indirect responsibility as Akayesu. In the summary judgment, the Chamber noted that:

> "Although the evidence establishes in this case that rape was utilized as a form of genocide, the Chamber has concluded that it would be prejudicial to the Accused to hold them responsible for a charge of which they had insufficient notice."[186]

Based on her actions, Nyiramasuhuko was culpable for the rapes that occurred under her purview. Yet it was not prosecuted as such because the Chamber claimed that they did not have sufficient time to process this charge.[187] This is a failure from the Chamber and fails to encompass the extent of the crimes that she committed.

Implications of Cases at the ICTY and ICTR

There are a few key takeaways from the prosecutions at the ICTY and ICTR. First, superior responsibility widens the breadth of individuals who can be prosecuted for

[185] Fairbanks, "Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda," 116.
[186] The Prosector vs. Pauline Nyiramasuhuko Arsene Shalom Ntahobali Sylvain Nsabimana Alphonse Nteziryayo Joseph Kanyabashi Elie Ndayambaje, Trial Chamber II, No. Case No. ICTR-98-42-T (International Criminal Tribunal for Rwanda June 24, 2011).
[187] Ibid.

genocide. The article ensures that individuals are held responsible for crimes of their subordinates, when they have the power to prevent it. The next logical step in genocide prosecution is extending this to rape.

This logic was applied to the act of killing through numerous cases and must be extended to rape. When rape is used as an intentional military tool, it can be prosecuted as an act of genocide, as is killing. For example, during the Bosnian genocide, Kunarac said that "she would now carry a Serb baby and would not know who the father would be," in reference to a Bosniak woman.[188] If Kunarac had used this rhetoric in conversation with his subordinates, this could be perceived as a statement made with genocidal intent to encourage acts of rape. Therefore, establishing genocidal intent means that the acts ordered under this individual can be conceived as genocidal acts.

Courts are also willing to make unprecedented decisions when pressured by women's groups and feminist advocates. During Prosecutor v Akayesu and Prosecutor v. Kunarac, Kovač, and Vuković, the Tribunal judges were willing to make decisions in alignment with women's rights because of external pressures and factors. Therefore, it is not necessarily a lack of legal measures that prevent the prosecution of rape as genocide, rather, it is a disregard for women's rights.

The courts demonstrated a willingness to prosecute rape as a crime against humanity but largely overlooked rape as genocide. In Prosecutor v. Akayesu, the court acknowledged that rape could constitute genocide but failed to follow through on this precedent. The ICC and other domestic and hybrid courts have cited these judgments but

[188] Dragoljub Kunarac in Buss, "Prosecutor Mass Rape: Prosecutor V. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic," 94.

failed to prosecute individuals for rape as an element of genocide. The subsequent chapter will explore the courts after the ICTR and ICTY and the practices they have followed.

Chapter IV: Prosecutions at an International, Hybrid, and Domestic Court

This chapter will address the prosecutions of rape and sexual violence that have transpired at the International Criminal Court (ICC), the Extraordinary Chambers in the Court of Cambodia (ECCC), a hybrid court, and the International Crimes Tribunal of Bangladesh (ICT), a domestic court. For each court, this chapter will outline the accountability for genocide and rape, respectively, and the process of adopting precedence from the ICTY and ICTR.

ICC

The UN established the ICC in 1998, and the court tried its first case in 2002. The UN recognized the need for courts to establish international norms for the gravest crimes committed. After the Bosnian and Rwanda genocides, the ICC sought to promote individual accountability by enacting a court that could handle ICL cases. Unlike the ICTY and ICTR, which largely abide by common law statutes, the ICC more effectively combines common law and civil law. However, in civil law systems, courts tend not to follow precedent of past cases.[189] Therefore, the ICC is not bound by judgements from past cases, but judges can still reference them on their own volition.[190]

The ICC has a Pre Trial-Chamber, Trial Chamber, and Appeals Chamber. The Pre Trial-Chamber supervises the Office of the Prosecutors' investigations. If the Office finds

[189] Christopher Greenwood, "What the ICC Can Learn from the Jurisprudence of Other Tribunals," *Harvard International Law Journal* 58 (Spring 2017), https://harvardilj.org/2017/04/what-the-icc-can-learn-from-the-jurisprudence-of-other-tribunals/.
[190] Ibid.

sufficient evidence against the accused, the Pre-Trial Chamber will issue an arrest warrant or a summons. However, the Office of the Prosecutor cannot actively seek evidence.[191] This is particularly difficult when finding evidence for sexual violence cases because investigators often must actively search for this information.

The Trial Chamber and the Appeals Chamber allows experts to submit *amicus curiae*, who can provide their opinion and expertise on specific elements of the case. For example, during the case against Dominic Ongwen, a member of the Ugandan Lord's Resistance Army, experts were instrumental in pressuring the court to include the charge of forced pregnancy under sexual violence.[192] Hence, through *amicus* briefings, NGOs can influence the court opinion by providing accurate legal background on relevant topics. This is a practice that was common at the ICTR and ICTY trials, as NGOs successfully pressured prosecutors to include more issues that were relevant to sexual violence.

The ICC has only prosecuted 31 cases since its formation, and it has issued 38 arrest warrants.[193] Amongst these 31 cases, the court has convicted 10 individuals.[194] The court has only prosecuted one sexual violence case since 2002. However, despite its limited implementation, the Rome Statute codifies rape and sexual violence as a crime against humanity and a war crime, which was considered a major step in women's rights. The Statute also includes some of the most progressive language about gender, so the

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[191] "Understanding the International Criminal Court," 32.
[192] SITUATION IN UGANDA IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN, No. ICC-02/04-01/15 A A2 (International Criminal Court 2021).
[193]"About the Court," International Criminal Court, accessed April 20, 2023, https://www.icc-cpi.int/about/the-court.
[194] Ibid.

international community had profound expectations for the ICC's progressiveness, which have not yet manifested in practice.

Prosecutor v. Germain Katanga

Germain Katanga was tried for crimes committed during a February 2003 attack in the Bogoro village in the DRC.[195] Katanga was charged with three counts of crimes against humanity and seven counts of war crimes.[196] He was responsible for the attack in his capacity as a leader of the Patriotic Resistance Force in Ituri (FRPI). The Pre Trial-Chamber at the ICC discovered that before attacking civilians, soldiers "chanted songs in which they made it clear that they would kill Hema individuals but would show mercy to Ngiti or Bira individuals;" therefore specifically targeting individuals of the Hema ethnicity.[197] The Pre-Trial Chamber uncovered that Katanga's subordinates, who were of the Lendu and Ngiti ethnicities, committed acts of sexual slavery and rape, including abducting and enslaving Hema women.[198] On March 7, 2014, Katanga was found guilty of one count of a crime against humanity and four counts of war crimes, including murder, attacking civilians, destruction of property, and pillaging.[199] However, he was convicted on all except the sexual violence charges.

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[195] "DRC: All You Need to Know about the Historic Case against Germain Katanga," *Amnesty International*, March 6, 2014, https://www.amnesty.org/en/latest/news/2014/03/drc-all-you-need-know-about-historic-case-against-germain-katanga/.
[196] ibid.
[197] SITUATION IN UGANDA IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN, 9.
[198] Carsten Stahn, "Justice Delivered or Justice Denied?," *Journal of International Criminal Justice* 12 (2014): 831.
[199] "DRC: All You Need to Know about the Historic Case against Germain Katanga."

The trial judgement determined that acts of sexual violence were undoubtedly committed during the attack on the village, stating that:

> "the Chamber accordingly finds that the evidence establishes beyond reasonable doubt that crimes of sexual slavery as a war crime and a crime against humanity under articles 8(2)(e)(vi) and 7(1)(g) of the Statute were intentionally committed, in the aftermath of the battle of Bogoro on 24 February 2003, by combatants from camps belonging to the Ngiti militia of Walendu-Bindi and by others in the camps."[200]

Articles 8(2)(e)(vi) and 7(1)(g) are the respective clauses in the Rome Statute that codify sexual violence as a war crime and crime against humanity.[201] Combatants also "captured and imprisoned [women] and kept them as their 'wives' […] and forced and threatened them to engage in sexual intercourse."[202] Hence, the pre-trial chamber also deemed that acts of sexual violence undoubtedly occurred per witness statements. However, the question was Katanga's culpability, and the trial deemed that he could not be held responsible. According to the judgement, rape and sexual slavery were not under the purview of Katanga's individual criminal responsibility because the acts were not contributing to a common purpose.[203] This judgement is controversial because it contradicts some of the pre-trial findings, which demonstrate that rape was used by the

[200] SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA, Trial Chamber II Judgement (ICC-01/04-01/07 March 7, 2014), 385.
[201] "Rome Statute of the International Criminal Court and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court."
[202] SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE OF THE PROSECUTOR v. Germain Katanga and Mathieu Ngudjolo Chui, Pre Trial Chamber I, No. ICC-01/04-01/07 (International Criminal Court September 30, 2008).
[203] Stahn, "Justice Delivered or Justice Denied?," 821.

Ngiti combatants as a weapon against women of the Hema ethnicity.[204] The judgement makes a distinction between rape and sexual slavery being strategies of the combatants instead of "instrumental" to the acts.[205] This decision gave a greater degree of importance to crimes of physical destruction, such as pillaging for which Katanga was held responsible, than crimes of sexual violence.[206] Therefore, the court's failure to prosecute sexual violence is not necessarily founded in a strong legal argument and is riddled with contradictions.

ICC White Paper

Under the purview of Fatou Bensouda as Office of the Prosecutor, the ICC adopted a more progressive policy on sexual violence through the Policy Paper on Sexual and Gender-Based Crimes in July 2014. The paper enumerated the ICC's commitment to justice for sexual and gender-based crimes. In the introduction, the ICC writes that "sexual and gender-based crimes committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group may also constitute acts of genocide."[207] The Paper also has a specific section on Article 6, which codified the crime of genocide, in the Statute, indicating that the five listed elements can have a sexual or gendered element.[208] In particular, the constituent element of rape can be considered under Article 6(c) on causing bodily or mental harm because of the social stigma that survivors of

[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] "Policy Paper on Sexual and Gender-Based Crimes" (International Criminal Court, 2014), 9.
[208] "Policy Paper on Sexual and Gender-Based Crimes," 18.

sexual violence face.[209] Despite that the paper is progressive and has encouraged the ICC to confront more accusers on charges of gendered crimes, it fails to mention that rape is not explicitly codified in the genocide clause. This omission indicates that the ICC has yet to consider that rape should be permanently enumerated as a constituent element of genocide. Yet, the paper does recognize the intersectionality of gender with race and sexual orientation.[210] The recognition bodes well for the future prosecution of rape as an element of genocide because rape often takes place under the context of this intersectionality.

Arrest Warrant for Omar al-Bashir

In 2016, the ICC filed 10 counts of war crimes against Sudan's President, Omar al-Bashir. The Sudanese government committed acts of genocide against civilians after rebels in Darfur and South Sudan attempted to gain greater control of their region. The first arrest warrant for Omar al-Bashir included charges of genocide by causing serious bodily or mental harm, and deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction.[211] The second arrest warrant included rape as a constituent element of genocide and recognized the use of rape to target a specific ethnic group.[212] In the arrest warrant, rape is listed as a sub element of

[209] Ibid.
[210] Tanja Altunjan, "The International Criminal Court and Sexual Violence: Between Aspirations and Reality," July 13, 2021, 888.
[211] "Sudan," Yale University Genocide Studies Program, accessed April 20, 2023, https://gsp.yale.edu/case-studies/sudan.
[212] SITUATION IN DARFUR, SUDAN THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR, Pre Trial Chamber I, No. ICC-02/05-01/09 (International Criminal Court July 12, 2010), 3.

genocide under the elements of "causing serious bodily or mental harm" and "deliberately inflicting conditions of life calculated to bring about physical destruction."[213] Within the genocide charge, the prosecution specifically listed rape. This enumeration of rape, even if only through an arrest warrant, demonstrates a reasonable basis for rape as an explicit, constituent element of genocide. Hence, this arrest warrant demonstrates that the ICC may be making more informed decisions and putting gender-based crimes at the forefront.

Extraordinary Chambers in the Court of Cambodia

The Extraordinary Chambers in the Court of Cambodia (ECCC) was a hybrid court that was established to prosecute the crimes committed by the Khmer Rouge between April 1975 to April 1979. Under the leadership of the Khmer Rouge Communist Party, led by Pol Pot, between 1.5 and 3 million people were killed.[214] After the genocide, the Cambodian government, in conjunction with the ICC, created a hybrid court. This court received international support through the United Nations Assistance to the Khmer Rouge Trials (UNAKRT).[215] Cambodian judges and foreign personnel oversaw the court.[216] The court dealt with charges of genocide and rape as a crime against humanity, respectively. The ECCC never considered a case that had rape enumerated as genocide.

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[213] Ibid.
[214] "Cambodia," University of Minnesota Holocaust and Gender Studies, accessed April 23, 2023, https://cla.umn.edu/chgs/holocaust-genocide-education/resource-guides/cambodia.
[215] "Introduction to the ECCC," Extraordinary Chambers in the Courts of Cambodia, accessed April 20, 2023, https://www.eccc.gov.kh/en/introduction-eccc.
[216] "Introduction to the ECCC."

Case 002 was the most important case that the ECCC handled, as it included the four most senior leaders of the Khmer Rouge: Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith.[217] The four individuals never took responsibility for their actions and blamed lower-ranking combatants for acts of genocide.[218] Eventually, only Nuon Chea and Khieu Samphan stood trial; they were charged with genocide against the Muslim Cham and the Vietnamese populations, as well as charges of forced marriage and rape.[219] Chea and Samphan were found guilty of the charges of crimes against humanity and grave breaches of the Geneva Convention of 1949. They were also found guilty under the doctrine of superior responsibility for the genocide of the Muslim Cham population.[220] Specifically, they were found guilty of rape within forced marriage.

While scholars have posited that rape during forced marriage can constitute genocide, this case failed to further this argument.[221] The ECCC described forced marriage "as including the abduction of women, the deprivation of their liberty, and the coercion of women into performing sexual duties and housework for their husbands."[222] The women's' "husbands" threatened them and prevented them from leaving; they were also forced to have sex with their husbands.[223] Edita Gzoyan and Regina Galustyan

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[217] John Ciorciari, "The Centrepiece Case Against Senior Leaders: 'Cutting the Head to Fit the Hat'" (University of Michigan Press, 2014), 134.
[218] ibid.
[219] "Case 002," Extraordinary Chambers in the Courts Cambodia, accessed April 20, 2023, https://www.eccc.gov.kh/en/case/topic/119.
[220] Ibid.
[221] Carmel O'Sullivan, "Dying for the Bonds of Marriage: Forced Marriages as a Weapon of Genocide," *HASTINGS WOMEN'S LAW JOURNAL* 22 (January 1, 2011): 275.
[222] John Ciorciari, "The Centrepiece Case Against Senior Leaders: 'Cutting the Head to Fit the Hat'" (University of Michigan Press, 2014), 134., 33.
[223] Ibid.

explain that women often sustained physical injuries from rape and were ostracized from society as a result.[224] Forced marriage was a seemingly strategic and intentional military campaign encouraged by individuals at the top echelons of the Khmer Rouge, including Chea and Samphan. If the rapes occurred under the purview of Chea and Samphan, then the same precedent ruled in Prosecutor v. Akayesu should have been applied to the ECCC case. Therefore, it is reasonable to wonder why rape during forced marriage was not prosecuted as a constituent element of genocide.

The prosecution also proposed the charge of rape as a crime against humanity, but it was not included in the judgment.[225] Instead, rape was categorized under the charge of other inhumane acts under crimes against humanity.[226] This further stigmatizes sexual violence because the court inaccurately prosecuted grave crimes, thus failing to ostracize the individuals who committed them. Ultimately, rape was not enumerated as an explicit charge, thus failing to hold Chea and Samphan accountable.

International Crimes Tribunal of Bangladesh

Rape was a prominent element of the campaign against Bangladeshi women and girls during the 1971 Bangladeshi Liberation War.[227] During the nine-month war, Pakistani soldiers raped between 200,000 to 400,000 Bangladeshi women.[228] Soldiers

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[224] Ibid.
[225] Ibid.
[226] Ciorciari, "The Centrepiece Case Against Senior Leaders: 'Cutting the Head to Fit the Hat.'"
[227] Lisa Sharlach, "Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda," *New Political Science* 22, no. 1 (August 2010): 89–102.
[228] Sharlach, 94.

often murdered women after raping them, and girls who were gang-raped often died from the injuries they sustained.[229] Women and girls who survived rape often killed themselves because of the stigma they faced.[230] Amita Malik, a reporter from India, wrote that a Pakistani soldier said that "[they] are leaving. But [they] are leaving their Seed behind."[231] He also described the rape campaign in detail, enumerating its use as a tactic and saying that senior officers allowed, and allegedly encouraged, keeping women and girls hostage for months in military bunkers.[232] After the war ended, Sheikh Muhibur Rahman attempted to reintegrate women who had been raped into society by providing opportunities for rehabilitation and offering rewards to the men who were willing to marry them.[233] Despite these efforts, these women were denied marriage proposals and often killed themselves or fled.[234] The military campaign of rape had severely detrimental implications for women and intended to target their community. Hence, the campaign had genocidal characteristics.

The International Crimes Tribunal of Bangladesh (ICT) was established in 2012 by the parliament of Bangladesh to prosecute the grave crimes committed during the war. Bangladesh adopted tenets of international law into its domestic law so it could prosecute these crimes within the country. Unlike the ECCC, the ICT is a domestic court and not under international purview. The court was largely focused on prosecuting local

[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Sharlach, "Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda," 95.
[233] Ibid.
[234] Ibid.

collaborators who assisted the Pakistani soldiers in facilitating violence.[235] The court prosecuted individuals in person and in absentia; it was also particularly controversial in Bangladesh and resulted in numerous protests across the country.

The court's first case was the Chief Prosecutor vs. Delowar Hossain Sayeedi. The trial judgment was delivered in February 2013. He was initially sentenced to death but after significant protests, this sentence was commuted to life imprisonment. Sayeedi was allegedly a former leader of the Jamma-e-Islami, which was the political party that was responsible for genocide during the Liberation War. The trial judgment references several ICTR and ICTY cases, including prosecutorial and sentencing practices that the ICT adopted.[236] The prosecution enumerated that Sayeedi was a member of a local peace committee that participated in killing, torture, rape, and forced conversions of Hindus.[237] The court found Sayeedi guilty on eight of the twelve initial charges.

Sayeedi committed genocide against 14 individuals in the Parerhat Bazar. [238] Although it is unusual to bring forth charges of genocide against a specific number of individuals, the trial judgement used the way that the individuals were murdered to demonstrate Sayeedi's intent. Sayeedi allegedly "tied [the victims] with a single rope and dragged them to Pirojpur and handed over them to Pakistani [military] where they were killed and [their] dead bodies were thrown into the river."[239] The judgement specifically

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[235] Sudha Ramachandran, "Flawed Justice in Bangladesh," *The Diplomat*, October 31, 2013, https://thediplomat.com/2013/10/flawed-justice-in-bangladesh/.
[236] The Chief Prosecutor versus Delowar Hossain Sayeedi, No. ICT-BD Case No. 01 OF 2011 (International Crimes Tribunal Bangladesh February 28, 2013).
[237] The Chief Prosecutor versus Delowar Hossain Sayeedi, 27.
[238] The Chief Prosecutor versus Delowar Hossain Sayeedi, 85.
[239] Ibid.

says that "this act was directed against a civilian population with intent to destroy in whole or part of a religious group, which is genocide."[240] Based on past trial judgements from the ICTR and ICTY, genocide can be determined based on the intent with which individuals were targeted, hence it is possible for genocide to occur against 14 individuals if executed with specific intent. The judgement seems to accurately interpret genocide, albeit in an unusual manner.

The court did prosecute Sayeedi on charges of rape that should have been extended to rape as an element of genocide, based on the trial judgment documents. The prosecution argued that Sayeedi led a team of 50 to 60 Razakar Bahini to attack a group of Hindu individuals. Members of the Razakar Bahini raped women, and Sayeedi, as their leader, failed to prevent it.[241] Notably, the trial judgment documents cite Prosecutor v. Akayesu, for its precedent.[242] The document details that the ICTR case was the first time that sexual violence was considered a constituent element of genocide and that sexual violence was defined as any sexual act committed under coercive circumstances.[243] The court deemed that Sayeedi was present at the place of the incident and had knowledge of the crimes being committed under his purview.[244] Therefore, the ICT is demonstrating that past judgments from the ICTR and ICTY can be referenced by the prosecution. The ICC and other courts that use international law can, therefore, also use precedent-setting cases to influence their judgments and sentencing practices.

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[240] Ibid.
[241] The Chief Prosecutor versus Delowar Hossain Sayeedi, 86.
[242] The Chief Prosecutor versus Delowar Hossain Sayeedi, 90.
[243] Ibid.
[244] Ibid.

Since Sayeedi's case, the court has received criticism. Human Rights Watch and Amnesty International questioned the legitimacy of the case and the courts' processes.[245] Additionally, individuals who were convicted of crimes were sentenced to death, which was heavily criticized by the international human rights community.[246] Relative to other international courts, the ICT has also heard considerably more cases and has convicted everyone who was charged. Therefore, there are particular failures associated with the court that preclude it from being invoked as precedent for future cases. Despite these failures and criticisms, the ICT has successfully used precedent to convict individuals for crimes, including rape, using language from international law. Therefore, the ICT is an example of a domestic court that effectively implemented international precedent to prosecute grave crimes committed. The court can inform future domestic tribunals that are, hopefully, held to a higher ethical and legal standard.

The ICC, ECCC, and ICT have each handled issues of rape in a distinct manner at their court. Ultimately, the ICC has not prosecuted any rape as a constituent element of genocide cases, although this could still happen with Omar al-Bashir's case. Each court has handled cases of genocide and rape as a crime against humanity, following the precedent from ICTR and ICTY judgements, demonstrating that international courts can use past judgements to inform present decision-making. However, only the ICT case directly referenced Prosecutor v. Akayesu to prosecute rape as an element of genocide.

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[245] "Three Killed in More Bangladesh War Crimes Violence," *BBC*, March 2, 2013, https://www.bbc.com/news/world-asia-21639831.
[246] Ibid.

Since international criminal law is a rather new development, these inconsistencies are natural. Each case demonstrated that rape was used on a strategic and intentional level against a targeted race, ethnicity, or religion. Therefore, based on the definition of genocide, each court oversaw cases that should have determined that rape was a direct constituent element of genocide. The next chapter will explore wars where mass rape was used as a weapon in events that were not classified as genocide. Could these events have been prosecuted as genocide solely based on the use of systemic rape?

Chapter V: Rape as an Instrument of War or Genocide?

Is all systematic rape during war genocidal? This chapter will examine the three cases of the Rape of Nanjing, the Battle of Berlin, and the current political crisis in Tigray, Ethiopia to evaluate this question. Rapes often occur in war. But when they involve a systematic assault against a specific group, and when they are ordered by high-ranking commanders, they conform to the definition of genocide. This chapter will further examine this question and develop more nuance on rape as instrument of genocide compared to rape as an element of war.

Since an event has never been classified as genocide based solely on the use of rape, this chapter seeks to analyze if this is possible. The question is whether an event that includes rape as an instrument of war, intended to systematically destroy the population, can be considered a genocide even if the rest of the acts committed during the war do not conform to the definition of genocide. This paper will make the necessary distinction between rape as an act during war and rape as an instrument of genocide. To determine whether these were acts of genocide, we need to consider the intent, rather than the impact.

Rape of Nanjing

The Rape of Nanjing was a campaign against Chinese civilians spurred by the Japanese Imperial Army after it seized Nanjing, China in early December 1937. It is estimated that between 100,000 to 300,000 Chinese civilians were killed during the

massacre, and between 20,000 and 80,000 women were raped.[247] Iris Chang, author of *Rape of Nanjing*, writes that:

> "Many soldiers went beyond rape to disembowel women, slice off their breasts, nail them alive to walls. Fathers were forced to rape their daughters, and sons their mothers, as other family members watched."[248]

If the woman resisted or her family intervened, they would immediately be killed.[249] After being raped, the women would also be killed and often mutilated by Japanese soldiers.[250] These were depraved acts of violence committed against Chinese women and girls.

The Japanese soldiers followed the command of Matsui Iwane, a general of the Japanese Central China Front Army. Matsui remained in the outer region of Nanjing until December 17, 1937, when he entered Nanjing to declare Japanese victory.[251] He remained in the city for a week subsequent to this declaration.[252] Muto, a colonel under Matsui, admitted that he and Matsui were aware of the atrocities being committed in the city.[253] Given that Matsui failed to prevent the soldiers from committing these atrocities, he could be culpable for their actions under the purview of indirect responsibility. Eventually, Matsui was called back from Nanjing by the Japanese government but, when

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[247] Danqing Yang, "Nanjing Massacre," in *Oxford Research Encyclopedia of Asian History*, August 27, 2020, 1.
[248] Iris Chang, "Introduction," in *The Rape of Nanking: The Forgotten Holocaust of World War II*, 1st ed (New York, NY: BasicBooks, 1997), 6.
[249] International Military Tribunal for the Far East Judgement of 4 November 1948 (International Military Tribunal for the Far East November 4, 1948).
[250] Ibid.
[251] International Military Tribunal for the Far East Judgement of 4 November 1948 at 486.
[252] Ibid.
[253] Ibid.

he returned, he was revered by the government and was appointed Cabinet Councilor.[254] Hence, the Japanese government did not hold him responsible for the acts of violence that he instigated.

However, when the IMTFE was enacted, Matsui was charged with several counts of war crimes. The court declared that Matsui was aware of the crimes committed during the Rape of Nanjing and failed to stop the individuals who were under his command.[255] Therefore, he was found guilty on one count of deliberately disregarding his duty.[256]

Arnold C. Brackman, the trial reporter at the IMTFE, said that "the Rape of Nanking was not the kind of isolated incident common to all wars. It was deliberate. It was policy. It was known in Tokyo. Yet it was allowed to continue over six weeks."[257] The intentionality of the siege in Nanjing indicates that there could be the special intent that is necessary for genocide. The women were targeted and raped because they were Chinese civilians, hence, they were targeted for the greater intent of harming their group. The act of systematic mass rape in Nanjing seems to have had genocidal intent. Even though the Japanese could by no means obliterate all Chinese nationals, their actions appear consistent with Lemkin's original intent in defining genocide, that is, that it could describe acts intended to lead to "the disintegration of the political and social institutions [..] and the destruction of the personal security, liberty, health, dignity, and even the lives

[254] International Military Tribunal for the Far East Judgement of 4 November 1948, 497.
[255] International Military Tribunal for the Far East Judgement of 4 November 1948, 573.
[256] Ibid.
[257] "Basic Facts on the Nanjing Massacre and the Tokyo War Crimes Trial," New Jersey Hong Kong Network, accessed April 21, 2023, http://www.cnd.org/njmassacre/nj.html#NJM.

of the individuals belonging to such groups."[258] Therefore, the Rape of Nanjing could be deemed an event in which rape was used as a means of genocide, with the Japanese intending to use the individuals in Nanjing as a proxy for the Chinese population.

The Battle of Berlin

The Battle of Berlin exemplifies a similar gray area in genocide prosecution as the Rape of Nanjing. After the collapse of Hitler's Third Reich, the Allied forces, including the Soviet Red Army, invaded Germany. The Red Army used mass rape as a tactic against German women. Based on German hospital and clinic abortion records, it is estimated that 100,000 women were raped during the Battle of Berlin.[259] Natalya Gesse, a Soviet correspondent, said that the Soviet military force was raping every woman between the ages of eight and eighty.[260] A veteran of the Red Army recounts a situation in which the soldiers entered Berlin and immediately begin raping all women.[261] Their children were shot when they tried to protect their mothers while commanders laughed at the situation.[262] The same former soldier describes when he encountered two 14 to 16 year-old German girls who were looking for their mother and brother.[263] He tried to tell them to leave but when the Army Commander found them, the soldiers lined up and

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[258] Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, 81 and 82.
[259] Eric Westervelt, "Silence Broken On Red Army Rapes In Germany," *NPR*, July 17, 2009, sec. World, https://www.npr.org/templates/story/story.php?storyId=106687768.
[260] Antony Beevor, "The Russian Soldiers Raped Every German Female from Eight to 80," May 1, 2002, https://www.theguardian.com/books/2002/may/01/news.features11.
[261] *Russian Veteran Recalls Their Crimes in Germany*, 2020, https://www.youtube.com/watch?v=5Ywe5pFT928.
[262] Ibid.
[263] Ibid.

raped each girl before killing them.[264] The soldiers and the commander were amused by this brutality.[265] An anonymous reporter also recounts the Battle of Berlin in *A Woman in Berlin*. She writes about her experience during the war and her discussions with other women. Anonymous writes about the rape of a 19-year-old, Gerti, she described that:

> "Three Russians had hauled her out of the basement into the stranger's apartment on the first floor, threw her on the sofa, and had their way with her - first one after the other, then in no particular order. Afterwards the three of them turned into jokesters. They rummaged through the kitchen, but all they found was some marmalade and ersatz coffee [...]. Laughing, they spooned the jam into Gerti's hair, and once her head was covered they sprinkled it generously with erastz coffee."[266]

The Soviets were brutal with German women and used rape to humiliate them. Sprinkling coffee onto Gerti after raping her was a means to humiliate and demoralize Gerti, who can be considered a proxy for the German community. Gang rapes were used commonly as a weapon of war by the Soviets, where multiple men would rape one woman.

However, this was not necessarily a weapon of genocide, as the Soviet commanders did not have clear intent. In the introduction of a *Woman in Berlin*, editor Antony Beevor reports that there was no documentation from Soviet archives that indicates the Red Army was using mass rape as a terror tactic against women.[267] He writes "Stalin was merely amused by the idea of Red Army soldiers having 'some fun' after a hard war."[268] The Soviet soldiers allegedly also saw this as an opportunity to take revenge on Germany for raping women in the USSR; they believed that it was in their

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[264] Ibid.
[265] Ibid.
[266] Marta Hillers, *A Woman in Berlin*, trans. Philip Boehm (Metropolitan Books, 2017), 225.
[267] Hillers, XiX.
[268] Ibid.

right to rape these women.[269] Therefore, this is not an evident case of genocidal rape, as the Rape of Nanjing may have been. The soldiers were not trying to destroy all Germans through the rapes, instead they were using mass rape as a means of punishing men and the state. In this case, the women were being used *en masse* as an instrument for revenge.

At the ICTR, *Nahimana* Appeals Chamber, the judgement concluded that "Hutu political opponents" could not be deemed a protected group under the definition of genocide. [270] However, the Tutsi ethnic minority could be deemed as such. Therefore, revenge killings or rapes conducted against Hutu political opponents could not be considered genocide. Parallels between this decision and the Red Army's use of rape can be made. Using the same logic, the German women were not necessarily a part of a protected group, per the definition of genocide, hence attacks against them did not conform to the traditional definition of genocide.

However, the Red Army soldiers were still seeking the downfall of the German men and state, indicating that the women were being targeted as a member of a group, even if this was not a protected group. There must be a way to capture this event legally and hold leaders accountable for what was certainly not a series of individual attacks on individual women. The Red Army soldiers were using rape as more than just a crime against humanity – they were using German women in Berlin as a proxy for the rest of the population, which is similar to the Rape of Nanjing.

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[269] Ibid.
[270] "Genocide." International Criminal Law & Practice Training Materials. International Criminal Law Services, n.d.

Tigray Conflict

In 2018, Abiy Ahmed Ali was elected as Prime Minister, ending decades of Tigrayan rule in the Ethiopian government. Prior to Abiy's election into office, the Tigray People's Liberation Front (TPLF) was Ethiopia's primary political party. After Abiy gained power, tensions between Tigray and the federal government increased. The TPLF, in fear of attack, began an assault on federal government military bases.[271] In retaliation, on November 4, 2020, Abiy ordered the Ethiopian National Defense Force (ENDF) troops to begin the Mekelle Offensive in Tigray.[272] The conflict continued to escalate until it devolved into the Tigray War.

Abiy's forces, with the assistance of the Eritrean government, continued a brutal attack against the Tigrayan region and its people. The United Nations Human Rights Chief issued a joint investigation into the abuses that occurred during the conflict. The report included the observation that "sexual and gender-based violence has been characterized by a pattern of extreme brutality, including gang rapes, sexualized torture and ethnically targeted sexual violence."[273] Since November 2020, Insecurity Insight has reported that 471 women and girls were affected by rape by 260 perpetrators.[274] They analyzed 84 specific incidents that found rape was being disproportionately used against

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[271] "War in Ethiopia," Council on Foreign Relations, March 31, 2023, https://cfr.org/global-conflict-tracker/conflict/conflict-ethiopia.
[272] Ibid.
[273] "Probe in Ethiopia's Tigray Did Not Reach Site of Axum Attack: UN," September 13, 2021, https://www.aljazeera.com/news/2021/9/13/un-probe-in-ethiopias-tigray-didnt-reach-axum-massacre.
[274] "Sexual Violence in Ethiopia" (Insecurity Insight, n.d.), https://insecurityinsight.org/wp-content/uploads/2022/01/January-2022-Update-Sexual-Violence-in-Ethiopia.pdf.

Tigrayan women and girls.[275] Amongst the analyzed incidents, approximately 73% were instances of Ethiopian, Eritrean, and Amhara forces raping Tigrayan women and girls.[276] The other 27% were instances of TPLF soldiers raping Amhara women.[277] Therefore, rape is being weaponized by both sides of the war.

However, there are stark differences in the rhetoric that the Amhara forces were using in comparison to TPLF forces. The rape conducted by TPLF forces has all the hallmarks of retributive rape. A TPLF soldier said "Amhara has massacred our people (Tigrayans), the Federal Defense forces have raped my wife, now we rape you as we want" to a woman that he raped.[278] This comment does not necessarily allude to a policy of rape within the TPLF forces, rather it suggests that the forces seek to use rape as a form of revenge against Amharan women. The Tigrayan use of rape as an instrument of revenge against Amharan women mimics the Soviet tactic of rape in Berlin. This is not necessarily an intentional policy, rather it is unspoken, sanctioned rape that should still be prosecuted distinctly from opportunistic, individual attacks against individual women but does not conform to the current definition of genocide. The ICTR *Nahimana* Appeals judgement can be applied to the Tigrayan retributive rape against Amharan women, as the Amharan forces are not necessarily a protected group per the Genocide Convention.

However, in contrast, the Amharan, Ethiopian, and Eritrean forces' comments towards women who were raped are starkly genocidal. In March 2021, Eritrean forces

[275] Ibid.
[276] Ibid.
[277] Ibid.
[278] Ibid.

claimed that they were ordered to "come after Tigrayan women."[279] Since the forces were allegedly ordered to rape women, this policy could be genocidal if these orders were coming from the individuals who were most responsible and if their intent was to destroy the Tigrayan population through rape. Further evidence is when a 34-year-old mother of three was raped by militia men when fleeing her home in Western Tigray. She reported that one of the attackers told her that "a Tigrayan womb should never give birth" and then stuck a hot rod in her uterus.[280] She is now infertile.[281] This rhetoric implies that the militia men believed that Tigrayan women, as a group, should not give birth. In conjunction with the alleged orders from high-ranking commanders, rape by the Amharan, Ethiopian, and Eritrean forces seem definitionally genocidal. In addition, Dr. Tedros Tefera said that:

> "The women that have been raped say that the things that they say to them when they were raping them is that they need to change their identity – to either Amharize them or at least leave their Tigrinya status [...] and that they've come there to cleanse them [...] to cleanse the blood line."[282]

Dr. Tefera's description of the violence against women also seems consistent with genocide. The soldiers are raping the women to make them less Tigrayan and change the fundamental group identity. To legally prosecute for rape as genocide might be challenging, given the *dolus specialis* and heavy evidentiary requirement, but that this was genocidal seems clear.

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[279] Ibid.
[280] "Sexual Violence in Ethiopia."
[281] Ibid.
[282] "Sexual Violence in Ethiopia."

This is rape to annihilate and destroy a group through the women. However, there are legal barriers that prevent rape from being prosecuted as such until more information is uncovered about the policy of the ENDF and Abiy. If Abiy and high-ranking soldiers were commending the use of rape or encouraging it as a policy, this is genocidal rape for which they can be prosecuted.

Analysis

Each of these cases demonstrate an ambiguous moment in history. Rape was used as a weapon against a woman and her community, thus contributing to the destruction of a group, but did not meet the high threshold of genocide. Prosecuting such events as a crime against humanity would fail the woman and her community by not acknowledging why rape was weaponized. During the Rape of Nanjing and the Battle of Berlin, in particular, the perpetrators knew that they could never destroy the entire Chinese and German populations, respectively. There was no anticipation that the genocide could be completed to destroy each national group, but the perpetrators used the respective cities and their civilians as proxies for the whole population. Thus, rape was weaponized against a woman and her community. International law has a gap in its framework regarding rape.

When Lemkin initially conceptualized genocide, he intended to create a broader definition than the one adopted in 1948. As demonstrated by these three case studies, the impact of attacks against a woman can have the specific genocidal intent to destroy a population, but this does not reflect in the legal definition of genocide. Genocidal attacks can tear apart the fabric of a society long after the perpetrators have left. Declaring such

attacks as a crime against humanity does a disservice to the survivors and victims who were targeted, specifically, as a member of a group. Therefore, our understanding of genocidal attacks needs to be broadened to accept more elements from Lemkin's initial theorization. A further developed definition should capture the degradation of social processes that include attacks intended to harm communities, not just the individuals in question, even in the absence of any hope for total destruction of the community.

Chapter VI: Conclusion

Genocide is the crime of all crimes.[283] And rape, which is frequently used as a means of annihilating a group through women, is not codified as such. The Rohingya genocide and the war in Ukraine are current instances of weaponized rape as genocide. This omission from the codified definition of genocide in international law is failing women and their targeted communities to this day.

In Myanmar, the military used rape as a weapon of genocide against the Rohingya Muslims. Rohingya women were raped by top military commander as a strategy of genocide.[284] In August 2018, UN investigators released a report accusing the Burmese military of abhorrent crimes. Rapes were frequently conducted in public spaces to humiliate women. Women and girls between 13 and 25 years-old were targeted, including pregnant women.[285] Soldiers would also frequently gang rape women, and Rohingya women would consider themselves lucky if they were raped by only a few men.[286] These are a few examples of the abhorrent attacks against women as a means of destroying the Rohingya Muslims.

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[283] William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2009).
[284] Djaouida Siaci, "The Mass Rape of Rohingya Muslim Women: An All-Out War Against All Women," Middle East Institute, September 29, 2019, https://www.mei.edu/publications/mass-rape-rohingya-muslim-women-all-out-war-against-all-women.
[285] "Report of the Independent International Fact-Finding Mission on Myanmar" (Human Rights Council 39th Session: United Nations, September 12, 2018), 9.
[286] Ibid.

In Ukraine, Russian forces are using rape as a deliberate attack against women. In October 2022, the UN declared that Russia was using rape as military strategy.[287] During the occupation of a basement in Bucha, 25 girls and one woman were raped and the Russian soldiers told them that "they would rape them to the point where they wouldn't want sexual contact with any man, to prevent them from having Ukrainian children."[288] This is evident rhetoric indicating that Russian soldiers want to destroy Ukrainian nationals by targeting women. Currently, rape continues to be used prolifically against women and girls.

The times of discussing rape as a "crime of honor" have passed, and the times of failing women who have been raped not only because they are women but also because they are a member of a specific race, religion, nationality, or ethnicity have passed. The next step in developing international law to protect women is by expanding the definition of genocide to include rape as an act of war, then lowering the high threshold of rape as an act of genocide - it would create a sufficient distinction between rape as an instrument of war compared to genocide and ensure prosecutions for events such as the Battle of Berlin, the Rape of Nanjing, and the Tigray War.

Rape is a brutal, inexcusable crime. Rape as a systematic weapon of war and genocide must be actively prohibited by the Rome Statute of the ICC. Considering the

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[287] Philip Wang, Josh Pennington, and Heather Chen, "Russia Using Rape as 'military Strategy' in Ukraine: UN Envoy," CNN, October 15, 2022, https://www.cnn.com/2022/10/15/europe/russia-ukraine-rape-sexual-violence-military-intl-hnk/index.html.

[288] Yogita Limaye, "Ukraine Conflict: 'Russian Soldiers Raped Me and Killed My Husband,'" *BBC News*, April 11, 2022, sec. Europe, https://www.bbc.com/news/world-europe-61071243.

ubiquitous use of mass rape in genocide, rape has not been sufficiently evaluated and codified. The first step in recognizing this weaponization of rape is by formalizing it as an element of genocide. Inaccurately classifying rapes during these events as a crime against humanity - essentially an attack against an individual - fails the women who seek to understand why a senseless, brutal crime was committed against them, thus perpetuating patriarchal standards of genocide and its prosecution.

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