

# SEXUAL VIOLENCE OR RAPE AS A CONSTITUENT ACT OF GENOCIDE: LESSONS FROM THE *AD HOC* TRIBUNALS AND A PRESCRIPTION FOR THE INTERNATIONAL CRIMINAL COURT

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*In 2010, the International Criminal Court (ICC) issued its first warrant of arrest for sexual violence committed in furtherance of the crime of genocide. Although the ICC has no experience prosecuting sexual violence as genocide under the Rome Statute, such prosecutions are not without precedent: the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY) offer guidance. This Article evaluates the jurisprudence of the ICTR and ICTY, and uses that case law to formulate a prescription for future prosecutions at the ICC. This Article concludes that an amendment to the Rome Statute, specifically enumerating sexual violence as a constituent act of genocide, offers the best means of ensuring continued prosecution of genocidal sexual violence under international law.*

## INTRODUCTION

The Rome Statute, the treaty that governs the International Criminal Court (ICC), is in dire need of amendment. To date, twenty-three cases have come before the ICC,<sup>1</sup> thirteen of which

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1. Two cases from the situation in Uganda have come before the ICC. See Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest (July 8, 2005) [hereinafter *Kony* Warrant of Arrest]; Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Warrant of Arrest (July 8, 2005). Six cases from the situation in the Democratic Republic of the Congo have come before the ICC. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Warrant of Arrest (Feb. 10, 2006); Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Second Warrant of Arrest (July 13, 2012); Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Warrant of Arrest (July 2, 2007) [hereinafter *Katanga* Warrant of Arrest]; Prosecutor v. Ngudjolo, Case No. ICC-01/04-02/12, Warrant of Arrest (July 6, 2007) [hereinafter *Ngudjolo* Warrant of Arrest]; Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Warrant of Arrest (Sept. 28, 2010) [hereinafter *Mbarushimana* Warrant of Arrest]; Prosecutor v. Mudacumura, Case No. ICC-01/04-01/12, Warrant of Arrest (July 13, 2012) [hereinafter *Mudacumura* Warrant of Arrest]. Five cases from the situation in Darfur, Sudan have come before the ICC. See Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest

have contained charges of sexual violence.<sup>2</sup> Despite its recognition

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(Apr. 27, 2007) [hereinafter *Harun* Warrant of Arrest]; Prosecutor v. al-Bashir, Case No. ICC-02/05-01/09, First Warrant of Arrest (Mar. 4, 2009) [hereinafter *al-Bashir* First Warrant of Arrest] and Prosecutor v. al-Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010) [hereinafter *al-Bashir* Second Warrant of Arrest]; Prosecutor v. Abu Garda, Case No. ICC-02/05-02/09, Summons to Appear (May 7, 2009); Prosecutor v. Banda, Case No. ICC-02/05-03/09, Summons to Appear (Aug. 27, 2009); Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Warrant of Arrest (Mar. 1, 2012) [hereinafter *Hussein* Warrant of Arrest]. Two cases from the situation in the Central African Republic have come before the ICC. Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Warrant of Arrest (June 10, 2008) [hereinafter *Bemba* Warrant of Arrest]; Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Warrant of Arrest (Nov. 20, 2013). Four cases from the situation in the Republic of Kenya have come before the ICC. *See* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Summons to Appear (Mar. 8, 2011); Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Summons to Appear (Mar. 8, 2011) [hereinafter *Kenyatta* Summons]; Prosecutor v. Barasa, Case No. ICC-01/09-01/13, Warrant of Arrest (Aug. 2, 2013); Prosecutor v. Gicheru, Case No. ICC-01/09-01/15, Warrant of Arrest (Mar. 10, 2015). One case from the situation in Libya has come before the ICC. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Warrant of Arrest (June 27, 2011). Two cases from the situation in the Republic of Côte d'Ivoire have come before the ICC. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Warrant of Arrest (Nov. 30, 2011) [hereinafter *Laurent Gbagbo* Warrant of Arrest] and Prosecutor v. Blé Goudé, Case No. ICC-02/11-02/11, Warrant of Arrest (Dec. 21, 2011) [hereinafter *Blé Goudé* Warrant of Arrest] (Case No. ICC-02/11-01/11 and Case No. ICC-02/11-02/11 have been consolidated for trial); Prosecutor v. Gbagbo, Case No. ICC-02/11-01/12, Warrant of Arrest (Feb. 29, 2012) [hereinafter *Simone Gbagbo* Warrant of Arrest]. One case from the situation in the Republic of Mali has come before the ICC. Prosecutor v. Al Faqi, Case No. ICC-01/12-01/15, Warrant of Arrest (Sept. 18, 2015).

2. Throughout this Article, I use the terms “sexual violence” and “sexual assault” to denote both forcible vaginal or anal intercourse, and other kinds of coerced sexual crimes (including, but not limited to, forced oral-to-genital contact, sexual penetration with objects, and compelled viewing of sexual acts). That is consistent with the definitions articulated by both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY). Trial Chamber I of the ICTR has defined rape as a “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 598 (Sept. 2, 1998) [hereinafter *Akayesu* Judgment]. After initially adopting that articulation in Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 479 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), the ICTY's Trial Chamber II later revised its definition to expressly include vaginal, anal, and oral penetration. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 185 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) [hereinafter *Furundžija* Judgment]. In *Furundžija*, the ICTY described the elements of rape as follows: “the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator . . . by coercion or force or threat of force against the victim or a third person.” *Id.* ¶ 185.

The thirteen cases charging the defendants with sexual violence are: *Kony* Warrant of Arrest, *supra* note 1 (charging sexual slavery and rape as crimes against humanity, and the induction of rape as a war crime); *Katanga* Warrant of Arrest, *supra* note 1 (charging sexual slavery as a crime against humanity and a war crime); *Ngudjolo* Warrant of Arrest, *supra* note 1 (charging sexual slavery as a crime against humanity and a war crime); *Mbarushimana* Warrant of Arrest, *supra* note 1 (initially charging rape as both a crime against humanity and a war crime, but Pre-Trial Chamber I declined to confirm the charges); *Mudacumura* Warrant of Arrest, *supra* note 1 (charging rape as a war crime);

of sexual crimes in over fifty percent of cases, the ICC has been plagued by criticism for its ineffective prosecution of sexual violence.<sup>3</sup> Moreover, where allegations of sexual violence were in fact brought, the acts were charged as crimes against humanity or war crimes.<sup>4</sup> Notably absent were indictments for sexual violence com-

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*Harun* Warrant of Arrest, *supra* note 1 (charging rape as a crime against humanity and a war crime); *al-Bashir* First Warrant of Arrest, *supra* note 1 (charging rape as a crime against humanity) and *al-Bashir* Second Warrant of Arrest, *supra* note 1 (discussing rape as a component of a “genocidal policy”); *Hussein* Warrant of Arrest, *supra* note 1 (charging rape as a crime against humanity and a war crime); *Bemba* Warrant of Arrest, *supra* note 1 (same); *Kenyatta* Summons, *supra* note 1 (charging rape as a crime against humanity); *Laurent Gbagbo* Warrant of Arrest, *supra* note 1 (charging “rape and other forms of sexual violence” as a crime against humanity); *Simone Gbagbo* Warrant of Arrest, *supra* note 1 (same); and *Blé Goudé* Warrant of Arrest, *supra* note 1 (same).

3. For an external critique, see Passy Mubalama & Espérance Nzigire, *ICC Still Facing Rape Case Challenges*, INST. FOR WAR & PEACE REPORTING (Aug. 8, 2011), <http://iwpr.net/report-news/icc-still-facing-rape-case-challenges> (stating that, “[i]n the past, the ICC has been widely [criticized] for a lack of emphasis on crimes of sexual violence perpetrated against the female population in countries where it has sought to prosecute atrocities, particularly in the Democratic Republic of Congo.”). For an internal critique of the Prosecution by Trial Chamber I, see *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment, ¶¶ 629–30 (Mar. 14, 2012) (observing that, despite pretrial evidence of the commission of rape under the defendant’s command, “[n]ot only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step,” and, “because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue.”). Judge Elizabeth Odio Benito—who signed on to the majority opinion in the *Lubanga* judgment—wrote a separate and dissenting opinion criticizing the majority of the court itself for, among other things, failing to recognize sexual violence as a method of conscripting children to “participate actively in the hostilities.” *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito, ¶ 16 (Mar. 14, 2012). Judge Odio Benito explained that the majority was “making this critical aspect of the crime invisible,” and that “[i]nvisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription[,] and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group.” *Id.*

4. See *supra* note 2 (demonstrating that all thirteen cases alleging sexual violence have charged the acts as crimes against humanity or war crimes). The Rome Statute defines “crimes against humanity” as certain enumerated crimes—murder; extermination; enslavement; deportation or forcible transfer; imprisonment or other severe deprivation of physical freedom; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or sexual violence of comparable gravity; persecution on prohibited grounds; enforced disappearance; the crime of apartheid; and other inhumane acts—when the act is “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute]. Conversely, war crimes in an international context are defined as “[g]rave breaches of the Geneva Convention” and “[o]ther serious violations of the laws and customs applicable in international armed conflict.” *Id.* art. 8(2)(a)–(b). “Other serious violations” include both the commission of “outrages upon personal dignity, in particular humiliating and degrading treatment” as well as “rape, sexual slavery,

mitted in furtherance of the crime of genocide<sup>5</sup>—until 2010, when the ICC issued a second arrest warrant for Sudanese President Omar al-Bashir, charging him with three counts of genocide and expressly noting rape as a component of his “genocidal policy.”<sup>6</sup> Now that the ICC’s landmark first trial has ended,<sup>7</sup> and in light of the ongoing and ethnically-targeted rape crisis in Sudan,<sup>8</sup> it is time to authorize the ICC to prosecute sexual violence as genocide if the evidence supports such a charge.

Although the ICC has no experience trying sexual violence as genocide under Article 6 of the Rome Statute, such prosecutions are not without precedent. The ICC should look to the Interna-

enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.” *Id.* art. 8(2)(b)(xxi)–(xxii). In the event of a non-international armed conflict, war crimes include “serious violations of article 3 common to the four Geneva Conventions” against persons not involved in the hostilities (including outrages against personal dignity) and “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character” (including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence). *Id.* art. 8(2)(c),(e).

5. The Rome Statute defines the crime of “genocide” as “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) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group.” *Id.* art. 6.

6. See Marlise Simons, *International Court Adds Genocide to Charges Against Sudan Leader*, N.Y. TIMES, July 12, 2010, at A4 (noting that the warrant “cited torture, rape, the poisoning of water, expulsions and killings as part of what it called ‘the genocidal policy’” (emphasis added)); see also *al-Bashir* Second Warrant of Arrest, *supra* note 1, at 6 (stating that, “as part of the [Government of Sudan]’s unlawful attack on . . . [the] part of the civilian population of Darfur and with knowledge of such attack, [Government of Sudan] forces subjected, throughout the Darfur region . . . thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination . . . .” (emphasis added)).

7. Press Release, ICC, The ICC Appeals Chamber Confirms the Verdict and the Sentence Against Thomas Lubanga Dyilo (Dec. 1, 2014) [hereinafter Press Release, Confirmation of Verdict and Sentence Against Lubanga].

8. Human Rights Watch (HRW) recently reported that, in October 2014, Sudanese army forces raped over 200 women and girls in the northern Darfur town of Tabit. HRW, MASS RAPE IN DARFUR: SUDANESE ARMY ATTACKS AGAINST CIVILIANS IN TABIT 14 (Feb. 2015) [hereinafter HRW REPORT]; see also Press Release, HRW, Sudan: Mass Rape by Army in Darfur (Feb. 11, 2015), <https://www.hrw.org/report/2015/02/11/mass-rape-north-darfur/sudanese-army-attacks-against-civilians-tabit> (reporting on the same). The HRW report, released in February 2015, characterized the attacks as possibly “amount[ing] to crimes against humanity,” but did not suggest that they were carried out with genocidal intent. *Id.* at 2. Nonetheless, because a majority of Tabit residents belong to the Fur ethnic group, and because the warrant for al-Bashir’s arrest identifies that group as a target of his “genocidal polic[ies],” the ICC must have the authority to prosecute those mass rapes as genocide if the evidence supports it. *al-Bashir* Second Warrant of Arrest, *supra* note 1, at 7.

tional Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY) for guidance on the successful prosecution of sexual violence as genocide. This Article evaluates the experiences of the ICTR and ICTY, and formulates a prescription for future ICC prosecutions.

Part I of this Article articulates the definition of genocide under international law, while Part II explains how sexual violence might function as an act of genocide pursuant to that definition. Parts III and IV explore the jurisprudence of the ICTR and ICTY, respectively, and discuss the extent to which each tribunal has prosecuted sexual violence as an act of genocide. Part V analyzes the progression (or lack thereof) of rape-as-genocide in the ICC, and Part VI contains a prescription for future ICC sexual violence prosecutions. The Article concludes that an amendment to the Rome Statute, specifically enumerating sexual violence as a constituent act of genocide, is the best means of ensuring continued prosecution of genocidal rape and sexual assault.<sup>9</sup> Such an enumeration will strengthen the emerging *jus cogens* prohibition<sup>10</sup> against sexual violence in customary international law, remove some of the jurisdictional limitations to prosecuting gender-based crimes, reduce the problem of due process challenges based on textual ambiguity and, perhaps most importantly, increase justice for victims.

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9. For a review of the feminist arguments against the prosecution of sexual violence as genocide, see Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 786 (2005) (noting that many feminist critiques center around "whether a focus on genocidal rape function[s] to downplay the extent to which all women raped during war [a]re victims."). For the argument that the prohibition against rape should be classified as a *jus cogens* norm rather than prosecuted as a constituent act of genocide, see Michelle Seyler, *Rape in Conflict: Battling the Impunity That Stifles its Recognition as a Jus Cogens Human Right*, 15 GONZ. J. INT'L L. 30, 44 (2011) (observing that classifying rape as an act of genocide "fails to address perhaps the greatest underlying issue: rape is a crime unto itself."). Nonetheless, it is important to note that the ICC must take into account human rights norms—especially those that have attained *jus cogens* status—in interpreting and applying the Rome Statute. See Rome Statute, *supra* note 4, art. 21(3) (providing that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights."). Therefore, those feminist critiques may actually present a false dichotomy. See *infra* note 10 for a general discussion of *jus cogens* norms.

10. A *jus cogens* norm is "a fundamental principle of international law considered to have acceptance among the international community of states as a whole." Nicole Hallet, *The Evolution of Gender Crimes in International Law*, in PLIGHT AND FATE OF WOMEN DURING AND FOLLOWING GENOCIDE 183, 195 (Samuel Totten ed., 2008). It is a peremptory norm from which no derogation is permitted. ANNE-MARIE L.M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 434 (2005) (citing Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331).

## I. DEFINING GENOCIDE UNDER INTERNATIONAL LAW

The 1948 Convention on the Prevention & Punishment of the Crime of Genocide defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group.<sup>11</sup>

The ICTR and ICTY incorporated the Convention's definition into their respective statutes verbatim (the ICTR in its statute's Article 2 and the ICTY in its statute's Article 4).<sup>12</sup> The ICC, which is governed by the Rome Statute, also adopted identical language in defining genocide in the ICC statute's Article 6.<sup>13</sup>

In order to prosecute the crime of genocide, two elements must be proven: the *actus reus* (the criminal act) and the *mens rea* (the mental intent to commit the act).<sup>14</sup> Sub-elements (a) through (e) constitute the *actus reus* of the crime: those acts that, if committed with the requisite specific intent, will rise to the level of genocide.<sup>15</sup> The *mens rea* for genocide requires specific intent (*dolus specialis*) to destroy a protected group—or a group “as such”—in whole or in part.<sup>16</sup> The ICTR and ICTY have interpreted the terms “destruction,” “in whole or in part,” and “protected group,” in turn.

11. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, S. Exec. Doc. O, 81-1, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

12. Compare *id.* with Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 art. 2, Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR Statute] and Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 4, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]. Although the tribunals define the crime of genocide in identical terms, the provisions relating to war crimes and crimes against humanity are different. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 306 (2003).

13. Rome Statute, *supra* note 4, art. 6.

14. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 90 (May 21, 1999) [hereinafter *Kayishema* Judgment].

15. *Id.* ¶ 100.

16. *Id.* ¶ 91; Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 550–51 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) [hereinafter *Krstić* Judgment].

The “destruction” element does not necessarily require physical elimination; one may also destroy a group “through purposeful eradication of its culture and identity,” such that the group no longer constitutes “an entity distinct from the remainder of the community.”<sup>17</sup> In order to realize the destruction of the group “in whole or in part,” the perpetrator must “intend[ ] to destroy at least a substantial part of the protected group.”<sup>18</sup> Factors for consideration include, but are not limited to, the numeric size of the group, the number of individuals targeted—both in absolute terms and in relation to the group’s overall size—the prominence of the targeted part of the group, and the current and potential area of the perpetrators’ control.<sup>19</sup> Finally, a protected group is defined by national, ethnic, racial, or religious identity, and the acts in question “must be directed towards a specific group on these dis-

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17. *Krstić* Judgment, *supra* note 16, ¶ 574.

18. Prosecutor v. *Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶ 12 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) [hereinafter *Krstić* Appeals Judgment]; Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgment, ¶ 749 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012) (citing *Krstić* Appeals Judgment); see also *Kayishema* Judgment, *supra* note 14, ¶¶ 95, 97 (concluding that “‘in part’ requires the intention to destroy a considerable number of individuals who are part of the group.”).

19. *Krstić* Appeals Judgment, *supra* note 18, ¶¶ 12–13. In Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶¶ 864–65 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010), the ICTY’s Trial Chamber II quoted the “substantiality” language from the *Krstić* Appeals Judgment, and went on to hold that two high-ranking Bosnian Serb military leaders, Vujadin Popović and Ljubiša Beara, committed genocide against the Muslims of Eastern Bosnia, a subgroup that “constitute[s] a substantial component of the entire group, Bosnian Muslims.” On appeal from that judgment, Beara argued that the trial chamber erred in finding that the targeted subgroup of Bosnian Muslims constituted a substantial part of the group as a whole. He asserted that the court “ignored the numeric size of the targeted group and based its finding on factors of secondary importance which could not compensate for the fact that not enough members of the group were targeted to satisfy this requirement.” Prosecutor v. Popović, Case No. IT-05-88-A, Appeals Judgment, ¶ 416 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015). In particular, Beara argued that the court erred in relying on the following three factors to conclude that the “Srebrenica enclave” was strategically important to the Bosnian Serb leaders: “(1) the ethnically Serb [S]tate [that the Bosnian Serb leadership] sought to create would remain divided and access to Serbia disrupted without Srebrenica; (2) most Muslim inhabitants of the region had, at the relevant time, sought refuge in the Srebrenica enclave and the elimination of the enclave would accomplish the goal of eliminating the Muslim presence in the entire region; and (3) the enclave’s elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their defencelessness and be ‘emblematic’ of the fate of all Bosnian Muslims.” *Id.* In a judgment released on January 30, 2015, the ICTY Appeals Chamber rejected those arguments. It observed that the trial chamber did not disregard the numeric size of the targeted part of the group, but that—in accordance with the *Krstić* Appeals Judgment—simply went on to consider “secondary factors.” *Id.* ¶ 416. The Appeals Chamber further held that the trial chamber neither gave those secondary factors undue weight nor applied them to the facts erroneously, and ultimately dismissed that portion of Beara’s appeal. *Id.* ¶ 422.

criminatory grounds.”<sup>20</sup> In recent years, the international community has recognized that sexual violence may—under certain circumstances—be perpetrated with the requisite intent to give rise to a charge of genocide.

## II. SEXUAL VIOLENCE AS GENOCIDE UNDER INTERNATIONAL LAW

Sexual violence can function as a tool of genocide on multiple levels. First, physical, as well as psychological damage resulting from sexual violence can render the victim unable or unwilling to have children.<sup>21</sup> Second, perpetrators may use sexual violence as a tool of cultural and community destruction: sexual assault may serve to “isolat[e] and humiliat[e] women and men of the same culture” because the crime “has a chilling effect on the normative relations between a man and woman who might [otherwise] choose to procreate.”<sup>22</sup> Arguably, that effect is the same regardless of the biological sex or gender of the victim.<sup>23</sup> This chilling effect may be particularly intense in cultures where victims of sexual violence “are perceived as undesirable, soiled, and unfit for marriage.”<sup>24</sup>

Third, and perhaps most complicated, is the infliction of forced pregnancy as an instrument of genocidal violence.<sup>25</sup> In such cases, “interference with autonomous reproduction” is accomplished by impregnating a woman with the sperm of a man who does not belong to her protected group, as defined by a national, ethnic,

20. *Kayishema* Judgment, *supra* note 14, ¶ 98. “An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).” *Id.* “A racial group is based on hereditary physical traits often identified with geography,” while “a religious group includes denomination or mode of worship or a group sharing common beliefs.” *Id.*

21. See Jonathan M.H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 MICH. J. RACE & L. 503, 510 (2003).

22. *Id.* at 509 (quoting Sarnata Reynolds, *Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 LAW & INEQ. 601, 606–07 (1998)).

23. But see Dustin A. Lewis, *Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law*, 27 WIS. INT’L L.J. 1, 30, 47 (2009) (arguing that international law fails to adequately acknowledge and punish sexual crimes against men, but observing that the judgment in *Akayesu*—in which the ICTR first recognized sexual violence as a constituent act of genocide—acknowledged that rape can act as a deterrent to procreation through its mental, as well as physical, effects).

24. Short, *supra* note 21, at 509–10 (discussing the Muslim communities of the former Yugoslavia).

25. See *id.* at 510.



racial, or religious identity.<sup>26</sup> The goal of the perpetrators may be, as in the former Yugoslavia, to “dilute” the protected population.<sup>27</sup> In theory, at least, forced pregnancy is only an “effective” tool of genocide in patrilineal societies, where any child resulting from forced pregnancy is automatically labeled with the father’s ethnic status and affiliation.<sup>28</sup>

### III. SEXUAL VIOLENCE AS A CONSTITUENT ACT OF GENOCIDE IN RWANDA

Because the ICTR Statute incorporated the Convention’s definition of genocide, it does not expressly recognize sexual violence as a constituent element of genocide.<sup>29</sup> In contrast, the ICTR Statute’s Article 3 defines rape as a crime against humanity and as a violation of Common Article 3 to the Geneva Conventions and Article 4 of Additional Protocol II.<sup>30</sup> Yet the ICTR went beyond the textual confines of its statute when it recognized sexual violence as a constituent act of genocide in *Prosecutor v. Akayesu*.<sup>31</sup> The *Akayesu* case marked the first successful prosecution for sexual violence as both a crime against humanity (as an enumerated crime) and as genocide (as a constituent element of the crime).<sup>32</sup>

#### A. The Seminal Case: *Prosecutor v. Akayesu*

Jean-Paul Akayesu, the bourgmestre (or mayor) of Taba commune in Rwanda, was indicted on twelve counts of genocide,

26. *Id.* at 511–12 (quoting Siobhán K. Fisher, Note, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 93 (1996)).

27. *Id.* at 512.

28. *Id.*

29. ICTR Statute, *supra* note 12, art. 2.

30. *Id.* art. 3 (rape as a crime against humanity); *id.* art. 4 (rape as a violation Common Article 3 and Additional Protocol II). Specifically, Article 4 of the ICTR Statute defines violations of Common Article 3 and Additional Protocol II as including “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, *rape*, enforced prostitution and any form of indecent assault.” *Id.* art. 4 (emphasis added). “Common Article 3” is referred to as such because it is an Article common to all four Geneva Conventions. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 6 (2012). Common Article 3 applies to any armed conflict, whether international or non-international. *Id.* It prohibits both “violence to life and person” and the commission of “outrages upon personal dignity” against those “persons taking no part in the hostilities.” *Id.* Additional Protocol II was the second of two additional protocols to the Geneva Conventions adopted in 1977. *See id.* Additional Protocol II applies to all armed conflicts, even non-international armed conflicts, and promises “general protection” for civilian populations. *Id.*

31. *See Akayesu* Judgment, *supra* note 2.

32. *See Askin*, *supra* note 12, at 318.

crimes against humanity, and war crimes.<sup>33</sup> The indictment contained neither charges of, nor references to, crimes of a sexual nature.<sup>34</sup> However, the case proved groundbreaking, both for the prosecution of sexual violence as a constituent act of genocide and for the prosecution of sexual violence more generally.<sup>35</sup>

During the trial in Trial Chamber I of the ICTR,<sup>36</sup> witness testimony led the judges to direct the prosecution to “renew their investigation of sexual violence in connection with events which took place in Taba at the bureau communal.”<sup>37</sup> The Prosecution ultimately amended the indictment to include charges of sexual violence, explaining that “evidence previously available was not sufficient to link the Accused to acts of sexual violence” and noting that “factors to explain this lack of evidence might include the shame that accompanies acts of sexual violence as well as insensitivity in the investigation of sexual violence.”<sup>38</sup>

The amended indictment alleged that “hundreds of civilians . . . sought refuge at the bureau communal” and that the females “were

33. *Id.* At the time of the genocide, the country of Rwanda was divided into eleven prefectures, which were further subdivided into communes. Prosecutor v. Akayesu, Case No. ICTR-96-4-I, Amended Indictment, ¶ 2 (June 17, 1997) [hereinafter *Akayesu* Indictment]. Each commune was governed by a “bourgmestre,” an official appointed by the President of the Republic. *Id.* Taba commune was located in the Gitarama prefecture. *Id.* ¶ 5.

34. See Askin, *supra* note 12, at 318; see generally *Akayesu* Indictment, *supra* note 33.

35. See Askin, *supra* note 12, at 318 (noting that *Akayesu* represented “the first ever conviction of either genocide or crimes against humanity for sexual violence.”).

36. The ICTR is comprised of three trial chambers and an Appeals Chamber (shared with the ICTY). Each trial chamber is composed of three judges. ICTR, *About ICTR: The Chambers*, <http://www.unictr.org/tabid/103/Default.aspx> (last visited Sept. 21, 2015) (providing an overview of the ICTR chambers and listing the ICTR judges by name, chamber, and country of origin). Judge Laïty Kama of Senegal presided over the *Akayesu* trial, joined by Judge Lennart Aspegren of Sweden and Judge Navanethem Pillay of South Africa. Press Release, ICTR, Historic Judgment Finds Akayesu Guilty of Genocide (Sept. 2, 1998) [hereinafter Press Release, Historic Judgment]. Not only was Judge Pillay the sole female judge at the ICTR in 1998, but she also possessed extensive knowledge of gender violence in international law. Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, HUMAN RIGHTS BRIEF, Spring 2004, at 16, 17. It was Judge Pillay who initiated further questioning of the witnesses with respect to sexual crimes. *Id.*

37. *Akayesu* Judgment, *supra* note 2, ¶¶ 416–17 (“Allegations of sexual violence first came to the attention of the Chamber through the testimony of Witness J, a Tutsi woman, who stated that her six year-old daughter had been raped by three Interahamwe when they came to kill her father. On examination by the Chamber, Witness J also testified that she had heard that young girls were raped at the bureau communal. Subsequently, Witness H, a Tutsi woman, testified that she herself was raped in a sorghum field and that, just outside the compound of the bureau communal, she personally saw other Tutsi women being raped and knew of at least three such cases of rape by Interahamwe.”).

38. *Id.* ¶ 417.

regularly taken by armed local militia and/or communal police and subjected to sexual violence . . . .”<sup>39</sup> The indictment further alleged that:

Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.<sup>40</sup>

Finally, the indictment alleged that Akayesu “knew that the acts of sexual violence . . . were being committed and was at times present during their commission” and he “facilitated the commission of the sexual violence . . . by allowing [it] and beatings and murders to occur on or near the bureau communal premises.”<sup>41</sup>

The amended indictment charged Akayesu with rape as a crime against humanity and as a violation of Common Article 3 and Additional Protocol II.<sup>42</sup> However, because the genocide counts listed in the indictment “also referenced the paragraphs alleging the rape crimes,” this “allow[ed] a finding of rape as an instrument of genocide if the evidence led to that conclusion.”<sup>43</sup>

## 1. The Prosecution

Following the amendment of the indictment, Trial Chamber I heard testimony from prosecution witnesses JJ, NN, OO, PP, and KK.<sup>44</sup> Witness JJ, a Tutsi woman, testified that the Interahamwe, a government-backed Hutu militia,<sup>45</sup> “took young girls and women from their site of refuge near the bureau communal into a forest in the area and raped them” and she personally was raped repeatedly by members of the militia.<sup>46</sup> Witness JJ testified that she could “not count” the number of times she was raped because “each time you

39. *Akayesu* Indictment, *supra* note 33, ¶ 12A.

40. *Id.*

41. *Id.* ¶ 12B.

42. *Id.* at 7 (Counts 13 and 15).

43. Askin, *supra* note 12, at 319.

44. *Akayesu* Judgment, *supra* note 2, ¶¶ 416–48. During the hearings, eyewitnesses requiring protection (“protected witnesses”) were referred to by pseudonyms and shielded from public view to ensure the confidentiality of their testimony. *Id.* ¶ 18; *see* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses (Sept. 27, 1996).

45. MODERN GENOCIDE: THE DEFINITIVE RESOURCE AND DOCUMENT COLLECTION 1746 (Paul R. Bartrop & Steven Leonard Jacobs eds., 2015).

46. *Akayesu* Judgment, *supra* note 2, ¶ 421.

encountered attackers they would rape you.”<sup>47</sup> Although Witness JJ never saw Akayesu personally commit rape, she did recall hearing him say to a member of the Interahamwe, “Never ask me again what a Tutsi woman tastes like.”<sup>48</sup> With respect to that statement, she testified that it seemed the defendant was “talking as if . . . encouraging a player,” and she further testified that she believed that he was overseeing the commission of the rapes.<sup>49</sup>

Witness NN (the younger sister of Witness JJ) was raped in the courtyard of her home after the murder of her male family members.<sup>50</sup> She recalled one of her attackers saying that “the girls had been spared so that they could be raped.”<sup>51</sup> When NN’s mother begged the men to kill her daughters rather than rape them in front of her, the men replied that the “principle was to make them suffer.”<sup>52</sup> After those attackers left, two neighbors approached and raped Witness NN and her sister; additional rapes occurred later that night.<sup>53</sup> After fleeing the scene at her mother’s urging, Witness NN was subjected to repeated rapes on her way to the bureau communal.<sup>54</sup>

Upon arriving at the bureau communal, Witness NN encountered a member of the Interahamwe that she had known prior to the conflict.<sup>55</sup> The man, Rafiki, told Witness NN that he “was going to rape her and not marry her.”<sup>56</sup> She testified that Rafiki locked her in his home where he raped her repeatedly.<sup>57</sup> She was then subjected to nearly identical brutality at the hands of Rafiki’s brother.<sup>58</sup> Witness NN testified that Rafiki also gave the keys to his house to other young men who took turns raping her.<sup>59</sup>

Witness OO, also a Tutsi woman, testified that members of the Interahamwe raped her after she sought refuge at the bureau communal.<sup>60</sup> Witness PP, a Tutsi woman married to a Hutu man, described witnessing such rapes of three Tutsi women.<sup>61</sup> She testi-

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47. *Id.*

48. *Id.* ¶ 422.

49. *Id.*

50. *See id.* ¶ 430.

51. *Id.*

52. *Id.*

53. *See id.* ¶ 431.

54. *See id.* ¶ 432.

55. *See id.* ¶ 434.

56. *Id.*

57. *Id.*

58. *Id.* ¶ 436.

59. *Id.*

60. *Id.* ¶¶ 424–26.

61. *Id.* ¶ 437.

fied that the Interahamwe first forced the women to undress and “walk, run and perform exercises ‘so that they could display the thighs of Tutsi women’” in front of approximately 200 people.<sup>62</sup> Before publicly raping one of the women, her Interahamwe attacker growled, “[n]ow, let’s see what the vagina of a Tutsi woman feels like.”<sup>63</sup> The genocidal intent of the attackers was made apparent by Witness PP’s testimony that she was not raped “because they did not know which ethnic group she belonged to.”<sup>64</sup>

The testimony of Witness KK, a Hutu woman married to a Tutsi man, highlights that the patrilineal cultural context dictated the perpetrators’ genocidal behavior. Witness KK recalled hearing Akayesu tell a young girl who claimed to be Hutu that she “must be a Tutsi because he knew her father to be a Tutsi.”<sup>65</sup> Similarly, she testified that Tutsi women married to Hutu men generally “were left alone because it was said that these women deliver Hutu children.”<sup>66</sup> Accordingly, she explained that some Hutu men married Tutsi women in order to “save them.”<sup>67</sup>

## 2. The Defense

Akayesu pleaded not guilty on all counts.<sup>68</sup> Although the defendant conceded that a genocidal massacre had indeed occurred, he seemed to argue that he had been “helpless to prevent” the events, having been “outnumbered and overpowered” by the Interahamwe.<sup>69</sup> The Defense argued that the ICTR “should not require [Akayesu] to be a hero, to have laid down his life . . . in a futile attempt to prevent killings and beatings.”<sup>70</sup>

With respect to the charges pertaining to sexual violence, however, the Defense “emphatically denied” that rapes were committed in Taba commune.<sup>71</sup> Moreover, the Defense alleged that the rape charges were “added under the pressure of public opinion”

62. *Id.*

63. *Id.*

64. *Id.* ¶ 438 (emphasis added); see also *infra* text accompanying note 89 (discussing how a woman was not raped “because her ethnic background was unknown.”) (emphasis added).

65. Akayesu Judgment, *supra* note 2, ¶ 429.

66. *Id.*

67. *Id.*

68. *Id.* ¶ 29.

69. *Id.* ¶ 30.

70. *Id.* ¶ 31.

71. *Id.* ¶ 32. Trial Chamber I recognized an inherent tension between those two defenses, “not[ing] the Accused’s emphatic denial of facts which are not entirely within his knowledge.” *Id.* (emphasis added).

and were “not credibly supported by the evidence.”<sup>72</sup> It described a particular witness account—that of Witness JJ—as “the product of fantasy . . . ‘of interest to psychiatrists, but not justice.’”<sup>73</sup>

Trial Chamber I disagreed, finding no facts to support Akayesu’s allegation that the sexual violence charges were fabricated.<sup>74</sup> Notably, on cross-examination, the Defense did not challenge the occurrence of specific acts of sexual violence.<sup>75</sup> Moreover, Trial Chamber I reasoned that the so-called public pressure—in the form of interest from non-governmental organizations—was simply “indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes.”<sup>76</sup> The ICTR then put an end to that traditional omission of gender-based violence when Trial Chamber I ultimately convicted Akayesu of genocide and found that “[s]exual violence was *an integral part of the process of destruction.*”<sup>77</sup>

### 3. The Judgment

The *Akayesu* judgment is critically important for three reasons. First, it “articulated the seminal definitions of rape and sexual violence” in international criminal law.<sup>78</sup> Second, it produced the first genocide conviction for sexual violence—based on sub-element (a) (killing members of the group) and sub-element (b) (causing serious bodily or mental harm to members of the group).<sup>79</sup> Third, it offered guidance for future tribunals applying the sub-elements of genocide to cases involving sexual assault.

#### a. Defining Rape and Sexual Violence Under International Law

Trial Chamber I defined rape broadly, in the context of crimes against humanity, as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>80</sup> It defined sexual violence, including rape, as “any act of a sexual nature which is committed on a person under circumstances which

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72. *Id.* ¶ 42.

73. *Id.*

74. *Id.* ¶ 460.

75. *Id.* ¶ 453.

76. *Id.* ¶ 417.

77. *Id.* ¶ 731 (emphasis added).

78. Askin, *supra* note 12, at 318.

79. *Id.* Moreover, the decision also represented the first formal recognition of gender crimes as “systematic[ ] . . . weapons of war,” acknowledging the impact of those crimes not only on individual victims, but also on victims’ families, communities, and the broader society. *Id.* at 297.

80. *Akayesu* Judgment, *supra* note 2, ¶ 598.

are coercive.”<sup>81</sup> The *Akayesu* judges rejected the narrower approach adopted by many national jurisdictions—to define rape as “non-consensual intercourse”—on the grounds that “variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.”<sup>82</sup> Subsequent ICTR panels have accepted those definitions.<sup>83</sup>

b. Rape and Sexual Violence as Constituent Acts of Genocide: Killing Members of the Group and Inflicting Serious Bodily or Mental Harm

The *Akayesu* judgment expressly recognized that rape and sexual violence may constitute genocide under certain circumstances. After “cho[osing] *sua sponte* ‘to consider sexual violence in connection to [the genocide count],’”<sup>84</sup> Trial Chamber I concluded:

With regard, particularly, to . . . rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, *they constitute genocide in the same way as any other act* as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.<sup>85</sup>

Trial Chamber I found that sub-element (a) (killing members of the group) and sub-element (b) (causing serious bodily or mental harm to members of the group) of the crime of genocide were perpetrated in Rwanda by means of sexual violence. It noted that rape and sexual violence “certainly constitute infliction of *serious bodily and mental harm* on the victims and are even . . . one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm.”<sup>86</sup> Furthermore, Trial Chamber I observed that not only were many of the rapes in Rwanda accompanied by an intent to kill, but also “the acts of rape and sexual violence . . . reflected the determination to make Tutsi women suffer and to mutilate them *even before killing them*, the intent being to

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81. *Id.*; see also Short, *supra* note 21, at 517 (noting that, although those definitions were articulated in the context of a crime against humanity, “[they] are relevant to the Chamber’s determination of whether rape or sexual violence—the underlying acts—occurred for purposes of the genocide charges.”).

82. *Akayesu* Judgment, *supra* note 2, ¶ 596.

83. Short, *supra* note 21, at 517 (referencing *Kayishema* Judgment, *supra* note 14, ¶ 116).

84. *Id.* at 516.

85. *Akayesu* Judgment, *supra* note 2, ¶ 731 (emphasis added).

86. *Id.* (emphasis added).

destroy the Tutsi group while inflicting acute suffering on its members in the process.”<sup>87</sup>

Trial Chamber I concluded that sexual violence “was perpetrated against all Tutsi women and solely against them.”<sup>88</sup> For support, it cited the fact that, “[a] Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped *because her ethnic background was unknown*.”<sup>89</sup> Citing Akayesu’s alleged statement to the Interahamwe (“Never ask me again what a Tutsi woman tastes like”),<sup>90</sup> Trial Chamber I reasoned that “[t]his sexualized representation of ethnic identity graphically illustrates that [T]utsi women were subjected to sexual violence because they were Tutsi. Sexual violence was *a step in the process of destruction* of the [T]utsi group[—]destruction of the spirit, of the will to live, and of life itself.”<sup>91</sup>

Under the circumstances, Trial Chamber I found that the sexual violence constituted “acts as enumerated in Article 2(2) of the ICTR’s Statute, which constitute the factual elements of the crime of genocide, namely the killings of Tutsi or the serious bodily and mental harm inflicted on the Tutsi.”<sup>92</sup>

### c. Sexual Violence May Constitute Measures Intended to Prevent Births Within the Group

In Trial Chamber I’s discussion to “clarify the constitutive elements of the crime of genocide,” it discussed how sexual violence might also rise to the level of sub-element (d) (measures intended to prevent births within the group).<sup>93</sup> Trial Chamber I held that such measures include “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”<sup>94</sup> It further noted the following:

In patriarchal societies, where membership of a group is determined by the identity of the father, an example . . . is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have

87. *Id.* ¶ 733 (emphasis added).

88. *Id.*

89. *Id.* (emphasis added); *see also* text accompanying *supra* note 64 (describing Witness PP’s testimony that she was not raped “because they did not know which ethnic group she belonged to.”).

90. *Supra* text accompanying note 48.

91. *Akayesu* Judgment, *supra* note 2, ¶ 732 (emphasis added).

92. *Id.* ¶ 734.

93. *Id.* ¶ 499.

94. *Id.* ¶ 507. That was also echoed in Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 158 (Jan. 27, 2000) [hereinafter *Musema* Judgment].



her give birth to a child who will consequently not belong to its mother's group.<sup>95</sup>

Finally, Trial Chamber I found that such measures may be mental as well as physical: “[f]or instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”<sup>96</sup>

### B. *Other ICTR Contributions to the Body of International Law on Sexual Violence as Genocide*

Trial Chamber I was not the only Rwandan chamber to acknowledge that sexual violence can amount to genocide under certain circumstances.<sup>97</sup> In *Prosecutor v. Kayishema*,<sup>98</sup> Trial Chamber II built

95. *Akayesu* Judgment, *supra* note 2, ¶ 507. The term “patriarchal” is inapposite here; the proper word would be “patrilineal.” See Short, *supra* note 21, at 513 n.58 (noting that, “[p]atrilineal refers to the line of heritage, which is of importance here, whereas patriarchal refers to a normative social order.”).

96. *Akayesu* Judgment, *supra* note 2, ¶ 508; see text accompanying *supra* notes 22–24 (discussing the psychological effect of sexual violence on procreation and how that effect is the same regardless of the gender of the victim).

97. Trial Chamber I expanded the *Akayesu* ruling in 2000 with the *Musema* Judgment. In *Musema*, the defendant was found to have orchestrated the gang rape of a Tutsi woman, among other crimes. *Musema* Judgment, *supra* note 94, ¶ 907. Immediately prior to assaulting the victim, the defendant announced, “The pride of the Tutsi is going to end today[.]” *Id.* In light of that evidence, Trial Chamber I concluded that, “acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole . . . [i]n this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such.” *Id.* ¶ 933.

When Trial Chamber I delivered the judgment in *Musema*, the panel was comprised of the same three judges that ruled in *Akayesu*. Compare Press Release, ICTR, Tea Factory Director Convicted of Genocide (Jan. 27, 2000), with Press Release, Historic Judgment, *supra* note 36. *Musema*’s genocide conviction was affirmed on appeal. *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Appeals Judgment (Nov. 16, 2001).

98. See *Kayishema* Judgment, *supra* note 14.

upon the *Akayesu* ruling;<sup>99</sup> in *Prosecutor v. Gacumbitsi*<sup>100</sup> and *Prosecutor v. Muhimana*,<sup>101</sup> Trial Chamber III did the same.<sup>102</sup>

1. *Prosecutor v. Kayishema*: Trial Chamber II Observes in Dicta That Rape May Constitute a Condition of Life Calculated to Bring About Destruction of the Group

In *Prosecutor v. Kayishema*, the ICTR's Trial Chamber II found that sub-element (c)—deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part—"includes methods of destruction *which do not immediately lead to the death* of members of the group"—such as starvation diets, the withholding of medicine, and *the act of rape*.<sup>103</sup>

In that case, the defendants, the prefect of Kibuye<sup>104</sup> and a commercial businessman, were convicted of genocide after Trial Chamber II found that they deprived the Tutsis "of food, water and adequate sanitary and medical facilities," and that those deprivations were "a result of the *persecution* of the Tutsis, with the *intent to exterminate* them within a short period of time thereafter."<sup>105</sup> Because the perpetrators intended to murder their victims not long after depriving them of life's necessities, the court found that the denial did not amount to "the deliberate creation of conditions

99. At the time of *Kayishema*, Judge William Sekule (Tanzania) presided over Trial Chamber II, joined by Judge Yakov Ostrovsky (Russian Federation) and Judge Tafazzal Hossain Khan (Bangladesh). Press Release, ICTR, Clement Kayishema (Former Prefect of Kibuye) and Obed Ruzindana (a Successful Businessman) Convicted of Genocide (May 21, 1999).

100. *Prosecutor v. Gacumbitsi*, Case No. ICTR 2001-64-I, Indictment (June 20, 2001) [hereinafter *Gacumbitsi* Indictment].

101. *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment (Apr. 28, 2005) [hereinafter *Muhimana* Judgment].

102. At the time of *Gacumbitsi*, Trial Chamber III was composed of Judge Andresia Vaz (Senegal), presiding; Judge Jai Jam Reddy (Fiji Islands); and Judge Sergei Alekseevich Egorov (Russian Federation). Press Release, ICTR, Sylvestre Gacumbitsi Sentenced to Thirty Years Imprisonment (June 17, 2004). At the time of *Muhimana*, Trial Chamber III was comprised of Judge Khalida Rashid Khan (Pakistan), presiding; Judge Lee Gaciuga Muthoga (Kenya); and Judge Emile Francis Short (Ghana). Press Release, ICTR, Tribunal Sentences Muhimana to Life Imprisonment (Apr. 28, 2005).

103. *Kayishema* Judgment, *supra* note 14, ¶ 116 (emphasis added) (specifically stating that, "the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part.").

104. Kibuye is a city in western Rwanda.

105. *Kayishema* Judgment, *supra* note 14, ¶ 548 (emphasis added). However, "the time periods during which these deprivation [sic] occurred were not of sufficient length or scale to bring about the destruction of the group." *Id.*

of life . . . intended to bring about [the Tutsis'] destruction."<sup>106</sup> Instead, Trial Chamber II analyzed the defendants' conduct in the context of sub-element (a)—killing members of the group—because “[t]he evidence established that the genocidal act of the accused persons was killing.”<sup>107</sup>

The *Kayishema* judgment suggested that, in order for rape to constitute a “condition[ ] of life calculated to bring about [a group’s] physical destruction” it must be committed (1) repeatedly, (2) over a substantial period of time, and (3) without the intent to kill the victim by any other means. One scholar has observed that a “notable ‘condition of life’ which may ultimately seek the physical destruction of a group is the intentional infection with HIV/AIDS through rape.”<sup>108</sup> The sexual transmission of the virus would not only result in a slow death for the victims, but it could also lead to the eventual demise of their partners and unborn children.<sup>109</sup>

In sum, *Akayesu* recognized that sexual violence may amount to genocide when it is perpetrated with the intent to kill members of the group, cause serious bodily or mental harm, or prevent births within the group.<sup>110</sup> The *Kayishema* judgment, in turn, effectively extended the *Akayesu* ruling to a fourth act: the deliberate infliction of conditions designed to bring about the slow destruction of a group.

## 2. *Prosecutor v. Gacumbitsi* and *Prosecutor v. Muhimana*: Trial Chamber III Delivers Two More Convictions for Sexual Violence as Genocide<sup>111</sup>

In *Prosecutor v. Gacumbitsi*, the defendant, the mayor of the commune of Rusumo, was indicted on charges of genocide, or, in the alternative, complicity in genocide; as well as extermination, mur-

106. *Id.*

107. *Id.* ¶ 547.

108. DE BROUWER, *supra* note 10, at 57.

109. *Id.*

110. See *supra* notes 84–96 and accompanying text.

111. In a third case, *Prosecutor v. Nyiramasuhuko*, Trial Chamber II observed that, with respect to two of the defendants, the Prosecution’s pre-trial brief and opening statement “ma[d]e reference to rape as genocide,” and the Appendix to the pre-trial brief “provide[d] witness summaries that [were] pled in support of genocide.” *Prosecutor v. Nyiramasuhuko*, Case No. ICTR 98-42-T, Judgment, ¶¶ 5832–37 (June 24, 2011). However, because the indictment had charged the defendants with rape only as a crime against humanity, Trial Chamber II concluded that it would unfairly prejudice the defendants to prosecute those same acts as genocide. *Id.*

der, and rape as crimes against humanity.<sup>112</sup> Discussing the genocide charges, Trial Chamber III recognized that “serious bodily harm” means “any form of physical harm or act that causes serious bodily injury to the victim, such as torture *and sexual violence*.”<sup>113</sup> It cited *Akayesu* for the proposition that such harm need not be “irremediable” for it to amount to a constituent act of genocide.<sup>114</sup>

In the statement of facts to support the genocide charges, the indictment observed that “[s]exual violence against Tutsi women was systematically incorporated in the generalized attacks against the Tutsi.”<sup>115</sup> Specifically, paragraph 21 of the indictment charged that the defendant had:

[C]irculated about Rusumo commune in a vehicle announcing by megaphone that Tutsi women should be raped and sexually degraded. For example, on or about 17 April 1994 [the defendant] exhorted the population along the Nyarubuye road to ‘rape Tutsi girls that had always refused to sleep with Hutu’ . . . and to ‘search in the bushes, do not save a single snake . . .’<sup>116</sup>

Citing that paragraph, Trial Chamber III found that Gacumbitsi “publicly instigated the rape of Tutsi women and girls” and that the subsequent rapes of eight women and girls, including a girl as young as twelve, were a “direct consequence thereof.”<sup>117</sup> Concluding that those rapes “caused serious physical harm to members of the Tutsi ethnic group,” Trial Chamber III found Gacumbitsi guilty of genocide.<sup>118</sup>

Similarly, in *Prosecutor v. Muhimana*, Trial Chamber III found that the defendant, a municipal conseiller (or local councilor) in the commune of Gishyita, satisfied the *actus reus* of the crime of genocide when he “killed and caused serious bodily or mental harm to members of the Tutsi group” by, among other acts, “taking part in attacks at Mugonero Complex, *where he raped Tutsi women*

112. *Gacumbitsi* Indictment, *supra* note 100. Rusumo commune was located in the prefecture of Kibungo. *Id.* ¶ 4.

113. *Prosecutor v. Gacumbitsi*, Case No. ICTR 2001-64-T, Judgment, ¶ 291 (June 17, 2004) [hereinafter *Gacumbitsi* Judgment] (emphasis added). Similarly, Trial Chamber III defined “serious mental harm” as “some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim.” *Id.*

114. *Id.* (citing *Akayesu* Judgment, *supra* note 2, ¶ 502; *Kayishema* Judgment, *supra* note 14, ¶ 110; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment, ¶¶ 320–21 (May 15, 2003)).

115. *Gacumbitsi* Indictment, *supra* note 100, ¶ 20.

116. *Id.* ¶ 21.

117. *Gacumbitsi* Judgment, *supra* note 113, ¶¶ 292, 202.

118. *Id.* ¶ 292.

and shot at Tutsi refugees.”<sup>119</sup> Discussing the specific intent or *mens rea* requirement for a genocide conviction, Trial Chamber III observed:

The Accused targeted Tutsi civilians during these attacks by shooting and raping Tutsi victims. He also raped a young Hutu girl, Witness BJ, whom he believed to be Tutsi, but later [apologized] to her when he was informed that she was Hutu. During the course of some of the attacks and rapes, the Accused specifically referred to the Tutsi ethnic identity of his victims.<sup>120</sup>

In *Muhimana*, the fact that a Hutu victim was raped based on the defendant’s mistaken belief that she was actually a Tutsi was sufficient evidence for Trial Chamber III to conclude that the defendant acted with the requisite intent to target a protected ethnic group.<sup>121</sup>

In 2014, the ICTR’s Office of the Prosecutor released its *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions*.<sup>122</sup> That report reflected that more than half of the ICTR’s indictments had charged rape and sexual violence as a method of perpetrating genocide, as a crime against humanity, or as a war crime.<sup>123</sup> In addition to the seminal *Akayesu* decision, the manual identified two ICTR convictions for the direct commission of sexual violence as genocide, including *Muhimana*;<sup>124</sup> one for instigating sexual violence as genocide, namely, *Gacumbitsi*;<sup>125</sup> and one for sexual violence as genocide through participation in a joint criminal enterprise.<sup>126</sup> As the fol-

119. *Muhimana* Judgment, *supra* note 101, ¶ 513 (emphasis added). Gishyita commune was located in the prefecture of Kibuye. *Id.* ¶ 4.

120. *Id.* ¶ 517.

121. That finding stands in contrast to *Prosecutor v. Hategekimana*—another case involving the rape of a Hutu woman—in which Trial Chamber II found genocidal intent lacking where the victim was assaulted because of her family’s perceived political affiliation. See *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Judgment, ¶¶ 30, 725 (Dec. 6, 2010) (observing at ¶ 30 that “the evidence does not establish that [the victim] was a Tutsi or that she was raped with genocidal intent” and concluding at ¶ 725 that the victim was actually Hutu “but she was raped and killed because of the perceived political affiliation of her father.”). Political affiliation—unlike national, ethnic, racial, or religious identity—is not protected by the Genocide Convention. See *supra* note 11 and accompanying text.

122. See ICTR, Office of the Prosecutor, *Prosecution of Sexual Violence—Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (Jan. 30, 2014).

123. *Id.* at iii.

124. *Id.* at annex C 6, 15 (*Muhimana* and *Prosecutor v. Rukundo*, Case No. ICTR-2001/70/T, Judgment (Feb. 27, 2009); the latter conviction was overturned on appeal).

125. *Id.* at annex C 8 (*Gacumbitsi*).

126. *Id.* at annex C 11 (*Prosecutor v. Karemera*, Case No. ICTR-98/44/T, Judgment (Feb. 2, 2012)).

lowing Part demonstrates, however, the ICTR's relative success in prosecuting sexual violence as genocide has not been replicated in the ICTY.

#### IV. THE NON-APPLICATION OF *AKAYESU* AND ITS PROGENY IN THE ICTY: PROSECUTING SEXUAL VIOLENCE IN THE FORMER YUGOSLAVIA

The Yugoslavian conflict was characterized by widespread sexual violence by any measure; estimates of the number of female victims raped or sexually assaulted vary from 10,000 to 60,000.<sup>127</sup> Furthermore, the majority of assaults were committed against Muslim and Croatian women by ethnic Serbs.<sup>128</sup> Victims were assaulted in public, at home, and even in "rape camps."<sup>129</sup> Some scholars accordingly distinguish the Yugoslavian sexual violence campaign from the sexual atrocities committed in Rwanda because the former was orchestrated "not merely to drive away and to harm non-Serb women, but to rape them repeatedly to ensure that they became pregnant."<sup>130</sup>

Like the ICTR Statute, the ICTY Statute adopted the Genocide Convention's definition of genocide and includes rape as an enumerated crime against humanity.<sup>131</sup> Unlike the ICTR, however, the ICTY did not have jurisdiction over violations of Common Article 3 of the Geneva Conventions or Additional Protocol II and thus, could not criminalize sexual violence under those provisions.<sup>132</sup> Although the ICTY has long recognized in dicta that sexual violence may amount to genocide under certain conditions,<sup>133</sup> there

127. Lisa Sharlach, *Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda*, 22 NEW POL. SCI. 89, 96 (2000).

128. *Id.*

129. *Id.*

130. *Id.* at 96–97.

131. Compare ICTY Statute, *supra* note 4, arts. 4–5, with Genocide Convention, *supra* note 11, art. 2.

132. See ICTY Statute, *supra* note 4, art. 5.

133. See *Furundžija* Judgment, *supra* note 2, ¶ 172 (observing that rape may amount to "a grave breach of the Geneva Conventions, a violation of the laws or customs of war, or an act of genocide, if the requisite elements are met" (emphasis added)); see also *Krstić* Judgment, *supra* note 16, ¶ 513 (discussing *Akayesu* and holding that, "inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury" (emphasis added)). Notably, the judgments against both *Furundžija* (1998) and *Krstić* (2001) followed the landmark *Akayesu* decision in 1998. Compare *Akayesu* Judgment, *supra* note 2, with *Furundžija* Judgment, *supra* note 2, and *Krstić* Judgment, *supra* note 16 (reflecting that chronology). As early as 1996, however, the ICTY noted that, "the systematic rape of women, to which material submitted to the Trial Chamber attests, is in some cases intended to transmit a new ethnic identity to the child," and "certain acts submitted for review could have been planned or ordered with genocidal

have been no convictions to date for genocidal sexual violence in the Yugoslavia tribunal.<sup>134</sup>

As the next Section demonstrates, the ICTY has consistently declined to prosecute sexual violence as genocide, even where the facts would appear to support such a charge<sup>135</sup> and even where the tribunal has identified the rapes as part of a campaign of “ethnic cleansing.”<sup>136</sup> Although there is little concrete evidence to explain the source of that reluctance, Catharine MacKinnon hypothesizes that the ICTY has been caught in a self-reinforcing cycle.<sup>137</sup> She argues that Bosnian sexual assault survivors, who recognized the genocidal nature of the crimes perpetrated against them, became increasingly discouraged by the ICTY’s failure to prosecute those acts as such.<sup>138</sup> Thus, the court’s initial reluctance to prosecute sexual violence as genocide “damag[ed] trust and opportunities for cooperation,” rendering many witnesses unwilling to come forward, which ultimately had a negative “circular effect” on the ICTY’s charging practices.<sup>139</sup> In any case, the ICTY has declined

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intent.” Prosecutor v. Karadžić, Case Nos. IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶¶ 94–95 (Int’l Crim. Trib. for the Former Yugoslavia July 11, 1996) [hereinafter *Karadžić & Mladić* Rule 61 Review] (emphasis added).

134. This statement was accurate as of October 30, 2015.

135. The ICTR took judicial notice of the genocide in Rwanda. Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, ¶¶ 35–38 (June 16, 2006). No such notice was taken by the Yugoslavian tribunal. As a result, in order to prosecute rape or sexual violence as genocide in the ICTY, the prosecution would first need to establish—on a case-by-case basis—that genocide had occurred. To date, the ICTY has handed down genocide convictions only for acts related to the 1995 massacre at Srebrenica. Yuval Shany, *Two Sides of the Same Coin? Judging Milosevic and Serbia Before the ICTY and ICJ*, in *THE MILOSEVIC TRIAL: AN AUTOPSY* 441, 455 (Timothy William Waters ed., 2013).

136. In *Krstić*, the Trial Chamber linked rape to an “ethnic cleansing campaign” when it stated that, “there is no doubt that [the murders, rapes, beatings and abuses committed against the refugees at Potocari] were natural and foreseeable consequences of the ethnic cleansing campaign.” *Krstić* Judgment, *supra* note 16, ¶ 616. Although the Trial Chamber observed “obvious similarities between a genocidal policy and the policy . . . [of] ‘ethnic cleansing,’” the defendant’s genocide conviction was ultimately based upon the events at Srebrenica, not the sexual violence that occurred at Potocari. *Id.* ¶¶ 562, 727; Kimberly E. Carson, *Reconsidering the Theoretical Accuracy and Prosecutorial Effectiveness of International Tribunals’ Ad Hoc Approaches to Conceptualizing Crimes of Sexual Violence as War Crimes, Crimes Against Humanity, and Acts of Genocide*, 39 *FORDHAM URB. L.J.* 1249, 1271 n.120 (2012). A number of scholars have criticized that attempt to differentiate between ethnic cleansing and genocide. See, e.g., Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 *COLUM. J. TRANSNAT’L L.* 940, 949 (2006) (discussing the “stubborn misperception” that so-called ethnic cleansing in the former Yugoslavia “was something other than a euphemism for genocide.”).

137. MacKinnon, *supra* note 136, at 947, 949.

138. See *id.* at 949.

139. *Id.*

*Akayesu's* invitation to convict sexual violence as genocide in the former Yugoslavia.

A. *The ICTY Preference for Prosecuting Sexual Violence as a Crime Against Humanity*

In *Prosecutor v. Furundžija*, a judgment issued after the ICTR's groundbreaking *Akayesu* decision,<sup>140</sup> the ICTY Trial Chamber II<sup>141</sup> observed that:

The prosecution of rape is explicitly provided for in Article 5 of the Statute of the International Tribunal as a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war *or an act of genocide*, if the requisite elements are met, and may be prosecuted accordingly.<sup>142</sup>

However, the defendant, a local commander of a unit of the Croatian Defence Council, was not prosecuted for sexual violence as genocide.<sup>143</sup> Although *Furundžija* was present for, and participated in, an interrogation rife with sexual threats and assaults,<sup>144</sup> Trial Chamber II reasoned that the intention underlying the assault was not genocidal but was instead "to obtain information from [the victim] by causing her severe physical and mental suffering."<sup>145</sup> *Furundžija* was accordingly convicted of war crimes for torture and for "outrages upon personal dignity, including rape."<sup>146</sup>

140. *Furundžija* Judgment, *supra* note 2, ¶¶ 160, 176 (discussing *Akayesu* Judgment, *supra* note 2).

141. The ICTY, like the ICTR, is divided into three trial chambers. ICTY, *About ICTY: Chambers*, <http://www.icty.org/sections/AbouttheICTY/Chambers> (last visited Sept. 5, 2015). At the time of the *Furundžija* judgment, Trial Chamber II was comprised of Judge Florence Mumba (Zambia), presiding; Judge Antonio Cassese (Italy); and Judge Richard May (Britain). Press Release, ICTY, *Furundžija* Case: The Judgment of the Trial Chamber (Dec. 10, 1998).

142. *Furundžija* Judgment, *supra* note 2, ¶ 172 (emphasis added) (citing ICTY Statute, *supra* note 12, art. 4).

143. See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, First Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia June 2, 1998).

144. See *id.* ¶¶ 25–26 (noting that *Furundžija* "rubbed his knife against [the witness's] inner thigh and lower stomach and threatened to put his knife inside [her] vagina should she not tell the truth," and later failed to intervene when another perpetrator raped the same witness).

145. See *Furundžija* Judgment, *supra* note 2, ¶ 267.

146. *Id.* at 112; see also *id.* ¶¶ 264–69 (discussing the rape and sexual violence in the context of the torture conviction). The convictions were affirmed on appeal. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Appeals Judgment, 79 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) [hereinafter *Furundžija* Appeals Judgment]. Unlike the Rome Statute, the ICTY Statute does not specifically prohibit torture and outrages upon personal dignity as war crimes. Compare Rome Statute, *supra* note 4, art. 8 (enumerating both acts as war crimes), with ICTY Statute, *supra* note 12, art. 3 (containing no analogous



In *Prosecutor v. Kunarac*<sup>147</sup>—the first conviction of Serbian men for raping Bosnian Muslim women,<sup>148</sup> as well as the first international indictment dealing exclusively with sexual violence<sup>149</sup>—no charges of genocide were brought against Kunarac, a commander of a special unit for reconnaissance of the Bosnian Serb Army.<sup>150</sup> That omission occurred despite the observation by Trial Chamber II<sup>151</sup> that Muslim women were “specifically targeted” by the defendant for assaults and that, during one such assault, the defendant expressed his view that “the rapes against the Muslim women were one of the many ways in which the Serbs could assert their superiority and victory over the Muslims.”<sup>152</sup> Trial Chamber II concluded as follows:

The accused acted intentionally and with the aim of discriminating between the members of his ethnic group and the Muslims, in particular its women and girls. The treatment reserved by Dragoljub Kunarac for his victims was motivated by their being Muslims, as is evidenced by the occasions when the accused told women[ ] that they would give birth to Serb babies, or that they should ‘enjoy being fucked by a Serb[.]’<sup>153</sup>

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provisions). Instead, Article 3 of the ICTY Statute simply criminalizes “[v]iolations of the laws of customs of war” and provides a non-exhaustive list of such prohibited acts. ICTY Statute, *supra* note 12, art. 3. As interpreted by ICTY Trial Chamber II, however, Article 3 merely “constitutes an ‘umbrella rule’”; hence, “serious violations of any international rule of humanitarian law may be regarded as crimes falling under this provision of the [ICTY] Statute, if the requisite conditions are met.” *Furundžija* Judgment, *supra* note 2, ¶ 133. Accordingly, Trial Chamber II found that the Article 3 war crimes provision encompasses both torture and outrages upon personal dignity, including rape. *Id.* ¶ 158.

147. *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) [hereinafter *Kunarac* Judgment].

148. Engle, *supra* note 9, at 798.

149. See Beth Van Schaack, *Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson*, 17 AM. U. J. GENDER SOC. POL’Y & L. 363, 386 (2009).

150. See *Kunarac* Judgment, *supra* note 147, ¶ 4 (recounting the charges against Kunarac as including torture (as a crime against humanity and as a violation of the laws or customs of war) and rape (as a crime against humanity and as a violation of the laws or customs of war)).

151. At the time of the judgment in *Kunarac*, Judge Florence Mumba continued to preside over Trial Chamber II. Press Release, ICTY, Judgment of Trial Chamber II in the *Kunarac, Kovac and Vukovic* Case (Feb. 22, 2001). See *supra* note 141 (reflecting that, at the time of the judgment in *Furundžija*, Trial Chamber II was comprised of Presiding Judge Florence Mumba (Zambia), Judge Antonio Cassese (Italy), and Judge Richard May (Britain)).

152. *Kunarac* Judgment, *supra* note 147, ¶ 583.

153. *Id.* ¶ 654.

Despite the presence of that arguably genocidal *mens rea*, Kunarac was convicted of sexual violence as a crime against humanity and as a war crime, but not as a genocidal act.<sup>154</sup>

1. *Prosecutor v. Karadžić* and *Prosecutor v. Mladić*: A Turning of the Tide?

The ICTY's third amended indictment of Radovan Karadžić, the former President of the Serbian Democratic Party,<sup>155</sup> and its fourth amended indictment of Ratko Mladić, an officer in the army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska,<sup>156</sup> could yield the tribunal's first convictions for sexual violence as a constituent act of genocide. In an early procedural ruling confirming the charges against both defendants, Trial Chamber I specifically noted the widespread occurrence of sexual assault in detention camps, observing that, "[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late for them to undergo an abortion."<sup>157</sup>

A third amended indictment, issued in 2009, charged Karadžić, the "highest civilian and military authority in the [Republika Srpska],"<sup>158</sup> with, *inter alia*, two counts of genocide related to acts committed in Bosnia-Herzegovina (count one) and related to acts committed in Srebrenica (count two).<sup>159</sup> Only the genocidal acts alleged to have been committed in Bosnia-Herzegovina included a component of sexual violence.<sup>160</sup> Pursuant to count one, the indictment alleges that Karadžić was criminally responsible for,

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154. *Id.* ¶ 883. The appeal in *Kunarac* was dismissed. *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

155. *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Third Amended Indictment, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2009) [hereinafter *Karadžić Indictment*].

156. *Prosecutor v. Mladić*, Case No. IT-09-92-PT, Fourth Amended Indictment, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 16, 2011) [hereinafter *Mladić Indictment*].

157. *Karadžić & Mladić Rule 61 Review*, *supra* note 133, ¶ 64.

158. *Karadžić Indictment*, *supra* note 155, ¶ 33.

159. *Id.* ¶¶ 36–47. Count one of the indictment alleged that Karadžić committed genocide when he "participated in a joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from the territories of [Bosnia-Herzegovina] claimed as Bosnian Serb territory." *Id.* ¶ 37. Count two of the indictment alleged that Karadžić committed genocide when he "participated in a joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children and some elderly men from Srebrenica." *Id.* ¶ 42.

160. *Karadžić Indictment*, *supra* note 155, ¶ 40.

among other acts, “rape . . . [and] other acts of sexual violence” against Bosnian Muslims and Bosnian Croats that (a) caused serious bodily or mental harm, and/or (b) constituted conditions of life calculated to bring about physical destruction.<sup>161</sup> Specifically, the indictment alleges that, between March 31 and December 31, 1992, Karadžić was complicit in the following genocidal acts:

(b) the causing of serious bodily or mental harm to thousands of Bosnian Muslims and Bosnian Croats, including leading members of these groups, during their confinement in detention facilities. . . . At these locations, detainees were subjected to cruel or inhumane treatment, including torture, physical and psychological abuse, *rape, other acts of sexual violence* and beatings; and

(c) the detention of thousands of Bosnian Muslims and Bosnian Croats, including leading members of these groups, in detention facilities . . . under conditions of life calculated to bring about their physical destruction, namely through cruel and inhumane treatment, including torture, physical and psychological abuse, *rape, other acts of sexual violence*, inhumane living conditions, forced labour and the failure to provide adequate accommodation, shelter, food, water, medical care or hygienic sanitation facilities.<sup>162</sup>

In 2011, a fourth amended indictment charged Mladić with genocide in Bosnia-Herzegovina based on the same allegations.<sup>163</sup> The Karadžić trial commenced in 2009<sup>164</sup> and the Mladić trial began in May 2012.<sup>165</sup>

In June 2012, Trial Chamber III granted Karadžić’s motion for a judgment of acquittal with respect to the count alleging the commission of genocide in Bosnia-Herzegovina.<sup>166</sup> Specifically, Trial Chamber III concluded that (1) the evidence could not support a conclusion that the bodily injury or mental harm inflicted “reached a level where it contributed to or tended to contribute to the destruction of the Bosnian Muslims and/or Bosnian Croats in

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161. *Id.* ¶¶ 36–41.

162. *Id.* ¶ 40 (emphases added).

163. *Mladić* Indictment, *supra* note 156, ¶ 39.

164. Press Release, ICTY, Karadžić Case: Trial Chamber Conducts Site Visit in Sarajevo (May 16, 2011) (noting that the trial began in October 2009 and was subsequently suspended until May 2011).

165. Press Release, ICTY, Videos of Ratko Mladic Start of Trial - 16 and 17 May (May 17, 2012).

166. See Press Release, ICTY, Tribunal Dismisses Karadžić Motion for Acquittal on 10 of 11 Counts of the Indictment (June 28, 2012) (announcing that Trial Chamber III dismissed Karadžić’s motion for a judgment of acquittal on ten counts of the indictment but granted his motion with respect to count one, in which he was charged with genocide). Trial Chamber I later denied Mladić’s motion for a judgment of acquittal in its entirety. Press Release, ICTY, Tribunal Rejects Ratko Mladic’s Request for Acquittal (Apr. 15, 2014).

whole or in part,” and (2) the evidence could not support a conclusion that the conditions in the detention facilities “reached a level which could support an inference that Bosnian Muslims and/or Bosnian Croats were detained in conditions of life calculated to bring about their physical destruction.”<sup>167</sup> Trial Chamber III further concluded that the evidence was insufficient to permit a finding beyond a reasonable doubt that the underlying acts were committed with genocidal intent.<sup>168</sup>

The Appeals Chamber reversed Trial Chamber III’s ruling on appeal, however, with respect to both the *actus reus* and *mens rea* elements.<sup>169</sup> First, the Appeals Chamber considered whether Trial Chamber III had erred in analyzing the *actus reus* of genocide. With respect to the allegation that Karadžić had committed genocide via the infliction of serious bodily or mental harm, the Appeals Chamber emphasized that, in addition to evidence of severe physical assaults at the detention facilities, there was also evidence that women and girls had been repeatedly raped, as well as evidence of acts of sexual violence against men.<sup>170</sup> The Appeals Chamber concluded:

[T]he evidence reviewed by the Trial Chamber, taken at its highest, indicates that Bosnian Muslims and/or Bosnian Croats suffered injuries, *including rape* and severe non-fatal physical violence which are, on their face, suggestive of causing serious bodily harm. While the commission of individual paradigmatic acts does not automatically demonstrate that the *actus reus* of genocide has taken place, the Appeals Chamber considers that no reasonable trial chamber reviewing the specific evidence on the record in this case, *including evidence of sexual violence* and of beatings causing serious physical injuries, could have concluded that it was insufficient to establish the *actus reus* of genocide. . . . Accordingly, the Trial Chamber failed to take the evidence at its highest.<sup>171</sup>

The Appeals Chamber also concluded—though relying primarily on allegations of non-sexual conduct—that there was evidence in the record that Karadžić committed genocide by subjecting Bosnian Muslims and Bosnian Croats to conditions calculated to bring

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167. Prosecutor v. Karadžić, Case No. IT-9S-SI1, Appeals Judgment, ¶¶ 27, 40 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 2013) [hereinafter *Karadžić Appeals Judgment*].

168. *Id.* ¶ 52.

169. See Press Release, ICTY, Appeals Chamber Reverses Radovan Karadžić’s Acquittal for Genocide in Municipalities of Bosnia and Herzegovina (July 11, 2013).

170. *Karadžić Appeals Judgment*, *supra* note 167, ¶¶ 35–36.

171. *Id.* ¶ 37 (emphasis added).

about their destruction.<sup>172</sup> Accordingly, the Appeals Chamber reversed Trial Chamber III's conclusion that there was no evidence from which a factfinder could find that Karadžić was complicit in the underlying genocidal acts of causing serious bodily or mental harm and inflicting conditions of life calculated to bring about the destruction of the Bosnian Muslims and Croats.<sup>173</sup>

Next, the Appeals Chamber considered whether Trial Chamber III had erred in analyzing the *mens rea* of genocide. In addition to Karadžić's own statements, the Appeals Chamber noted that the record included indirect evidence of "genocidal and other culpable acts . . . such as killings, beatings, rape, and sexual violence."<sup>174</sup> The Appeals Chamber concluded that the evidence, "taken at its highest," was sufficient to support a finding that Karadžić acted with genocidal intent.<sup>175</sup> Accordingly, the Appeals Chamber reversed Karadžić's acquittal for genocide in Bosnia-Herzegovina and reinstated the charges against him.<sup>176</sup>

Today, the prosecutions of Karadžić and Mladić are ongoing, and both defendants once again face genocide charges based in part on allegations of sexual violence. If the evidence relied upon by the Appeals Chamber is credited at trial, these prosecutions could yield the first genocide convictions for sexual violence in the ICTY. Moreover, the *Karadžić* and *Mladić* judgments have the strong potential to flesh out the existing ICTR case law on the elements of "serious physical or mental harm" and "conditions of life calculated to bring about destruction," as they apply to sexually violent acts.

#### V. THE INADEQUATE PROSECUTION OF GENOCIDAL SEXUAL VIOLENCE IN THE ICC

Despite issuing a number of indictments charging sexual violence as a crime against humanity or a war crime,<sup>177</sup> the ICC has only recently shown a willingness to charge sex crimes as genocide under appropriate circumstances.<sup>178</sup> This trend can be explained, at least in part, by the fact that the Rome Statute and other governing documents provide minimal textual support for charging

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172. *Id.* ¶ 49 (emphasis added).

173. *Id.* ¶ 51.

174. *Id.* ¶ 99 (emphasis added).

175. *Id.* (emphasis added).

176. *Karadžić* Appeals Judgment, *supra* note 167, ¶¶ 51, 101.

177. *See supra* note 2.

178. *See supra* note 6.

sexual violence as genocide.<sup>179</sup> Regardless, recent events make clear that current charging practices are insufficient to address sexual violence perpetrated with genocidal intent.

A. *Weak Textual Support for Charging Sexual Violence as Genocide Stands in Contrast to Strong Textual Support for Charging Sexual Violence as a Crime Against Humanity and/or a War Crime*

The Rome Statute and the ICC Elements of Crimes<sup>180</sup> seem to confine the application of sexual violence as genocide to sub-element (b)—genocide by causing serious bodily or mental harm. The Rome Statute, like the ICTR and ICTY statutes, defines genocide in accordance with the Genocide Convention.<sup>181</sup> Article 9 of the Rome Statute, however, provides that the Elements of Crimes “shall assist the Court in the interpretation and application of Articles 6, 7 and 8.”<sup>182</sup> In a footnote affixed to the discussion of Article 6(b)—genocide by causing serious bodily or mental harm<sup>183</sup>—the

179. See text accompanying *infra* notes 180–85. The lack of textual support for charging sexual violence as genocide is particularly puzzling given the influence of the Women’s Caucus for Gender Justice in the International Criminal Court (Women’s Caucus). ALONA HAGAY-FREY, *SEX AND GENDER CRIMES IN THE NEW INTERNATIONAL LAW: PAST, PRESENT, FUTURE* 103 (Koninklijke Brill NV ed., 2011). The Women’s Caucus, founded in 1997, lobbied for the protection of women’s rights in the Rome Statute. *Id.* at 104–05. Its efforts yielded a number of successes, including female representation among ICC judges, prosecutors, and staff; the establishment of a witness and victims unit; and the creation of an advisory position focused on gender issues. *Id.* Moreover, the Rome Statute explicitly recognizes sexual violence as an act that can amount to a crime against humanity and/or a war crime under appropriate circumstances. *Id.* at 104. Despite those achievements, scholars have criticized the Rome Statute for failing to acknowledge gender crimes in the context of genocide in two important respects: (1) as discussed in this Part V, the statute “does not list sex crimes among the prohibited acts which can constitute the offense of ‘genocide’”; and, though not discussed in detail here, (2) the statute also does not specify “gender” as a “group” protected under the crime of genocide. *Id.* at 107.

180. INT’L CRIM. CT. (ICC), ELEMENTS OF CRIMES 2 n.3 (2011) [hereinafter ELEMENTS OF CRIMES], <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

181. See Rome Statute, *supra* note 4, art. 6. As Cate Steains explains, the lack of express reference to sexual violence in the genocide provisions of the Rome Statute is a consequence of “the strong reluctance of delegations . . . to deviate in any way from the definition of genocide contained in the 1948 [Genocide Convention].” Cate Steains, *Gender Issues*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 363 (Roy S. Lee ed., 1999). Delegations were of the view, Steains says, that the Genocide Convention definition “had entered the realm of customary international law and therefore should be replicated in the Statute verbatim.” *Id.*

182. *Id.* art. 9(1). While non-binding, the Elements of Crimes are persuasive authority. Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT’L L. 605, 627 (2004).

183. ELEMENTS OF CRIMES, *supra* note 180.

Elements of Crimes provide that, “[t]his conduct may include, but is not necessarily restricted to, acts of torture, *rape*, *sexual violence* or inhuman or degrading treatment.”<sup>184</sup> With respect to the other four methods of genocide (killing, inflicting conditions to bring about physical destruction, imposing measures to prevent births, and forcibly transferring children), the Elements of Crimes do not contain any references to sexual violence.<sup>185</sup>

Because the Elements of Crimes were amended in 2010 without changes to the provisions related to genocide,<sup>186</sup> the absence of references to sexual violence outside of sub-element (b)—especially in light of the precedents of *Akayesu* (imposing measures to prevent births)<sup>187</sup> and *Kayishema* (inflicting conditions of life calculated to bring about physical destruction)<sup>188</sup>—suggests that the ICC will interpret the *actus reus* of genocide narrowly. The likelihood of such an interpretation is further supported by the Rome Statute’s more expansive enumeration of sexual crimes in the context of crimes against humanity and war crimes.

For instance, the Rome Statute criminalizes rape, sexual slavery, enforced prostitution, and enforced sterilization as crimes against humanity and war crimes—but not as genocide. While the ICTR and ICTY statutes include “rape” as an enumerated crime against humanity,<sup>189</sup> the Rome Statute further includes, in addition to rape, “*sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.*”<sup>190</sup> The Rome Statute also designates those acts of gender-based vio-

184. *Id.* at 2 n.3 (emphasis added).

185. *Id.* at 2–4.

186. The document states that, “[t]he Elements of Crimes are reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B. The Elements of Crimes adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010 (International Criminal Court publication, RC/11).” ELEMENTS OF CRIMES, *supra* note 180, at cover page.

187. See text accompanying *supra* notes 92–95.

188. See text accompanying *supra* notes 101–07.

189. ICTR Statute, *supra* note 12, art 3; ICTY Statute, *supra* note 12, art. 5. The ICTR also includes rape as enumerated violation of Common Article 3 and Additional Protocol II. ICTR Statute, *supra* note 12, art. 4 (providing at (e) that such crimes include “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”).

190. Rome Statute, *supra* note 4, art. 7(1)(g) (emphasis added). The Rome Statute also enumerates, as a crime against humanity, “[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, *gender* . . . or other grounds that are universally recognized as impermissible under international law, in

lence as war crimes, along with “any other form of sexual violence also constituting a grave breach of the Geneva Conventions” or “any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.”<sup>191</sup>

Rather than heeding *Akayesu*—which acknowledged that both forced impregnation and sterilization could constitute measures intended to prevent births<sup>192</sup>—the ICC appears to be following the ICTY, which declined to prosecute forced impregnation as genocide, even in light of evidence that perpetrators specifically targeted Muslim women and told them that “they would give birth to Serb babies.”<sup>193</sup>

Nonetheless, the Rome Statute’s definition of forced pregnancy does seem to borrow language from the Article 6 prohibition on genocide.<sup>194</sup> The Rome Statute defines forced pregnancy as “the unlawful confinement of a woman forcibly made pregnant[ ] *with the intent of affecting the ethnic composition of any population* or carrying out other grave violations of international law.”<sup>195</sup> Several scholars view that articulation as a positive indication for future genocidal sexual violence/forced pregnancy prosecutions, observing that the definition “speaks directly to the crime of genocide under Article 6 [of the Rome Statute]” and constitutes “a solid foundation for future developments in the prosecution of forced pregnancy as genocide.”<sup>196</sup>

The aforementioned statutory and judicial distinctions between the three tribunals beg consideration of two questions. First, when a protected group is involved, how can the particular crimes of forced impregnation or sterilization ever be inflicted upon a targeted population *in the absence of* genocidal intent?<sup>197</sup> To prose-

connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.” *Id.* art. 7(1)(h) (emphasis added).

191. *Id.* art. 8(2)(b)(xxii) (governing international armed conflict); *id.* art. 8(2)(e)(vi) (applicable in non-international armed conflict).

192. *Akayesu* Judgment, *supra* note 2, ¶ 507.

193. *Kunarac* Judgment, *supra* note 147, ¶ 654.

194. *See supra* note 5.

195. Rome Statute art. 7(2)(f) (emphasis added) (for both crimes against humanity and war crimes). Enforced sterilization is not defined in the statute; however, the Elements of Crimes define the act as occurring when “[t]he perpetrator deprived one or more persons of *biological reproductive capacity*.” ELEMENTS OF CRIMES, *supra* note 180, at 9, 29, 38 (emphasis added).

196. Short, *supra* note 21, at 523.

197. It is important to note that rape may be prosecuted as a crime against humanity when the act is “motivated by political, religious, racial[,] or ethnic reasons.” NOËLLE N.R. QUÉNIVET, SEXUAL OFFENSES IN ARMED CONFLICT & INTERNATIONAL LAW 120 (2005). Under the Rome Statute, the requisite elements of the crime against humanity of persecution are



cute forced impregnation or sterilization only as a crime against humanity or a war crime ignores the impact that the acts have *on the group* “as such.” As one scholar explains:

While it seems dehumanizing to view an act of sexual violence against an individual woman in terms of functionality, utility, and group benefit, it is unrealistic not to incorporate such analyses into the examination. . . . When a perpetrating group calculates to destroy a victim group by these means, having, for example, the clear intent to remove important members from functioning within the group with the intended effect of lowering the birthrate, *it is irresponsible not to also view and prosecute the sexual violence in those terms: as genocide.*<sup>198</sup>

The second, and perhaps more important, question is why the drafters of the Rome Statute, after enumerating sexual acts that constitute crimes against humanity and war crimes, explicitly declined to articulate them in the context of Article 6 of the statute as well. Based on the following discussion of ICC jurisprudence, it is clear that that omission was, at best, an oversight, and at worst, a significant misstep.

B. *Recent Events Indicate That the Current Statutory Regime is Insufficient to Prosecute Sexual Violence Committed in Furtherance of Genocide*

Until the second arrest warrant issued for Sudan’s President Omar al-Bashir, the ICC Prosecutor had not charged a single defendant with sexual violence committed in furtherance of the crime of genocide.<sup>199</sup> Congolese militia leaders Germain Katanga and Mathieu Ngudjolo Chui were tried for sexual violence as a

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met when, in the context of a “widespread or systematic attack” against a civilian population, a defendant engages in “[p]ersecution 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.” Rome Statute, *supra* note 4, art. 7(1)(h). Nonetheless, the prosecution of rape *as genocide* has a distinct advantage over the prosecution of rape as a crime against humanity—as a form of “persecution”—for three reasons: First, the term “persecution” is simply insufficient to convey the physical violence inherent in individualized acts of rape. Second, only the crime of genocide acknowledges the perpetrator’s goal to *destroy* the group as such. Third, as discussed *infra* Section B, genocide prosecutions are not confined by the same jurisdictional limitations as prosecutions for crimes against humanity (for instance, a “widespread or systematic attack” on civilians is not a prerequisite for commission of the crime of genocide).

198. Short, *supra* note 21, at 511 (emphasis added) (also discussing forced impregnation).

199. See *supra* notes 2, 6.

crime against humanity and as a war crime<sup>200</sup>—though not as a constituent act of the crime of genocide—and those charging decisions are emblematic of the ICC's generally ineffective prosecution of genocidal sexual violence to date.

The confirmation of charges against Katanga and Ngudjolo clearly illustrates that the criminal sexual acts were committed against a protected group. The ICC observed that the conflict in question was initiated by combatants “largely of Lendu and Ngiti ethnicity” as a means of fighting other combatants “largely of Hema ethnicity.”<sup>201</sup> Furthermore, the attack was directed “against the civilian population of [Bogoro] and in particular, against the Hema civilians . . . .”<sup>202</sup> Pre-Trial Chamber I also recounted that, before commencing the attack, the combatants “chanted songs in which they made it clear that they would kill Hema individuals, but would show mercy to Ngiti or Bira individuals.”<sup>203</sup>

Furthermore, the confirmation of charges demonstrates that Katanga and Ngudjolo intended to destroy the Hema population, in whole *or in part*, through sexual violence and other acts. Pre-Trial Chamber I concluded that “the attack *was intended to ‘wipe out’ or ‘raze’ Bogoro village by killing the predominately Hema civilian population* and destroying the homes of civilian inhabitants during and in the aftermath of the attack.”<sup>204</sup> Furthermore, Pre-Trial Chamber I also found “substantial grounds to believe that, prior to and after the . . . attack against the civilian population of Bogoro, [combatants] regularly abducted, imprisoned in military camps, *and subsequently raped and sexually enslaved women and girls predominantly of Hema ethnicity.*”<sup>205</sup> Despite that evidence, no genocide charges

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200. See Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges ¶¶ 339–54, 437–44 (Sept. 30, 2008) (discussing rape and sexual slavery as a war crime; discussing rape as a crime against humanity) [hereinafter *Katanga* Decision on the Confirmation of Charges]; Prosecutor v. Ngudjolo, ICC-01/04-02/12, Judgment pursuant to article 74 of the Statute (Dec. 18, 2012) (acquitting Ngudjolo of the charges of war crimes and crimes against humanity, and ordering his immediate release) [hereinafter *Ngudjolo* Judgment]; Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute (Mar. 7, 2014) (finding Katanga guilty, as an accessory, of one count of crime against humanity (murder), and four counts of war crimes (murder, attacking a civilian population, destruction of property, and pillaging); although the tribunal found evidence that sexual crimes had indeed been committed, that evidence did not prove Katanga's responsibility for those crimes) [hereinafter *Katanga* Judgment].

201. *Katanga* Decision on the Confirmation of Charges, *supra* note 200, ¶ 404 (discussing the crime against humanity charges).

202. *Id.* ¶ 405.

203. *Id.*

204. *Id.* ¶ 406 (emphasis added).

205. *Id.* ¶ 414 (emphasis added).

were brought against Katanga and Ngudjolo,<sup>206</sup> suggesting a reluctance to bring charges of genocide when charges of crimes against humanity or war crimes are available.

There has certainly been significant progress in recent years. The ICC took an important step in 2010 when it designated rape as a component of Sudanese leader al-Bashir's "genocidal policy."<sup>207</sup> Shortly thereafter, the Office of the Prosecutor adopted, as a strategic goal for 2012–2015, "[e]nhanc[ing] the integration of a gender perspective in all areas of our work and continu[ing] to pay particular attention to sexual and gender-based crimes and crimes against children."<sup>208</sup> To that end, in December 2014, the Office of the Prosecutor officially launched its Policy on Sexual and Gender-Based Crimes.<sup>209</sup> The policy, which was first unveiled in a paper published in June 2014, "aims to strengthen the Office's capacity to investigate and prosecute perpetrators of sexual and gender-based crimes falling within the Court's jurisdiction in a systematic and comprehensive manner, and to enhance the integration of a gender perspective and expertise in all aspects of operations."<sup>210</sup> Most importantly for purposes of this Article, the policy recognizes that the Rome Statute "authorises the Court to exercise jurisdiction over sexual and gender-based crimes if they constitute acts of genocide," and commits the Office to "ensur[ing] a consistent approach in giving full effect to th[o]se provisions."<sup>211</sup> It specifically provides:

In relation to article 6 of the Statute, all the underlying acts, such as killings, causing serious bodily or mental harm, and imposing measures intended to prevent births within the group, may have a sexual and/or gender element. If committed with intent to destroy a national, ethnic, racial, or religious group, in whole or in part, such acts may amount to genocide. In view of the *serious bodily or mental harm* (and potential social stigma) associated with rape and other forms of sexual violence within targeted groups, such acts can cause significant and irreversible harm to individual victims and to their communities. The

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206. The charges against Katanga and Ngudjolo were ultimately severed; Katanga was convicted of crimes not of a sexual nature, and Ngudjolo was acquitted and released. *Katanga* Judgment, *supra* note 200, ¶ 1648; *Ngudjolo* Judgment, *supra* note 200, ¶ 516.

207. See *supra* note 6.

208. ICC, Office of the Prosecutor, *Strategic Plan: June 2012–2015*, 27 (2013).

209. Press Release, ICC, ICC Prosecutor, Fatou Bensouda, Launches Policy on Sexual & Gender-Based Crimes: Ensuring Victims Have a Voice in Court Today Can Prevent These Crimes Tomorrow #EndSexualViolence (Dec. 9, 2014).

210. *Id.*; see ICC, OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES ¶ 28 (2014) [hereinafter OFFICE OF THE PROSECUTOR, POLICY PAPER].

211. OFFICE OF THE PROSECUTOR, POLICY PAPER, *supra* note 210, ¶ 25.

Office position is that acts of rape and other forms of sexual violence may, depending on the evidence, be an integral component of the *pattern of destruction inflicted upon a particular group of people*, and in such circumstances, may be charged as genocide.<sup>212</sup>

In sum, the ICC has now acknowledged—at least in theory—that both sub-element (b) (causing serious bodily or mental harm to members of the group) and sub-element (c) (inflicting conditions calculated to bring about destruction of the group) of the crime of genocide may be perpetrated by way of sexual violence.<sup>213</sup>

Only time will tell whether these developments signal a greater willingness to prosecute sexual violence under Article 6 in appropriate circumstances. Notwithstanding recent progress made by the current Prosecutor, it is unclear whether her successors will share her commitment to combatting sexual and gender-based crimes—and, in particular, whether they will recognize the need to prosecute such crimes as genocide.<sup>214</sup> The ICC's historic reluctance to prosecute sexual violence under Article 6, coupled with the fact that recent progress reflects a purely discretionary policy choice by the Prosecutor, suggests that the statutory regime remains insufficient to adequately prosecute sexual violence committed in furtherance of genocide.<sup>215</sup>

## VI. PRESCRIPTION OF THE FUTURE: THE ICC SHOULD AMEND THE ROME STATUTE TO EXPRESSLY INCLUDE SEXUAL VIOLENCE AS A CONSTITUENT ACT OF GENOCIDE

The ICC must have the same textual authority to prosecute sexual violence as genocide that it has to prosecute sexual violence as

212. *Id.* at ¶¶ 30–31 (emphasis added).

213. See also *Akayesu* Judgment, *supra* note 2, ¶ 731 (holding that rape and sexual violence may constitute the infliction of serious bodily and mental harm on members of the group); *Kayishema* Judgment, *supra* note 14, ¶ 116 (holding that rape and sexual violence may constitute conditions of life calculated to bring about the destruction of the group, in whole or in part).

214. ICC, *Office of the Prosecutor*, [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/office%20of%20the%20prosecutor.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/office%20of%20the%20prosecutor.aspx) (last visited Sept. 11, 2015) (noting that the current Prosecutor, Fatou Bensouda, was elected by the Assembly of States Parties in 2012 for a term of nine years).

215. Some scholars argue that sexual violence used “systematically as an instrument of group harm” must be distinguished from “everyday” sexual violence. Carson, *supra* note 136, at 1289. As Catharine A. MacKinnon famously said of the rapes committed by Serbs against Bosnian Muslims: “These rapes are to everyday rape what the Holocaust was to everyday anti-Semitism. Without everyday anti-Semitism a Holocaust is impossible, but anyone who has lived through a pogrom knows the difference.” *Id.* (citing Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 8 (1994)).

crimes against humanity or war crimes. Article 6 of the Rome Statute should thus be amended to read as follows:

For the purpose of this Statute, ‘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) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group; and (f) *committing rape, forced pregnancy, enforced sterilization or mutilation, intentional transmission of disease, forced abortion or miscarriage, forced marriage, sexual slavery, or any other form of sexual violence of comparable gravity committed as part of the genocidal actus reus articulated in (a)–(e).*<sup>216</sup>

The above included crimes of rape, forced pregnancy, and enforced sterilization are borrowed from the crimes against humanity and war crimes provisions of the Rome Statute;<sup>217</sup> the addition of forced marriage is my own.<sup>218</sup> The remainder of this text is adapted from the scholarship of Kelly Askin.<sup>219</sup> The adop-

216. This Article proposes only the addition of sexual crimes to the list of prohibited acts; it does not suggest the addition of “gender” as a protected group under Article 6. While I take no position on the merits of the latter approach, the topic is beyond the scope of this Article.

217. See Rome Statute, *supra* note 4, art. 7(g) (crimes against humanity), art. 8(2)(b)(xxii) (war crimes), art. 8(2)(e)(vi) (war crimes).

218. Forced marriages—not to be confused with arranged marriages—generally occur during armed conflict and “involve a woman or girl being abducted and declared the ‘wife’ of her captor” in the absence of either her or her family’s consent. Carmel O’Sullivan, *Dying for the Bonds of Marriage: Forced Marriage as a Weapon of Genocide*, 22 HASTINGS WOMEN’S L.J. 271, 272 (2011). These so-called “marriages” are characterized by rape, forced pregnancy, sexual slavery, and other forms of sexual violence. *Id.* Under the current international law scheme, forced marriage may theoretically be prosecuted as a crime against humanity (utilizing the subcategories of rape, sexual slavery, forced pregnancy, and other inhumane acts). *Id.* at 289 (discussing a conviction in Sierra Leone, Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 1297 (Mar. 2, 2009)); see also Closing Order, Case 002/19-9-2007-ECCC-OCIJ, ¶¶ 843–44, 1430, 1442 (Sept. 15, 2010) (the Extraordinary Chambers in the Courts of Cambodia found that forced marriages occurred “during the entire period of the [Khmer Rouge] regime in nearly every zone” and concluded that the elements of the crime against humanity of rape had been established “in the context of forced marriage.”). There is nonetheless a strong case for prosecuting forced marriage as genocide where the requisite elements are met. As O’Sullivan points out, in the context of Rwanda, forced marriages “compl[ie]d with the three main criteria of genocide: these ‘marriages’ fit within a number of the enumerated acts, the acts [were] directed against a protected group, and although intent has to be determined on a case-by-case basis, there is evidence that a large number of the actors intended to destroy the targeted group in whole or in part through their actions.” O’Sullivan, *supra*, at 289.

219. Askin, *supra* note 12, at 315–16 (observing that, “[s]exual violence can fall under each of the sub-elements, although the most common means of using sex crimes as instru-

tion of this text would also acknowledge that, as Askin has noted, “[s]exual violence can fall under *each* of the sub-elements”—not just one of them.<sup>220</sup>

At a minimum, the drafting representatives of the Assembly of States Parties should amend the ICC Elements of Crimes to expressly encompass the above language in the articulation of sub-elements (a) through (e) of the Rome Statute’s Article 6. Not only would that assist those responsible for charging decisions in interpreting the Rome Statute, but it would also solidify the prohibition of rape as a *jus cogens* norm, enable the effective prosecution of sexual violence even in the absence of an armed conflict or a systemic attack targeting civilians, ensure due process for defendants, and increase justice for victims.

A. *A Clear Enumeration in the Rome Statute Will Strengthen the Prohibition Against Sexual Violence and Rape in the Formation of Customary International Law*

Certainly, customary international law has made extraordinary leaps forward over the past two decades with respect to the prosecution of sexual violence as genocide. But it remains unclear whether the crime has reached *jus cogens* status.<sup>221</sup> Genocide scholar Samuel Totten argues that it has not. Specifically, Totten contends that the exclusion of sexual violence from Article 6 of the Rome Statute is one indicator “that gender crimes have yet to achieve *jus cogens* status as genocide.”<sup>222</sup> Anne-Marie De Brouwer takes the opposite position, arguing:

The acceptance that sexual violence may rise to the level of genocide, a *jus cogens* crime, means that sexual violence as genocide has become[sic] to be accepted as a *jus cogens* norm as well. For the abovementioned reasons, the ICC Statute needs to be amended to include specific sexual violence crimes and gender as a ground for group destruction.<sup>223</sup>

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ments of genocide are: (b), causing serious bodily and mental harm to the group (such as by raping or otherwise violating women); (c), inflicting conditions of life on members calculated to bring about a slow death (such as having HIV/AIDS-infected persons repeatedly rape the victims); and (d), imposing measures intended to prevent births within the group (such as forced abortion or miscarriage, forced impregnation, sexual mutilation, or rape by a different ethnic group when custom dictates that the father determines the ethnicity of the child”).

220. *Id.* at 316 (emphasis added).

221. See Hallet, *supra* note 10, at 195 (defining a *jus cogens* norm as “a fundamental principle of international law considered to have acceptance among the international community of states as a whole.”).

222. *Id.*

223. DE BROUWER, *supra* note 10, at 83.

Thus, while Totten believes that the exclusion of sexual violence from Article 6 *forecloses* the possibility that the crime has become a *jus cogens* norm, De Brouwer argues for its inclusion on the ground that genocidal sexual violence has already attained *jus cogens* status.

Regardless of the crime's current status, an amendment to the Rome Statute to codify the prohibition against genocidal sexual violence as a *jus cogens* norm would provide much needed clarity.<sup>224</sup> Because precedent is not binding across international tribunals<sup>225</sup> (*i.e.*, the ICTY need not rely on ICTR jurisprudence as anything more than persuasive authority), it is even more crucial to codify a prohibition on genocidal sexual violence in a statutory source of international law.<sup>226</sup> Moreover, the attainment of *jus cogens* status will render the prohibition against genocidal rape an *erga omnes* norm; that is, States will be bound by the resulting non-derogable obligation to prosecute or extradite perpetrators.<sup>227</sup>

B. *The ICC Needs Clear Authority to Prosecute Sexual Violence as Genocide Because Genocide is Not Subject to the Same Jurisdictional Limitations as Crimes Against Humanity and War Crimes*

The contextual requirements for genocide are fundamentally different from the social or political conditions required for the commission of a crime against humanity or a war crime. These requirements affect the ICC's ability to prosecute sexual violence

224. See *id.* at 84 (noting that such an amendment "should preferably be accompanied by an amendment of the definition of genocide contained in the 1948 Genocide Convention (or through an additional Protocol) in order to harmonise the law on genocide . . ."). See also Veronica C. Abreau, *Women's Bodies as Battlefields in the Former Yugoslavia: An Argument for the Prosecution of Sexual Terrorism as Genocide and for the Recognition of Genocidal Sexual Terrorism as a Violation of Jus Cogens Under International Law*, 6 GEO. J. GENDER & L. 1, 15 (2005) (not discussing the Rome Statute but arguing that "sexual terrorism" will eventually be recognized as genocidal and that, "[i]deally, such an expansion would take the form of an amendment to the Genocide Convention, explicitly naming and laying out the elements of the crime of genocidal sexual terrorism.").

225. See Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 35 (2006) (noting that "[s]tare decisis does not formally operate in international law."); see also MARIA ERIKSSON, *DEFINING RAPE: EMERGING OBLIGATIONS FOR STATES UNDER INTERNATIONAL LAW?* 396 (2011) (discussing the ICTR and ICTY, and noting that "the case law of the tribunals is restricted to the subject matter of those particular states and conflicts.").

226. See Abreau, *supra* note 224, at 17.

227. See David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 229–31 (2005) (explaining that the principle of *jus cogens* creates "state responsibility *erga omnes*" and that that "enables any state to arrest and prosecute those who have violated certain *jus cogens* norms and is restricted by neither territory nor nationality.").

under the various articles. Neither the existence of armed conflict nor a “widespread or systematic attack against a civilian population” is a prerequisite for the crime of genocide (in contrast to the contextual elements necessary for conviction of conduct as a war crime<sup>228</sup> or a crime against humanity,<sup>229</sup> respectively).

Accordingly, if sexual assault is committed in the absence of either an armed conflict or a widespread or systematic attack against a civilian population, the crime will escape the ICC’s enumerated jurisdiction over war crimes or crimes against humanity. Currently, the only clear path to prosecute such an assault under the Rome Statute—assuming it was committed with genocidal intent—is to rely on the footnoted discussion of sub-element (b) of genocide in the ICC’s Elements of Crimes. The ICC’s existing jurisprudence on rape as genocide (or lack thereof to date) indicates that that provision lacks sufficient authority or at least that it has not been used adequately in charging decisions.<sup>230</sup>

C. *Express Enumeration of Sexual Violence as Genocide Will Ensure Due Process for Defendants by Eliminating Much Textual Ambiguity*

As one scholar has noted, “[d]eviations in the jurisprudence of international tribunals from the exact wording of the Genocide

228. Armed conflict is a precondition for the commission of war crimes. See Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 81 n.9 (2005) (observing that, “while war crimes remain a staple of international criminal law, since both crimes against humanity and genocide need not be connected with armed conflict, not all international crimes are war crimes.”). For a comprehensive discussion of the prerequisites to war crimes, see *supra* note 4.

229. As a precondition for the commission of a crime against humanity, the Rome Statute requires that the conduct be “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Rome Statute, *supra* note 4, art. 7(1). Hence, that is the context for my analysis. It is worth noting, however, that while the ICTR took a similar approach (requiring “a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”), the ICTY instead proscribed certain crimes “when committed in armed conflict, whether international or internal in character, and directed against any civilian population.” ICTR Statute, *supra* note 12, art. 3; ICTY Statute, *supra* note 12, art. 5 (emphasis added). Thus, the ICTY excludes the “widespread and systematic” requirement, while incorporating an armed conflict requirement for crimes against humanity (a requirement reserved in the other statutes for war crimes only). For a discussion of the armed conflict requirement in the war crimes context, see *supra* note 228. For a more comprehensive discussion of the prerequisites for crimes against humanity under the Rome Statute, see *supra* note 4.

230. See *supra* note 2 (showing that all sexual violence prosecutions in the ICC have thus far charged rape as either a crime against humanity or as a war crime). But see *supra* note 6 and accompanying text (noting that the second warrant of arrest for Sudan’s Omar al-Bashir expressly charged him with rape as a component of his “genocidal policy.”).



Convention raise the question as to the measure of precision with which an offense need[s] to be defined in order to satisfy the demands of *nullum crimen sine lege*.<sup>231</sup> The *nullum crimen sine lege* doctrine—“no crime without law” or the prohibition on retroactive/*ex post facto* penal laws—is part of the principle of legality in international criminal law that “conduct must be criminalized and penalties fixed in advance of any criminal prosecution.”<sup>232</sup> Article 22 of the Rome Statute codified this principle, providing that, “[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”<sup>233</sup>

Moreover, the statute provides that “[t]he definition of a crime shall be strictly construed and *shall not be extended by analogy*” and that, “in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”<sup>234</sup> In contrast, neither the ICTR nor ICTY statutes contain a comparable provision codifying *nullum crimen sine lege*,<sup>235</sup> and it is unclear to what extent the omission has limited due process challenges to the ICTR’s convictions for genocidal rape. Theodor Meron, the current President of the ICTY, asserts that the principle of legality was not implicated in *Akayesu*, although at the time, “it might not have been clear to some defendants that rape could constitute an act of genocide.”<sup>236</sup> Because it was well established that sexual violence *could* amount to a crime against humanity, a war crime, or a crime under Rwandan domestic law, Meron argues that it did not violate the principle of legality for the tribunal “to undertake additional legal interpretations . . . that involve categorizations of conduct generally acknowledged to be illegal.”<sup>237</sup>

Nonetheless, the Elements of Crimes expressly provide that rape can amount to “serious bodily or mental harm” within the meaning of Article 6—while conspicuously declining to accord similar recognition to the other four sub-elements—exposing genocide convictions based on those other sub-elements to due process attacks

231. Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT’L L.J. 286, 315 (1999).

232. Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008).

233. Rome Statute, *supra* note 4, art. 22(1) (emphasis added).

234. *Id.* art. 22(2) (emphasis added).

235. See Mia Swart, *Legality as Inhibitor: The Special Place of Nullum Crimen Sine Lege in the Jurisprudence of International Criminal Tribunals*, 30 S. AFR. Y.B. INT’L L. 33, 37 (2005).

236. THEODOR MERON, *THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: A VIEW FROM THE BENCH*, SELECTED SPEECHES 112 (2011).

237. *Id.*

by defendants.<sup>238</sup> A defendant might challenge such an indictment on vagueness grounds, arguing that the Rome Statute did not provide sufficient notice that those acts could constitute genocide or that it did not articulate the constituent act with sufficient specificity. An amendment that expressly defines the crime of genocide to encompass sexual violence would ensure a fair balance between due process protections for defendants and the rights of sexual assault victims, while preserving the integrity and legality of the ICC's jurisprudence in the eyes of the international community.

#### D. Prosecuting Sexual Violence as Genocide Will Increase Justice for Victims

By failing to recognize genocidal intent where sexual violence is used as a tool of such targeted destruction, the international tribunals are failing to “grasp the entire point of the[ ] victimization.”<sup>239</sup> If, in contrast, the ICC were to establish a practice of charging genocidal sexual violence, those same victims might finally experience some level of vindication—both symbolically and also through enhanced opportunities for trial participation, more appropriate sentences for defendants, and expanded access to reparations.

##### 1. Prosecuting Sexual Violence as Genocide Could Increase Opportunities for Indirect Victim Participation in ICC Proceedings

Pursuant to Rule 85(a) of the ICC Rules of Procedure and Evidence, victims are defined as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”<sup>240</sup> In *Prosecutor v. Lubanga*, Trial Chamber I interpreted Rule 85(a) as providing for the participation of “two categories” of victims: direct victims and indirect victims.<sup>241</sup> Significantly, in that “Decision on ‘Indirect Victims,’” Trial Chamber I

238. ELEMENTS OF CRIMES, *supra* note 180, at 2 n.3.

239. MacKinnon, *supra* note 136, at 949.

240. ICC, RULES OF PROCEDURE & EVIDENCE, Rule 85(a) (2002) [hereinafter RULES OF PROCEDURE & EVIDENCE]; *see also id.* at Rule 85(b) (providing that, “[v]ictims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”).

241. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Redacted Version of “Decision on ‘Indirect Victims,’” ¶ 44 (Apr. 8, 2009) [hereinafter *Lubanga* Decision on Indirect Victims]. *See also* Valentina Spiga, *Indirect Victims' Participation in the Lubanga Trial*, 8 J. INT'L CRIM. J. 183, 185–86 (2010) (noting that the Decision on Indirect Victims relied heavily on *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-1433, Judgment on the Appeals of the

concluded that “indirect victims” of crimes, or those persons “who suffer harm as a result of the harm suffered by direct victims,” may also participate in ICC proceedings.<sup>242</sup> As a prerequisite to involvement, an indirect victim must establish a relationship with the direct victim and show that, “the loss, injury, or damage suffered by the latter gives rise to harm to them.”<sup>243</sup>

Recognizing sexual violence as an act of genocide could broaden the category of indirect victims to encompass, for example, the sexual assault victim’s partner who can no longer bear children with his spouse or the victim’s newborn child who was infected with HIV in her mother’s womb, even where the jurisdictional prerequisites for war crimes or crimes against humanity are not satisfied.<sup>244</sup> And, although the same indirect victim classification might be available even where sexual violence is charged as a crime against humanity or a war crime, the allegation of genocidal intent strengthens the case for allowing indirect victims’ participation. Because a perpetrator acting with genocidal intent targets the group *as such*, the Prosecutor can argue that the defendant demonstrated genocidal intent not only with respect to the sexual assault victim herself, but also with respect to the indirect victims of the crime.

## 2. Prosecuting Sexual Violence as Genocide Could Yield More Appropriate Sentences for Defendants

Although the ICC lacks specific sentencing guidelines,<sup>245</sup> the Rome Statute authorizes the court to impose either a term of imprisonment not exceeding thirty years or, “when justified by the *extreme gravity of the crime* and the individual circumstances of the convicted person,” a term of life imprisonment.<sup>246</sup> Because genocide is arguably perceived to be the most serious crime under inter-

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Prosecutor and the Defence Against Trial Chamber I’s Decision on Victim’s Participation (Jan. 18, 2008)).

242. *Lubanga* Decision on Indirect Victims, *supra* note 241, ¶ 44.

243. *Id.* ¶ 49 (noting that, “[i]t follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged.”). See also Spiga, *supra* note 241, at 187 (summarizing the tripartite criteria for the participation of indirect victims as follows: “(i) the indirect victims must have suffered personal harm; (ii) the harm suffered must arise out of the harm suffered by direct victims, as a result of the crimes charged; and (iii) the indirect victim must have suffered harm as a result of a personal or circumstantial relationship with the direct victim.”).

244. See *supra* notes 228–29.

245. See Andrew Dubinsky, *An Examination of International Sentencing Guidelines and a Proposal for Amendments to the International Criminal Court’s Sentencing Structure*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 609, 630 (2007).

246. Rome Statute, *supra* note 4, art. 77(1)(a)–(b) (emphasis added).

national law,<sup>247</sup> it follows that a genocidal sexual violence conviction could yield a longer sentence than a conviction for the same act charged as either a crime against humanity or a war crime.

The ICTR, which is governed by sentencing provisions similar to that of the ICC,<sup>248</sup> has elevated genocide above crimes against humanity and war crimes in terms of their relative gravity. As the ICTR Trial Chamber I observed in *Prosecutor v. Kambanda*:

Regarding the crime of genocide, in particular, the preamble to the Genocide Convention recognizes that at all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international cooperation to liberate humanity from this scourge. The crime of genocide is unique because of its element of *dolus specialis* (special intent) . . . hence the Chamber is of the opinion that *genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.*<sup>249</sup>

Unlike the ICTR, the ICTY has declined to recognize a hierarchy of international crimes.<sup>250</sup> However, at least one ICTY appellate judge, Judge Lal Chand Vohrah, has separately voiced dissatisfaction with that approach, noting that:

[F]or it to be held that the additional elements required for constituting genocide or crimes against humanity and the fact that a broader society is affected by such crimes do not deserve to be *reflected in the sentence of a person convicted of these crimes*, amounts to a failure to take into consideration the exceptionally egregious nature of genocide and crimes against humanity.<sup>251</sup>

While recognizing that genocide and crimes against humanity are both directed at *communities* (against protected groups and civilian populations, respectively), even Judge Lal Chand Vohrah's analysis failed to acknowledge that only genocide and the particu-

247. See Allison Marsten Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 482 (2001) (citing Helen Fein, *Genocide, Terror, Life Integrity and War Crimes: The Case for Discrimination*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 95, 95 (George J. Andreopoulos ed., 1994) (noting that "genocide is widely conceived of as the most reprehensible of crimes.")).

248. See ICTR Statute, *supra* note 12, art. 23(2) (providing that, "[i]n imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.").

249. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 16 (Sept. 4, 1998) (emphasis added).

250. Compare *id.* ¶ 14 (proclaiming war crimes to be "lesser crimes" than either genocide or crimes against humanity), with *Kunarac* Judgment, *supra* note 147, ¶ 860 (stating that "the Trial Chamber does not consider that crimes against humanity should in principle attract a higher sentence than war crimes.").

251. *Furundžija* Appeals Judgment, *supra* note 146, at 89–90 (from ¶ 8 of the Declaration of Judge Lal Chand Vohrah) (emphasis added).

lar crime against humanity of persecution<sup>252</sup> are *bias-motivated* crimes. Given the domestic law practice and trends in favor of sentence enhancements for crimes based on group bias,<sup>253</sup> it stands to reason that a parallel provision under international law would be appropriate where the perpetrator selects his victims based on their membership in a specific national, ethnic, racial, or religious group. If the ICC adopts that rationale—acknowledging, as the ICTR has, that genocide is the “crime of crimes”<sup>254</sup>—convictions for genocidal sexual violence will be subject to the harshest penalties available under international law.

### 3. Prosecuting Sexual Violence as Genocide Could Increase Access to Reparations for Members of Victimized Groups

The ICC aims “to achieve not only retributive justice by punishing the perpetrator, but also restorative justice by providing reparation[s] to victims.”<sup>255</sup> To that end, the Rome Statute directs the ICC to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation,” and provides that the tribunal may—by request or upon its own motion “in exceptional circumstances”<sup>256</sup>—determine whether or not a victim is to receive reparations.

In accordance with Rule 97 of the Rules of Procedure and Evidence, the ICC may award reparations “on an individualized basis or, where it deems it appropriate, *on a collective basis* or both.”<sup>257</sup> At

252. See *supra* note 197 (observing that rape may be prosecuted as the crime against humanity of “persecution” when the crime is motivated by political, religious, racial, or ethnic biases, but nonetheless concluding that the prosecution of rape as genocide has distinct advantages over the alternative).

253. See Danner, *supra* note 247, at 464–65 (observing that “[t]he municipal law of some countries makes special provision for crimes perpetrated on the basis of a victim’s membership in such a group,” and “the punishment for a bias-motivated crime is higher than it would be for the ‘parallel crime,’ that is, one not perpetrated on the basis of group-bias.”).

254. See text accompanying *supra* note 249.

255. Anne-Marie De Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families*, 20 LEIDEN J. INT’L L. 207, 218 (2007). Compensation is especially critical for victims who experience long-term hardship as a result of their rape, such as victims who contract HIV. See *id.* at 214 (observing that “[e]ven thirteen years after the [Rwandan] genocide ended women are still dying because of the lack of available reparative measures.”).

256. Rome Statute, *supra* note 4, art. 75(1).

257. RULES OF PROCEDURE & EVIDENCE, *supra* note 240, at Rule 97(1). See also *id.* at Rule 98(3) (“The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.”).

least one international human rights organization has suggested that that provision is especially appropriate for redressing victims of genocide, noting that there is “inherently a group aspect to the crime of genocide.”<sup>258</sup> As one scholar put it:

[T]he prosecution of rape as a form of genocide leads to the implication that rape is not a wrong in itself, but is wrong ‘because it is an *assault on a community* defined only by its racial, religious, national or ethnic composition . . . the violation of a woman’s body is secondary to the humiliation of the group.’<sup>259</sup>

After the Holocaust, for example, Jewish organizations asked Germany for collective reparations “to compensate for the damage caused to the ‘very fabric of the Jewish people’s existence’ including the loss of life, destruction of property, and suffering of those with no living heirs or dependents.”<sup>260</sup> Germany eventually paid Israel over \$800 million as reparations for crimes against the Jewish people, in addition to compensation to other European states and individual survivors.<sup>261</sup>

For the first time in 2012, following the conviction of Thomas Lubanga Dyilo,<sup>262</sup> the leader of the rebel group Congolese Patriotic Union, the ICC exercised its authority to order that compensation be made through the Trust Fund for Victims created under Article 79.<sup>263</sup> In light of the “uncertainty as to the number of victims of the crimes in th[at] case . . . and the limited number of individuals who ha[d] applied for reparations,” Trial Chamber I concluded that the court should “ensure there [wa]s a collective approach [to] ensure[ ] reparations reach[ed] those victims . . .

258. REDRESS, JUSTICE FOR VICTIMS: THE ICC’S REPARATIONS MANDATE 60 (May 20, 2011), [http://www.redress.org/downloads/publications/REDRESS\\_ICC\\_Reparations\\_May2011.pdf](http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf).

259. Amanda Beltz, Note, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim’s Rights of the Accused*, 23 J. CIV. RTS. & ECON. DEV. 167, 207 (2008) (quoting Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379, 387 (1999)) (emphasis added).

260. Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 121, 128 (Eric Stover & Harvey M. Weinstein eds., 2004) (quoting Elazar Barkan, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 6 (2000)).

261. *Id.*

262. Press Release, ICC, Lubanga Case: Trial Chamber I Issues First ICC Decision on Reparations for Victims, ICC-CPI-20120807-PR831 (Aug. 7, 2012). According to the decision, the potential beneficiaries of the reparations include both “direct” and “indirect” victims of Lubanga’s crimes of enlisting, conscripting, and using child soldiers. *Id.* That definition of “indirect” victims for purposes of reparations includes “the family members of direct victims, along with individuals who intervened to help the victims or to prevent the commission of these crimes.” *Id.*

263. Rome Statute, *supra* note 4, art. 75(2).

currently unidentified.”<sup>264</sup> Those collective reparations might include, among other things, medical services (including psychological and psychiatric care), general rehabilitation, housing assistance, education, and training programs.<sup>265</sup>

Furthermore, while Lubanga was convicted of war crimes, not genocide,<sup>266</sup> the decision was notable for its treatment of crimes involving sexual violence. It expressly provided that the ICC should “formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence.”<sup>267</sup> It stated:

The Court must reflect the fact that the consequences of these crimes are complicated and they operate on a number of levels; their impact can extend over a long period of time; they affect women and girls, men and boys, together with their families and communities; and they require a specialist, integrated and multidisciplinary approach.

The Court shall implement gender-sensitive measures to meet the obstacles faced by women and girls when seeking to access justice in this context, and accordingly it is necessary that the Court takes steps to ensure they are able to participate, in a full sense, in the reparations programs.<sup>268</sup>

The Women’s Initiatives for Gender Justice applauded the decision for “creat[ing] room for the ICC to address through reparations . . . the impact of gender-based violence” and observed that, by taking such an approach, the ICC reparations program “will necessarily address some of the underlying injustices and inequalities and may contribute, even if in some small way, to transforming communal and gender relations.”<sup>269</sup>

In a judgment delivered in March 2015, the Appeals Chamber affirmed the Trial Chamber’s decision to award reparations on only a collective basis, under Rule 98(3) of the Rules of Procedure

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264. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations, ¶ 219 (Aug. 7, 2012).

265. *Id.* ¶ 221.

266. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment pursuant to article 74 of the Statute (Mar. 14, 2012). *But see* Press Release, Genocide Watch, Sexual Violence as Acts of Genocide (Apr. 20, 2012), <http://www.genocidewatch.org/rapeasgenocide.html> (last visited Aug. 23, 2015) (observing that nearly two million women have been raped in the Democratic Republic of the Congo, and characterizing the rapes committed by the Democratic Forces for the Liberation of Rwanda and the Mai Mai militia group against Tutsi women in particular as “acts of genocide”).

267. *Id.* ¶ 207.

268. *Id.* ¶¶ 207–08.

269. Press Release, Women’s Initiatives for Gender Justice, Statement on the first Reparations Decision by the ICC: *The Prosecutor v. Thomas Lubanga Dyilo* (Aug. 10, 2012).

and Evidence, rather than on an individual basis, under Rule 98(2).<sup>270</sup> In so concluding, the Appeals Chamber emphasized that Rule 98(3) identifies the “number of victims” as one factor for consideration in determining whether collective reparations are most appropriate.<sup>271</sup> Although the Appeals Chamber ruled that Lubanga could not himself be held liable for reparations for sexual and gender-based violence—because the trial chamber had found that the acts of sexual violence were not attributable to him—the appellate judgment noted that it should not be read to preclude victims of sexual and gender-based crimes from accessing assistance activities coordinated by the Trust Fund for Victims.<sup>272</sup> Moreover, the amended Order for Reparations reaffirmed the importance of developing a “gender-inclusive” approach to reparations, providing, in particular, that, “[a] gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations ensuring that they are accessible to all victims in their implementation . . . gender parity in all aspects of reparations is an important goal of the Court.”<sup>273</sup>

With the *Lubanga* decisions on reparations, the ICC has signaled its willingness to redress the communal damage caused by the most serious international crimes, including those of a sexual nature.<sup>274</sup> At this stage, it is not entirely clear whether the ICC will create a tiered system of compensation for different crimes.<sup>275</sup> But, by recognizing that the crime of genocide, by its nature, targets a

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270. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment on the Appeals against the “Decision Establishing the Principles and Procedures to be Applied to Reparations” of 7 August 2012 with AMENDED Order for Reparations (Annex A) and Public Annexes 1 and 2, ¶¶ 140, 152 (Mar. 3, 2015) [hereinafter *Lubanga* Appeals Judgment on Reparations]; Press Release, ICC, Lubanga Case: ICC Appeals Chamber Amends the Trial Chamber’s Order for Reparations to Victims, ICC-CPI-20150303-PR1092 (Mar. 3, 2015); see also RULES OF PROCEDURE & EVIDENCE, *supra* note 240, at Rule 98(3) (“The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.”); *id.* at Rule 98(2) (“The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.”).

271. *Lubanga* Appeals Judgment on Reparations, *supra* note 270, ¶¶ 148–52.

272. *Id.* ¶ 199–98.

273. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-3129-AnxA, Order for Reparations (Amended), ¶ 18 (Mar. 3, 2015).

274. For a critique of the ICC’s handling of sexual and gender-based crimes in the *Lubanga* case, see Press Release, Women’s Initiatives for Gender Justice, ICC Issues First Appeal Judgment on Reparations: *The Prosecutor v. Thomas Lubanga Dyilo* (Mar. 3, 2015).

275. De Brouwer, *supra* note 255, at 226 n.100.



national, ethnic, racial, or religious group—and therefore necessarily impacts the collective identity of the group—prosecuting sexual violence as genocide in appropriate circumstances could increase access to reparations even for those victims who do not testify or have representatives for purposes of legal participation.

#### 4. Prosecuting Sexual Violence as Genocide Could Provide Symbolic Vindication for Victims

A United Nations report based on interviews with Rwandan sexual assault survivors revealed that the women “want[ed] the ICTR to say loudly and in no uncertain terms that *what was done to women was a crime of genocide . . .*”<sup>276</sup> When the ICTR chose to charge sexual violence as a crime against humanity or war crime—while prosecuting other violence that occurred in tandem as genocide—the tribunal denied individual victims that vindication. The ICC now risks going down that same limiting path. If sexual violence continues to be used as a tool of genocide—and if women remain its primary victims—a failure to prosecute it could perpetuate the historically discriminatory treatment of gender-based violence as a crime of lesser gravity than the same or similar conduct lacking a gendered component.

### CONCLUSION

When the ICTR delivered its groundbreaking judgment for genocidal rape in 1998, it seemed to signal a new approach to prosecuting sexual violence under international law. In the intervening years, however, the early promise of *Akayesu* has dimmed. Twenty years after the Rwandan genocide, and despite widespread evidence of rape camps and forcible impregnation in the former Yugoslavia, the ICTY has yet to hand down a genocide conviction based on sexual violence.<sup>277</sup> When the ICC was given the opportunity to codify the prohibition against genocidal rape as a *jus cogens* norm in the Rome Statute, the international community demurred. Not surprisingly, the early years of the ICC were entirely devoid of rape-as-genocide indictments, and yet the court continues to operate in the same limited manner that omits indicting, prosecuting, and ending impunity for those crimes.

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276. Binaifer Nowrojee, *Will the ICTR Fail Rwanda's Rape Victims?*, UNITED NATIONS RES. INST. FOR SOC. DEV. OCCASIONAL PAPER #10, 1, 5 (2005) (emphasis added).

277. See ICTY Statute, *supra* note 4.

An amendment to the Rome Statute—specifically enumerating rape and sexual violence as a constituent act of genocide—is the best long-term solution to this problem. The ICC needs clear authority to prosecute sexual violence as genocide to establish the prohibition against genocidal rape as a *jus cogens* norm of customary international law, avoid jurisdictional limitations, ensure due process for defendants, and guarantee maximum justice for victims. In the absence of an amendment to the Rome Statute, or in the interim, the ICC should use any opportunity to prosecute Sudan's Omar al-Bashir as an occasion to also develop a strong body of case law on sexual violence as genocide.<sup>278</sup> Only if the ICC takes action along these lines can we be certain that the promise of *Akayesu*—of achieving gender justice and ending impunity for the crime of crimes—has not been lost.

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278. *Supra* note 6.