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*YOU HAVE NO GOD: AN ANALYSIS OF THE PROSECUTION
OF GENOCIDAL RAPE IN INTERNATIONAL CRIMINAL LAW*

*Cassie Powell**

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ABSTRACT

Atrocities committed in Bosnia and Rwanda in the 1990's included rape as a form of genocide. Many individuals were subsequently tried in international tribunals and convicted of war crimes but very few were held to answer for the crime of genocidal rape. This Article explores how genocide is carried out through systematic sexual violence, presents the legal theories used to prosecute rape and genocide under international law, and calls for future prosecutions of genocidal rape in the International Criminal Court and other tribunals.

INTRODUCTION

One victim said: “[W]hen we see them, we run. Some of us succeed in getting away, and some are caught and taken to be raped -- gang-raped. Maybe around 20 men rape one woman. [...] These things are normal for us here in Darfur. These things happen all the time. I have seen rapes too. It does not matter who sees them raping the women -- they don't care. They rape women in front of their mothers and fathers.”¹

"I was sleeping when the attack on Disa started. I was taken away by the attackers, they were all in uniforms. They took dozens of other girls and made us walk for three hours. During the day we were beaten and they were telling us: "You, the black women, we will exterminate you, you have no god." At night we were raped several times. The Arabs guarded us with arms and we were not given food for three days."²

- Survivors of rape in Darfur, Sudan

In 2010, the Prosecutor for the International Criminal Court, Luis Moreno Ocampo, issued an amended arrest warrant for Omar al-Bashir for the crime of genocide, in violation of the Rome Statute.³ Although there was already an outstanding arrest warrant for al-Bashir, the first warrant charged him only with violations of crimes against humanity and war crimes, not genocide. After the amended warrant was issued, Omar al-Bashir became

¹ Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR 3 (July 14, 2008), <https://www.icc-cpi.int/NR/rdonlyres/A2BA9996-67C3-4A5F-9AD2-B20A7FD2D176/277757/ICCOTPST20080714ENG.pdf> (alteration in original).

² *Sudan, Darfur: Rape as a weapon of war: Sexual violence and its consequences*, AMNESTY INTERNATIONAL (July 18, 2004), <http://www.amnestyusa.org/node/55614>.

³ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF.

the first person accused of genocide in the International Criminal Court.⁴ A primary reason for this amended charge was the allegation that al-Bashir had orchestrated the rapes of thousands of civilian women, primarily of the Fur, Masalit and Zaghawa ethnic groups⁵ in the Darfur region of Sudan. Although the prosecutor had attempted to charge al-Bashir with genocide during his first indictment in 2008, the International Criminal Court found there was not enough evidence to indict him on that charge.⁶ Subsequently, the prosecutor collected evidence, including victim statements, that demonstrated the extent of and ethnical motivation for the mass rapes,⁷ and successfully persuaded the Court to indict al-Bashir for genocide on the basis of this new evidence in 2010.

The case of al-Bashir, and the charges against him of genocidal rape, represent the spotted jurisprudential history of rape and genocide in international criminal law. Despite the horrifying occurrence of systematic, ethnically motivated rape throughout history, only recently has it gained recognition in international criminal law. Moreover, actual prosecution of genocidal rape is rare; indeed, since the charges against al-Bashir, no other person has been charged with genocidal rape by the International Criminal Court. Furthermore, al-Bashir himself has never been officially tried for this offense—al-Bashir continues to be at large since the warrant for his arrest was issued in 2009.⁸

Genocidal rape, despite gaining legal status and recognition, is, thus, rarely prosecuted within the international criminal sphere. This paper seeks to establish that this is due to two reasons: (1) the theoretical complexity of prosecuting rape as a crime of genocide and (2) the reluctance of Prosecutors to bring genocidal rape cases.

Despite established precedent, the theory of genocidal rape has yet to be firmly constructed in international jurisprudence. An analysis of the history of the prosecution of rape as genocide in international criminal law demonstrates the lack of prosecutions is due to the theoretical and sociological complexity of genocidal rape. Despite precedent, the legal link between

⁴ *Darfur, Sudan: Situation in Darfur, Sudan ICC-02/05*, International Criminal Court, <https://www.icc-cpi.int/darfur>. (last visited Sep. 14, 2016); Marlisle Simons, Lydia Polgreen & Jeffrey Gettleman, *Arrest Is Sought of Sudan Leader in Genocide Case*, N.Y. TIMES, July 15, 2008, at A1, <http://www.nytimes.com/2008/07/15/world/africa/15sudan.html>.

⁵ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Information Sheet (March 26, 2015), <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf>.

⁶ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF; *Warrant issued for Sudan's leader*, BBC NEWS, Mar. 4, 2009), <http://news.bbc.co.uk/2/hi/africa/7923102.stm>.

⁷ David Scheffer, *Rape as Genocide in Darfur*, L.A. TIMES, November 13, 2008, available at: <http://www.latimes.com/la-oe-scheffer13-2008nov13-story.html>.

⁸ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01-09, Pre-trial, Mar. 4, 2009, <https://www.icc-cpi.int/darfur/albashir>.

genocide and rape remains tenuous. An added challenge is the reluctance of prosecutors to initiate rape cases because of three reasons: (1) the gender makeup of the Court, (2) issues with victim testimony and (3) the difficulty with establishing genocidal intent in rape cases. I argue both the theoretical complexity of genocidal rape, as well as the reluctance to prosecute rape cases, contribute to the lack of successfully prosecuted genocidal rape cases in international criminal law.

Part I examines the history of the prosecution of genocidal rape in the international criminal sphere. Here, I discuss significant cases in the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) that developed the precedent for genocidal rape, such as the *Prosecutor v. Akayesu* case in the ICTR.⁹ I also introduce the conflicts in the former Yugoslavia and Rwanda as a means of introducing the theoretical bases for genocidal rape. I end by examining the prosecution of rape within the International Criminal Court (ICC). Part II analyzes the lack of the prosecution of genocidal rape within the international criminal courts. I propose two reasons for this lack: (1) the theoretical complexity of linking genocide to rape and (2) the reluctance of the Officer of the Prosecutor (OTP) to prosecute genocidal rape. Part III ends with a call to further establish rape as a crime of genocide within the international criminal sphere as an important protection for women raped during conflict.

I. A SPOTTED HISTORY: THE PROSECUTION OF GENOCIDAL RAPE IN INTERNATIONAL CRIMINAL LAW

“Those who cannot remember the past are condemned to repeat it.”

- George Santayana, philosopher and poet

Rape has occurred throughout the history of armed conflict, often on a vast and systematic scale.¹⁰ Early scholars openly maintained that rape was a necessary aspect of conflict and that it was expected for women of the conquered.¹¹ If rape was a crime at all, it was crime against the husband or father of the woman raped as damage to his “property,” not as a violation her own bodily integrity.¹² By the Middle Ages, women acquired some legal protection under the Ordinances of War, but this was seldom enforced.¹³ Even throughout most of the 20th century, sexual violence against women in

⁹ See generally *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) <http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf>.

¹⁰ R. Charli Carpenter, *Surfacing Children: Limitations of Genocidal Rape Discourse*, in *WOMEN'S RIGHTS: A HUMAN RIGHTS QUARTERLY READER* 342, 346 (Bert B. Lockwood, ed., 2006).

¹¹ *Id.* at 346.

¹² See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 17 (Ballantine Books 1975); See also Carpenter, *supra* note 11, at 347.

¹³ See Carpenter, *supra* note 10, at 346-47.

conflict was largely ignored. For example, during World War II, sexual assault was widely committed, and reports containing evidence of torturous rape, forced prostitution, forced abortion, sexual mutilation, and sexual sadism were submitted to the Nuremburg Tribunal.¹⁴ Yet, no crimes against women were expressly included within the jurisdiction of the Nuremburg Tribunals and no such cases were pursued under more general provisions.¹⁵

The first time rape was recognized as a violation of international law was during the Tokyo Tribunal. Although rape was not specifically identified in the Tokyo Charter, it was successfully charged in that tribunal as a war crime under "inhumane treatment," "ill-treatment," and "failure to respect family honor and rights."¹⁶ The Tribunal documented evidence of over 20,000 rapes that occurred at the hands of the Japanese against the Chinese women of Nanking.¹⁷ However, even here, rape was prosecuted merely as a secondary offense, and the sexual slavery of "comfort women" by the Japanese forces was completely ignored.¹⁸

However, in the International Tribunals of the late 20th century, notably the ICTR and ICTY, rape began to be prosecuted as an international crime fully within the jurisdiction of those courts. Although rape was most often prosecuted as a war crime or a crime against humanity, it was also, at times, prosecuted as a crime of genocide. Through individual cases, rape began to be prosecuted successfully as a crime of genocide, redefining the way the world thought about the nature of both rape and genocide. In exploring the prosecution of genocidal rape in the ICTY and the ICTR, I will first examine the conflicts in the region itself and then analyze the prosecution of rape within each of these Tribunals.

A. International Criminal Tribunal for the Former Yugoslavia

The crimes of rape in Bosnia-Herzegovina, most of which were documented between the fall of 1991 and the end of 1993, were largely perpetrated by Serbian men against Muslim women from Bosnia-Herzegovina.¹⁹ Estimates of the number of rape victims, including Croatian and Serbian women, range from 20,000 to 50,000.²⁰ These rapes occurred alongside the capture of towns or while women were forcibly held in detention, either in

¹⁴ See DAVID LUBAN ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 1143–1144 (Aspen Pub., 2010). See also KELLY D. ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIME TRIBUNALS 339 (1997).

¹⁵ *Id.* at 1144.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing The International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649, 655–656 (1995).

²⁰ ALEXANDRA STIGLMAYER, MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 85 (Alexandra Stigl Mayer ed., Marion Faber trans., Univ. of Neb. Press 1994).

“rape-camps” or brothels.²¹ Often, women were raped in front of others, including their families and communities, and many were held until they became pregnant and after it was too late for them to obtain an abortion.²² A team of European Community investigators concluded in a 1993 report that rape carried out by the Serbian forces was not a secondary effect of the conflict but, rather, part of a *systematic policy of ethnic cleansing* and was “perpetrated with the conscious intention of demoralizing and terrorizing communities, driving them from their home regions and demonstrating the power of the invading forces.”²³

The horror of the rapes committed against the women in the former Yugoslavia is well documented. The *Final Report* by the United Nations on the conflict, as well as numerous human rights organizations, concluded that:

Many of these acts of violence are carried out with extreme brutality and savagery in a manner designed to instill terror in the civilian population, in order to cause them to flee and never to return. This is evidenced by the large number of purposeful and indiscriminate killings, rape and sexual assaults, and other forms of torture committed against civilians and prisoners of war, both inside and outside detention facilities.²⁴

The Commission of Experts, who authored the report, identified close to 800 individuals who gave specific information as to the place, time, or names of the perpetrators of the rapes.²⁵ One twenty year old woman, Emmina, told her experience to an investigator in a refugee camp, describing how her village of Biscevo, near Prijedor, was captured by the Serbian forces.

They went to the house next door and came back half an hour later. They brought our neighbor’s daughter Sanela, fourteen years old, and a girl from the neighboring village. They dragged us to the cellar and raped us there. Two of them held me tight, and the third one raped me. I tried to defend myself, but they used a knife on me.²⁶

Another woman, Sadeta, spoke of the aftermath of her experience after being raped in her village of Rizvanovici:

Maybe that’s their way of hurting Muslim and Croatian women, and the whole female race. Killing them isn’t interesting enough for them anymore. It’s a lot more fun to torture us, especially if they get a woman pregnant. They want to

²¹ Final Rep. of the Commission of Experts Established Pursuant to S.C. Resolution 780 of Its Forty-Ninth Session, U.N. Doc. S/1994/674, at 52-57 (1994) [hereinafter *Final Report*].

²² *Id.* at 59.

²³ PIERRE HAZAN, MASS JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 34 (James Snyder trans., Tex. A&M Univ. Press ed. 2004).

²⁴ Final Report, *supra* note 22, ¶ 135, at 34.

²⁵ Final Report, *supra* note 22, ¶ 236, at 56.

²⁶ STIGLMAYER, *supra* note 21, at 97.

humiliate us...²⁷

In many of the survivors' testimony, they discussed the systematic, widespread nature of the attacks and the emphasis on their ethnicity and nationality. Many of the rapists spoke of impregnating the women they raped, which was supported by the policy of holding women who became pregnant in camps until they were seven months pregnant, too late to obtain an abortion.²⁸ The brutality and horror of the rapes in Bosnia-Herzegovina, alongside the horror of the conflict itself, spurred the United Nations to establish a legal means for processing the aftermath of the war.

To this end, the ICTY, along with its sister Tribunal, the ICTR, were the first international criminal tribunals to prosecute sexual crimes within the international criminal sphere. The ICTY was established by the United Nations Security Council with Resolution 827, which followed Resolution 808 and outlined the idea of an international criminal tribunal to prosecute those "responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia since 1991."²⁹ In establishing the Tribunal, the creators explicitly envisioned the court as a place to prosecute sexual violence committed in this region; the crime of rape was explicitly included as a crime against humanity within the ICTY Statute.³⁰ However, rape was *not* included as a crime of genocide.

To aide in its aim of prosecuting sexual violence, the Tribunal enacted the Rules of Procedure and Evidence, many of which eased the burden of testifying for survivors and witnesses of rape. For example, Rule 96 provides:

In cases of sexual assault:
 No corroboration of the victim's testimony shall be required;
 Consent shall not be allowed as a defense if the victim
 Has been subjected to or threatened with or has had reason to fear violence, duress, detention, or psychological oppression, or
 Reasonably believed that if the victim did not submit, another might be so subjected, threatened, or put in fear;
 Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
 Prior sexual conduct of the victim shall not be admitted in evidence.³¹

Before establishing this rule, the judges noted domestic laws around evidentiary standards for rape were not sufficient for the types of violence committed against the women in this conflict. Often, domestic law in rape

²⁷ STIGLMAYER, *supra* note 21, at 96.

²⁸ Final Rep., *supra* note 22, at ¶ 248.

²⁹ S.C. Res. 827, at 2 (May 25, 1993).

³⁰ U.N. Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, art. 5 (1993) (amended 2002).

³¹ ICTY R. P. & EVID. 96.

cases allowed for the admission of evidence concerning a woman's prior sexual activity³² or required prosecutors to establish that a rape was "forcible" through corroboration.³³ Thus, in establishing Rule 96, the court demonstrated a "dramatic departure from domestic procedures around rape" and was remarkably "pro-woman."³⁴

Without Rule 96, defense attorneys would be able to demonstrate consent from lack of force. The impact of Rule 96 can best be understood through the following testimony from a physician who examined a series of survivors in a rape camp in Trnopolje:

At first the raped women and girls were beaten black and blue, especially in the lower body region. Later on we didn't find that kind of injury on them any more. The first ones probably told the others the best way to survive. A nineteen year old girl told me that she closed up tight inside. She laid down, tried to think of something else... The woman probably figured out that was the best way to survive and it was the least fun for the rapists. 'Cause if they resist, the men take it as a challenge.³⁵

Without Rule 96, the fact that this girl did not resist or fight her rapist would allow a defense attorney to demoralize her on the stand. Thus, the protective language of Rule 96 wisely allows a full range of scenarios and testimonies to come forward.³⁶

Rape was successfully prosecuted as a crime against humanity and a war crime in several of the ICTY cases. However, only one case convicted a defendant of genocide, and rape was a marginal, barely existent factor in this conviction.³⁷ Radislav Krstic was convicted on the basis of the mass execution of men in Serbia in 1995 and the transfer of women. In the press release indicting Krstic, rape was only mentioned once.³⁸ Although the trial chamber did find that rape was a crime of ethnic cleansing, it was only indirectly linked to genocide.³⁹ Thus, despite the ethnically motivated, widespread and systematic nature of the attacks on women, rape was not included as a crime of genocide in the ICTY. Rape, instead, was generally

³² *But see* FACTSHEET: THE VIOLENCE AGAINST WOMEN ACT, https://www.whitehouse.gov/sites/default/files/docs/vawa_factsheet.pdf (explaining that the United States changed their evidentiary standards regarding rape in this vein in 1994, with the federal Rape Shield Law. Some states had rape shield laws before 1994).

³³ Anais Berland, *Toward an International Definition of Rape*, GENDER NEWS: THE CLAYMAN INSTITUTE AT STANFORD UNIVERSITY, Jan. 3, 2013, <http://gender.stanford.edu/news/2012/toward-international-definition-rape>.

³⁴ *Id.*

³⁵ STIGLMAYER, *supra* note 21, at 90-91.

³⁶ *See* ASKIN, *supra* note 15, at 304.

³⁷ Press Release, The Hague, Radislav Krstic Becomes the First Person to be Convicted of Genocide at the ICTY and is Sentenced to 46 Years Imprisonment, U.N. Press Release OF/P.I.S./609e (August 2, 2001), <http://www.icty.org/sid/7964>.

³⁸ *Id.*

³⁹ *Id.*

prosecuted as a crime against humanity.

One proposed reason as to why rape was not included as a crime of genocide in the ICTY was that, unlike crimes against humanity, genocide and war crimes had pre-existing definitions within international law.⁴⁰ One scholar states, "While the ICTY statute had to imitate the definitions found in the Geneva Conventions, no such restrictions existed when drafting the list of crimes against humanity."⁴¹ The existence of the Geneva Convention, thus, essentially barred the expansion of the definition of genocide to include rape.

Rape was never prosecuted in the ICTY as a crime of genocide, nor was it used to establish a crime of genocide. However, the ICTY, including its Rule 96, was instrumental in allowing sexual violence to gain recognition in the international criminal area, and in allowing sexual violence to be prosecuted. For the first time, rape was explicitly recognized as an international crime. It was the ICTR, though, that established the beginnings of jurisprudence linking the crime of genocide to rape. In the next section I will analyze the development of this jurisprudence, specifically with the *Prosecutor v. Akayesu* case. I begin by providing a historical context for the crimes in Rwanda and the development of the ICTR by the United Nations.

B. International Criminal Tribunal for Rwanda

At least 250,000 women were raped during the Rwandan genocide of 1994.⁴² Rapes were perpetuated by members of the Hutu militia groups and directed and encouraged by political leaders at both national and local levels.⁴³ The sexual violence specifically targeted the Tutsi population and aimed to achieve certain political goals. The Hutu government in power, led by President Juvenal Habyarimana, had been losing support since the early 1990's, partly due to corruption and economic decline. At the same time, his regime was threatened by the invasion of the Rwandan Patriotic Front (RPF), a group based in Uganda and made up mostly of Tutsi refugees. As a means of regaining its lost popularity, the Hutu government in power began a propaganda campaign against the Tutsis, heightening ethnic tension and hatred on both sides of the conflict. The propaganda campaign specifically targeted women and sought to instill a sense of hatred against Tutsi women by the Hutu men.⁴⁴ According a report by Human Rights Watch,

⁴⁰ Nicole Hallett, *The Evolution of Gender Crimes in International Law*, in *PLIGHT AND FATE OF WOMEN DURING AND FOLLOWING GENOCIDE* 189 (Samuel Totten, ed. 2008).

⁴¹ *Id.*

⁴² See generally Peter Landeman, *A Woman's Work*, N.Y. TIMES MAGAZINE, Sept. 15, 2002.

⁴³ HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* 1 (1996).

⁴⁴ See *id.* at 16.

when the genocide began in 1994, Tutsi women were targeted and raped on the basis of this same genocidal propaganda which had portrayed them as calculated seductress-spies bent on dominating and undermining the Hutu. Tutsi women were also targeted because of the gender stereotype that portrayed them as beautiful and desirable, but inaccessible to Hutu men whom they allegedly looked down upon and were “too good for.” Rape served to shatter these images by humiliating, degrading, and ultimately destroying the Tutsi women. Rape survivors encountered such comments as, “We want to see how sweet Tutsi women are,” and, “You Tutsi women think that you are too good for us.”⁴⁵

The sexual crimes committed against the women in Rwanda are terrifying in both nature and scope. Women who were raped were often forced to watch the killings of members of their families and the destruction of their homes.⁴⁶ Some women were killed immediately after being raped, while others were told they were allowed to live so that they would “die of sadness.”⁴⁷ Some women were forced to kill their children before or after being raped while others were held as slaves for the duration of the conflict.⁴⁸ Many women were infected with HIV, sometimes by men specifically recruited as rapists because they were HIV positive.⁴⁹

One woman, Perpetue, 20 years old, reported to Human Rights Watch:

He raped me. I cried out because I was still wounded from [being raped before, by other men] and he was opening all the wounds again. He beat me for crying and gagged my mouth. He told me that I was forbidden to cry because Tutsi had no rights at that moment. He also said that any Tutsi woman from Gitarama would be killed in an even worse way than what he was doing to me. After the rape, I was left alone and naked. I decided to try and escape. I couldn't walk properly and so I was on all fours. When people passed me, I sat down and stopped walking so they wouldn't know that I had been raped because I was ashamed.⁵⁰

Perpetue's experience demonstrates the gravity of the genocide's impact on the individual lives of women, the severe sense of shame that rape brings in her culture, and the ethnical motivation for the violence against women by the Hutu government. The stories gathered from Human Rights Watch and detailed in their report following the conflict, *Shattered Lives*, each contain the same elements of horror as in Perpetue's story. In each case, women were targeted explicitly because they were Tutsi.

The United Nations established the International Criminal Court for

⁴⁵ *Id.* at 18.

⁴⁶ *Id.* at 1.

⁴⁷ HUMAN RIGHTS WATCH at 1.

⁴⁸ *Id.* at 39.

⁴⁹ Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350, 354 (2003).

⁵⁰ HUMAN RIGHTS WATCH, *supra* note 43, at 44.

Rwanda by Resolution 955 in 1994, "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda... between 1 January 1994 and 31 December 1994."⁵¹ The ICTR, like the ICTY, did not specify rape as a crime of genocide. However, from the beginning, the ICTR's Office of the Prosecutor (OTP) adopted a policy of aggressively prosecuting rape as a crime against humanity, a war crime, and, later, as a crime of genocide.⁵² This was assisted by the Court's Rules of Evidence: like the ICTY, the ICTR's Rules of Procedure included a Rule 96 which protected victim witnesses and made it easier to prosecute rape cases.⁵³

The first case in the ICTR that prosecuted rape as a crime of genocide, and thus the first case ever to prosecute rape as a crime of genocide internationally, was the *Akayesu* case.⁵⁴ Jean Paul Akayesu was the bourgmestre (mayor) of the Taba commune in Rwanda. Evidence from testimony at the trial chamber suggests he instigated, ordered, and otherwise aided and abetted in acts of rape and sexual violence committed against Tutsi women and girls in and around the Taba Commune in the Kigali Prefecture in Rwanda.

The OTP sought to prosecute Akayesu for the crime of genocide using evidence of sexual violence—in other words, that the rapes were committed with the express intention of destroying the Tutsi ethnic group. At first, the indictment did not include rape, but after hearing witness testimony, the prosecutor sought leave to amend the indictment to include rape.⁵⁵ The Court ruled against Akayesu, finding that the evidence of rape supported finding him guilty of the crime of genocide. The Report to the General Assembly that year about the *Akayesu* case stated the theory of the court in linking genocide and rape:

The Trial Chamber held that rape, which it defined as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive," and sexual assault constitute acts of genocide insofar as they were committed with the intent to destroy, in whole or in part, a targeted group, as such. It found that sexual assault formed an integral part of the process of destroying the Tutsi ethnic group and that the rape was systematic and had been perpetrated against Tutsi women only, manifesting the specific intent required for those acts to

⁵¹ S.C. Res. 955, ¶ 1, U.N. Doc. S/Res/955 (Nov. 8 1994).

⁵² Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT'L. & COMP. L. 135, 135-37 (2005).

⁵³ Rules of Procedure and Evidence, Rule 96, ICTR: 3/Rev 2 (July 5, 1996), <http://unictr.unmict.org/sites/unictr.org/files/legal-library/960515-rpe-en.pdf> [<https://perma.cc/ALF2-SMU7>].

⁵⁴ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).

⁵⁵ Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE. W. RES. J. INT'L. L. 225, 232 (2007).

constitute genocide.⁵⁶

Moreover, the *Akayesu* case provided a definition of rape within international law, broadly defining rape as an “invasion” versus a “penetration,” which allowed more crimes to be prosecuted as rape.⁵⁷

As one author notes, “Legal scholars concur that in the *Akayesu* judgment the ICTR ‘took the first step in breaking down the international legal community’s ambivalence toward rape and sexual violence as crimes under international law.’”⁵⁸ Not only was sexual violence in conflict given widespread attention, it also linked genocide to rape, allowing gender based violence, for the first time, to be specifically prosecuted as a violation of a crime of the highest order in international criminal law.

Nonetheless, progress in prosecuting genocidal rape in the ICTR effectively stopped with this case, and even regressed at times. Although the ICTR established other convictions for genocidal rape, none were as strong, and rape was eventually redefined more narrowly, limiting the ability of the OTP to prosecute rape in general. In *Prosecutor v. Furundzija*, the court redefined rape as “penetration” rather than “invasion,”⁵⁹ limiting the scope of crimes that could be prosecuted as rape. Additionally, in *Prosecutor v. Kunarac*, the court regressed even further, requiring the Prosecutor demonstrate that the victim did not consent to the rapes.⁶⁰ Each of these narrowed the establishment of *Akayesu* and decreased its impact on future cases, while also limiting the ability of the Prosecutor to obtain convictions for rape crimes.

In the ICTR, unlike the ICTY, rape was explicitly established as a crime of genocide within the international sphere. However, this link was not without controversy, as demonstrated by the regression of the Court in its later cases. This regression contributes to the continued discussion, throughout international law, of the fragility of the theoretical basis linking rape to genocide. In its establishment, the ICC essentially adopted this tension itself as it sought to prosecute rape crimes. The analysis below demonstrates that the prosecution of rape within the ICC has been haphazard at best; moreover, thus far the ICC has yet to obtain a conviction for rape as a

⁵⁶ U.N. Secretary-General, Report of the Int’l Criminal Tribunal for the Prosecution of Pers. Responsible for Genocide and Other Serious Violations of Int’l Humanitarian Law, ¶16, U.N. Doc. A/54/315 (Sept. 7, 1999).

⁵⁷ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment ¶ 668 (Sept. 2, 1998) (allowing, for example, those who raped women with objects, such as sticks or guns (as detailed in both the Rwandan and Bosnian genocides) to be prosecuted for rape under this definition, but not under the “penetration” definition).

⁵⁸ Obote-Odora, *supra* note 52, at 137.

⁵⁹ *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 19, 1998).

⁶⁰ Obote-Odora, *supra* note 52, at 152, *citing* *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/I-A, Judgment (June 12, 2002).

crime of genocide.

C. International Criminal Court

The International Criminal Court is the world's first standing international criminal court.⁶¹ Established by the Rome Statute in 2002, the ICC is charged with trying individuals for four specified "core crimes:" genocide, crimes against humanity, war crimes and aggression.⁶² Within the Rome Statute, the crime of genocide did not explicitly mention rape, but its definition was nonetheless broad enough to include rape as an act that constituted genocide.

Since the ICC began hearing cases in 2003, there have been twelve individuals indicted for rape. Of those twelve, only one has been indicted for genocidal rape—all others were indicted for rape as a war crime or as a crime against humanity.⁶³ An analysis of the rape crimes committed by those prosecuted indicates that some of these may constitute genocide, yet none were prosecuted as such. For example, despite the widespread and ethnically motivated acts of violence in the Democratic Republic of the Congo, none of the six individuals charged received indictments for genocide.⁶⁴

The indictment against al-Bashir described in the introduction to this paper was the first charge of genocidal rape within the ICC since its inception. Even this was difficult to obtain; when the OTP initially asked the Court to indict al-Bashir for the crime of genocide based on evidence of rape, they refused and granted the indictment only after more evidence was introduced.⁶⁵ Despite this indictment, the ICC has yet to add to the development of jurisprudence around this issue as al-Bashir continues to be at large.

Thus, notwithstanding the ruling in *Akayesu* and the indictment against al-Bashir, there continues to be a lack of prosecution for genocidal rape within international law. I posit this lack is due to the fragility of the legal theories linking rape to the crime of genocide. In the next section I explore this theoretical complexity, drawing on examples from the ICTY and ICTR conflicts described above. I also discuss the reluctance of the OTP to prose-

⁶¹ David P. Stewart, *The International Criminal Court*, in *THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 191, 192 (Chiara Giorgetti, ed.) (2012).

⁶² U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an Int'l Criminal Court, *The Rome Statute of the Int'l Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998).

⁶³ International Criminal Court, *All Cases*, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx (retrieved December 15, 2015).

⁶⁴ International Criminal Court, *Situation in the Democratic Republic of the Congo*, <https://www.icc-cpi.int/drc>.

⁶⁵ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF.

cute rape cases for a variety of reasons.

II. THEORY AND PRACTICE: THE CHALLENGES OF PROSECUTING GENOCIDAL RAPE

This paper seeks to establish two primary reasons as to why the prosecution of genocidal rape is rare and difficult, and why it has not been prosecuted thus far in the ICC. First, there is the theoretical complexity, not yet firmly established in the international criminal sphere, of legally linking rape to genocide. Second, there is the reluctance of many prosecutors and courts to take on genocidal rape cases, which require massive amounts of sensitive, graphic testimony from victims.

A. Can Rape Be Genocide? Linking Two Horrors

In conjunction with the development of jurisprudence regarding genocidal rape in the ICTY and the ICTR, several feminist and legal scholars began to debate: Can rape be genocide? Should it be, under the law? This section explores the theoretical and legal bases for including rape as a crime of genocide.⁶⁶

The development of the legality of genocidal rape was a slow and controversial process, fervently debated by feminist legal scholars. As one scholar states, “The articulation of rape as genocide was not an immediate assertion and not an uncontested one. Initially, scholarship on the human rights situation in Bosnia addressed both rape as well as genocide, but as distinct issues.”⁶⁷ The basis for this debate is the way that rape is treated under international law. Rape is prohibited under international law, but it is not specifically designated as an international crime. Because of this, rape must be subsumed within an established international crime such as genocide, crimes against humanity, or war crimes, if it is to be prosecuted within an international criminal tribunal or the International Criminal Court.⁶⁸

Of all the crimes under the jurisdiction of international criminal law, genocide is considered the gravest violation. Genocide, as defined by the Genocide Convention, is any of the following acts committed with intent to

⁶⁶ I do not include the rape of men in my analysis of genocidal rape. This is for two reasons: 1) the rape of men is far less pervasive and systematic, historically, than the rape of women in conflict; and, 2) many of the theoretical bases linking genocide and rape are tied to women’s biology. Thus, the implications of the rape of women v. the rape of men are different within this framework. For an analysis of the rape of men in conflict, see Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT. L. 253, 254 (2007).

⁶⁷ Carpenter, *supra* note 11, at 350 (alteration in original) (emphasis omitted).

⁶⁸ DANIELA DE VITO, RAPE, TORTURE AND GENOCIDE: SOME THEORETICAL IMPLICATIONS 2 (2011).

destroy, in whole or in part, a national, ethnical, racial or religious group,⁶⁹ such as:

Killing members of the group;
Causing serious bodily or mental harm to members of the group;
Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
Imposing measures intended to prevent births within the group; and
Forcibly transferring children of the group to another group.⁷⁰

Genocide, in essence, transfers the focus from the individual to the group. In this analysis, the rape of one woman becomes a crime against the entire group she belongs to.⁷¹

Some feminist scholars have expressed discomfort with this notion. Rhonda Copelon, for example, has suggested in this analysis, rape victims could lose their subjectivity and become objectified because the crime of genocidal rape would be viewed primarily as a crime perpetrated against a group versus an individual woman.⁷² Gender, thus, becomes subsumed within a broader spectrum of violence that negates the individual woman's experience. To the individual woman who is raped, the experience of genocidal rape versus "common" rape is inseparable.⁷³

However, genocidal rape carries a different message than rape as a crime against humanity or a war crime.⁷⁴ It suggests that the motivation for sexual violence against this woman was more than her gender—rather, it was her role as part of a particular group. In this way, scholars acknowledge the intersectionality of genocidal rape.⁷⁵ Genocidal rape, in essence, implicates both gender and ethnicity—in other words, "*certain* women are being raped by *certain* men for *particular* reasons."⁷⁶ Thus, genocidal rape becomes a

⁶⁹ In the Genocide Convention, groups are narrowly construed to include ethnic, racial, and religious groups only. Characteristics that link groups of people together, such as disabilities, are not included within the Genocide Convention. Some scholars have argued that "gender" should be included in the protected groups, but "gender" is not currently included in either the Genocide Convention or current jurisprudence on genocide. See ASKIN, *supra* note 15, at 343-344; see also David Shea Bettwy, *The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding Under Customary International Law?*, 2 NOTRE DAME J. INT'L & COMP. L. 167 (2011) (showing that scholars have concluded that protection against genocide in international law has not expanded beyond those narrow categories).

⁷⁰ United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 280.

⁷¹ DE VITO, *supra* note 69, at 2.

⁷² Russell-Brown, *supra* note 50, at 351.

⁷³ See *id.* at 351 (citing RHONDA COPELON, SURFACING GENDER: RECONCEPTUALIZING CRIMES AGAINST WOMEN IN TIME OF WAR 198, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmeier ed., Marion Faber trans.) (1994)).

⁷⁴ David Luban, JULIE R. O'SULLIVAN & DAVID P. STEWART, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 1179-80 (Aspen Pub. 2010 ed.)

⁷⁵ Russell-Brown, *supra* note 50, at 351.

⁷⁶ *Id.* at 351 (citing Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59, 64-65 (1993)).

crime against women *and* a group.

There are many theoretical bases for including rape as a crime of genocide. At first, the development of genocidal rape centered on the existence of forced impregnation.⁷⁷ For example, the mass rapes of Bosnian Muslim women by the Serbs in the former Yugoslavia seemed part of a widespread, systematic plan to force women to bear Serbian children.⁷⁸ Reports from the victims and the *Final Report* of the United Nations on the rape of the Bosnian women found some women who became pregnant after being raped were forcibly held until after it was too late for them to obtain an abortion.⁷⁹ In one such camp, where as many as 2000 women might have been held, the women were examined by gynecologists. If found to be pregnant, they were segregated, given special privileges, and held until their seventh month, when it was too late for them to have an abortion. Only after the seventh month were they released.⁸⁰ This example demonstrates the relationship between genocide, rape, and forced impregnation. “At several levels, the rapes reflect the policy of ethnic cleansing: rape is used as a means to terrorize and displace the local population, to force the birth of children of mixed ethnic descent in the group, and to demoralize and destroy.”⁸¹

Forced impregnation (through rape) becomes genocide in several forms. First, women may be “psychologically traumatized by the pregnancy and unable to have normal sexual or childbearing experiences with their own group.”⁸² Additionally, these women, simply because they are pregnant with the children of the aggressors, “cannot bear their own children during this time—their wombs are ‘occupied.’”⁸³ Finally, in societies in which ethnicity of the child is determined by the ethnicity of the father, mass rape to elicit forced impregnation is essentially the destruction of the ethnic group.

Rape can be genocidal in other ways. For example, “rape of one ethnicity by another ethnicity which causes one group to flee their homes and leave the territory also constitutes genocidal rape.”⁸⁴ Forcible homelessness, especially if a particular place is tied to one’s culture or ethnicity, constitutes genocide because it “deliberately inflicts on the group conditions of life calculated to bring about its physical destruction in whole or in part” by disseminating the group. Additionally, “if the aim is to destroy a culture,

⁷⁷ Carpenter, *supra* note 11, at 429.

⁷⁸ Siobhan K. Fisher, Note, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 106-107 (1997).

⁷⁹ Final Report, *supra* note 22, at ¶ 248.

⁸⁰ Niarchos, *supra* note 20, at 657 (citing Final Report, *supra* note 22, at ¶ 248).

⁸¹ Niarchos, *supra* note 20, at 658.

⁸² Fisher, *supra* note 79, at 93.

⁸³ *Id.* (noting that “their own children” refers to the children of the “group” of the mother. This might be especially true in societies in which the ethnicity of children is determined by the father.)

⁸⁴ Askin, *supra* note 15, at 339.

women are prime targets because of their cultural position and their importance in the family structure.”⁸⁵

Additionally, sexually transmitted diseases transferred purposefully through rape also constitute genocide. During the Rwandan genocide, approximately 70% of Tutsi women raped contracted HIV and most will eventually die from it.⁸⁶ Evidence suggests the “former Hutu government released AIDS patients out of the hospitals specifically to form battalions of rapists.”⁸⁷ In this way, rape becomes more than a single act of violence—it becomes a constructed effort to destroy a group, with rape as the weapon. By infecting the women with a life-threatening disease that many will surely die from, the rapists killed, but those killed die a gradual death. In this case, rape becomes a slow murder weapon, inflicted to destroy a group.

Violence intended to inflict mental or emotional harm, or inflicted against a small number of people, may also be considered genocide. The Genocide Convention’s Article II(b) forbids acts committed with an intent to destroy a particular group, in whole or in part, by causing “serious bodily or mental harm” to members of the group.⁸⁸ Sexual assault constitutes both bodily and mental harm.⁸⁹ Moreover, “public rape terrorizes and traumatizes the civilian population. There is only just beginning to be some understanding of the psychological damage caused by the trauma of violent sexual abuse.”⁹⁰ Thus, “[s]exual assault meets the elements of genocide certainly when committed in massive proportions in an attempt to destroy a particular group, and constructively even when committed to harm a single woman who is a member of the protected group.”⁹¹ Essentially, “[w]hen sexual assault crimes are deliberately inflicted upon an ethnic group in an effort to cause that group’s destruction, wholly or partially, physically or non-physically, genocidal rape is established.”⁹²

These bases establish several theories that link rape to genocide in international criminal law. Although these theories follow the jurisprudence established by the ICTR cases, especially *Akayesu*, they build on these cases, setting up additional means for prosecutors to put forth seeking to build on

⁸⁵ Carpenter, *supra* note 11, at 352.

⁸⁶ Russell-Brown, *supra* note 50, at 354 (citing Landesman, *supra* note 43).

⁸⁷ Russell-Brown, *supra* note 50, at 354 (citing Landesman, *supra* note 43).

⁸⁸ United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 1021 U.N.T.S. 280.

⁸⁹ Askin, *supra* note 15, at 340 (“Emotional behaviors experienced by most survivors of sexual abuse include, but are not limited to, grief, depression, guilt, self-blame, rage, terror, low self-esteem, intimacy and sexual difficulties, and self-destructive behaviors.”); *See also* KATHRYN QUINA & NANCY L. CARLSON, RAPE, INCEST & SEXUAL HARASSMENT: A GUIDE FOR HELPING SURVIVORS 143 (1989).

⁹⁰ Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT’L L. 326, 330 (1994).

⁹¹ Askin, *supra* note 15, at 342.

⁹² Askin, *supra* note 15, at 339.

this jurisprudence. However, none of these theories are firmly established within international criminal law. Currently, defining rape as a crime of genocide is still controversial and legally tenuous, resulting in a reluctance to bring these cases.

In addition to legal fragility of linking genocide to rape, there are also practical issues with prosecuting genocidal rape. The next subsection explores these issues, which expands to rape cases in general and becomes more complicated with *genocidal* rape cases.

B. Issues with Prosecuting Rape: Players and Actors

Practical impediments, in addition to theoretical ones, limit the prosecution of genocidal rape. Here, I discuss three reasons why the OTP may be reluctant to prosecute rape in international criminal law: (1) the makeup of the court itself, (2) the difficulty in trying rape cases with regard to victim testimony and (3) the added burden of linking genocidal intent along with establishing rape. Each of these hurdles create challenges to prosecuting genocidal rape.

1. The Gender Makeup of the Court

The makeup of the court itself impacts the way rape is prosecuted. Women, historically, are generally more attuned to gender-based violence than men, and thus the addition of their voices on the court is instrumental to effectively prosecuting rape as an international crime. Studies demonstrate that men are more willing to blame a rape survivor and see a rapist as less blameworthy than women.⁹³ Thus, when an international court seeking to prosecute gender-based crimes is largely made up of men, rape crimes are, generally speaking, less likely to be prosecuted successfully.

While there are no official data available reflecting the gender composition of the three international courts in their entirety, one study notes the percentage of female judges in the ICTY until 2004 was never higher than 24 percent; sometimes it was even as low as 12.5 percent.⁹⁴ The Rwanda Tribunal, on the other hand, was at times up to 40 percent of female judges, but usually remained at about 24 percent.⁹⁵ Currently, the ICC has a fair

⁹³ See JENNIFER TEMKIN & BARBARA KRAHE, SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE 43-44 (2009). See also SARA SHARRATT, GENDER, SHAME, AND SEXUAL VIOLENCE: THE VOICES OF WITNESSES AND COURT MEMBERS AT WAR CRIMES TRIBUNALS 39 (2011) (statement by Judge Navanethyem Pillay) (“I support the participation of women judges ... I do think women come with a particular sensitivity and understanding about what happens to people who get raped.”).

⁹⁴ SARA SHARRATT, GENDER, SHAME AND SEXUAL VIOLENCE, 19 (2011).

⁹⁵ *Id.*

gender balance, with women outnumbering men at some points.⁹⁶

The lack of female judges on the courts decreases the overall effectiveness of the court to prosecute gender-based crimes. In her study of judges and witnesses in the ICTY, Sara Sharratt noted the words of one female justice, "I often found myself tutoring my male colleagues on what it means to a woman to be raped. You have to be insistent that this was a serious crime and they could not have consented under the situation that they were in [captivity]." (Female Senior Judge, ICTY).⁹⁷ This tutoring by female judges is further supported by statements by Richard Goldstone, the former Chief Prosecutor for the ICTY and the ICTR. He stated that in the first indictment of the ICTY, Justice Odio Benito, the female judge, called upon the Prosecution to review its indictment to add gender crimes, either as a crime against humanity or as a grave breach or war crime.⁹⁸ Additionally, in *Prosecutor v. Akayesu*, Goldstone describes how the female judge, Justice Pillay of the ICTR, "elicited evidence from witnesses from the bench regarding sexual and gender-based crimes. Here too, the Tribunal requested the Prosecution amend the indictments to include crimes of sexual violence."⁹⁹ In each of these instances, a female judge's perspective was instrumental in seeking appropriate justice for the female victims.

The gender of the Prosecutor may also impact which crimes are brought and how certain acts are defined. For example, Richard Goldstone stated in the early years of both tribunals he believed there was a "gender bias" within his office. "He referred to the lack of senior female investigators and criticized the attitude among his investigators, stating that '[t]heir culture was not such as to make them concerned about gender-related crime.'"¹⁰⁰ The appointment of Gender Legal Advisors allays this bias somewhat. For example, the appointment of Patricia Sellers as the Gender Legal Advisor for the tribunals made an "immeasurable" impact on the prosecution of gender based crimes within the ICTR and the ICTY.¹⁰¹ In short, an equitable gender balance within an international court increases the likelihood that gender based crime will be prosecuted effectively. The lack of an equitable gender balance on the ICTY and the ICTR may explain why genocidal rape was so

⁹⁶ See generally Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, 11 INT'L CRIM. L. REV. 643 (2011) (analyzing the contribution of equal sex representation to the legitimacy of international courts and arguing that a gender balance of judges within international courts contributes to their effectiveness and legitimacy).

⁹⁷ SHARRATT, *supra* note 95, at 57.

⁹⁸ Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277, 281-282 (2002).

⁹⁹ Diane Luping, *Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court*, 17 J. GENDER, SOC. POL., & L. 431, 446-47 (2008), *citing* Goldstone, *supra* note 99, at 282.

¹⁰⁰ *Id.* at 445.

¹⁰¹ SHARRATT, *supra* note 94, at 19.

haphazardly prosecuted and why the definition of rape became narrower over time. However, the ICC is far more equitable in its makeup, and yet is still plagued with some of the same issues with prosecuting sexual violence. I posit that two additional factors impede the prosecution of rape as a crime of genocide: issues with victim testimony and the difficulty of establishing genocidal intent.

2. Victim Testimony

In addition to the issue of gender equity in the Courts and its personnel, there exists the perceived problem of obtaining victim testimony in rape cases. There is a profound reluctance by many prosecutors to take on rape cases because of the professed, added difficulty of preparing witnesses for testimony. According to one psychologist who worked at the ICTY Victim and Witness Unit, rape cases were “too complicated” and took “too much time.”¹⁰² Another male prosecutor stated, “When I get the rape cases I think that I am going to deal with the most traumatized victims... I [have to] think of how to get them to tell the evidence as they [often] only disclose it very gradually and confusingly.”¹⁰³ In other words, there exists a stereotype of the rape victim as a seemingly babbling, “too emotional,” non-objective person who will be incoherent on the stand.¹⁰⁴

This reluctance to elicit victim testimony comes despite the ICC’s rules that mirror the ICTY and ICTR’s Rule 96, allowing special protections for witnesses and victims of sexual assault. Some of those provision include: (1) being able to testify in closed hearings, (2) the ability to have a psychologist or family member present while testifying, (3) protecting the confidentiality of victim testimony, and (4) the definition of “consent” is strictly limited and corroboration is not needed to prove crimes of sexual violence.¹⁰⁵ Nonetheless, the elucidation of victim testimony in court is often impeded by the insensitivity of court personnel.

Judges, prosecutors, and other court personnel have been known to be insensitive to rape cases. For example, in the *Butare* case in the ICTR in 2001, three judges reportedly laughed at a victim witness who was testifying about her experience with rape. The defense attorney suggested that since the survivor had not taken a bath and smelled, she could not have been raped.¹⁰⁶ Overall, the survivor was asked 1,194 questions by the defense, some of which were perceived to be offensive, without interference

¹⁰² *Id.* at 63.

¹⁰³ *Id.* at 56.

¹⁰⁴ *Id.*

¹⁰⁵ See generally ICC-ASP/1/3 and Corr.1 at 10 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).

¹⁰⁶ Binaifer Nowrojee, “Your Justice is Too Slow” Will the ICTR Fail Rwanda’s Rape Victims?, UNITED NATIONS RES. INST. FOR SOC. DEV., Occasional Paper 10, at 1, 24 (2005), <http://www.bdigital.unal.edu.co/39692/1/9290850639.2005.pdf>.

by the judges.¹⁰⁷ Another prosecutor in the ICTY told Sara Sharratt in her study of gender based crimes, "[Rape in conflict] could be a question in some cases of lust, and that is not a war crime."¹⁰⁸ This type of insensitivity, both to the victim and regarding the nature of rape, increases the issues both with obtaining victim testimony and successfully prosecuting rape.

A final issue with obtaining the testimony of victims is the severe stigma that rape carries, which is particularly potent in some cultures. In Rwanda, for example, rape carries with it a sense of social shame that is isolating. Women who are raped are ostracized, and thus they are generally extremely reluctant to speak publicly about their experiences.¹⁰⁹ Rwandan women who have been raped fear they will be rejected by their family and the wider community and that they will never be able to reintegrate or to marry.¹¹⁰ One female psychiatrist who worked with victims at international tribunals stated that women had sometimes attempted to come forward many times within their own countries and were ignored or shunned afterwards.¹¹¹ The stigma of rape, which exists throughout the world but particularly within certain cultures, seriously impedes the ability of prosecutors to establish enough evidence to prosecute these cases.

3. Genocidal Intent and Establishing Rape

Finally, the evidentiary standards for prosecuting *genocidal* rape in international criminal law are often seemingly insurmountable. Prosecuting rape as a war crime or a crime against humanity requires victim testimony on sensitive issues and a willingness to bring the case forward by the OTP, but genocidal rape carries with it an added complexity—not only that rape was committed, but also that it was committed with the intent to destroy a group. The rapes, thus, must be *motivated* in part to destroy the group.

In the *Akayesu* judgment, the fact that the rapes were primarily committed against Tutsi women was key in establishing the crime of genocide.¹¹² As part of this case the prosecutor had to develop evidence of the *motivation* for the rapes, in addition to evidence the rapes were committed. Establishing this twofold argument is difficult, making it more of a challenge for prosecutors.

In short, prosecuting rape itself comes with the challenge of bias and in-

¹⁰⁷ *Id.* at 23.

¹⁰⁸ SHARRATT, *supra* note 94, at 58.

¹⁰⁹ HUMAN RIGHTS WATCH, *supra* note 44, at 2.

¹¹⁰ *Id.*

¹¹¹ SHARRATT, *supra* note 94, at 59.

¹¹² Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1999).

sensitivity, which obstructs the willingness of the victims to come forward as well as the willingness of the prosecutor to bring the case. Moreover, with genocidal rape there is an additional component, to prove the rapes were committed with the intent to destroy an ethnic, religious, or political group. These challenges, along with the legal tenuousness of genocidal rape, explain why genocidal rape is rarely prosecuted in the international sphere. I posit, however, this lack should be cause of concern for legal scholars, human rights activists, and those seeking justice for women throughout the world. In my conclusion, I discuss the importance of this issue in recognizing women's legal justice in international law.

CONCLUSION: THE RECOGNITION OF GENOCIDAL RAPE AS AN IMPORTANT PROTECTION FOR WOMEN

Genocidal rape, despite its widespread occurrence throughout history and current times, has yet to be established firmly in the international courts. Although *Prosecutor v. Akayesu* within the ICTR successfully established a link between genocide and rape, only one charge of genocidal rape has been brought forward in the International Criminal Court. This paper seeks to establish the reasons for this are both the theoretical complexity of linking rape and genocide, as well as a reluctance to prosecute these cases.

To amend this, legal scholars must continue to probe this theoretical complexity and the ICC must continue to charge and establish cases of genocidal rape. Successfully prosecuting al-Bashir on the charge of genocide due to the rape of women in Darfur would be a key step in this process.

Perceiving rape as a crime of genocide is an important protection for women in conflict areas. Of all the crimes the ICC has jurisdiction over, genocide is consistently regarded as the worst crime that an individual can commit. The prosecution of genocide carries with it a different meaning than a war crime or a crime against humanity, the primary ways in which rape is prosecuted.¹¹³ Often, women in conflict are raped with the express intent of destroying them as a group. Being female is a risk factor for being raped; women and girls are often targeted on the basis of their gender, regardless of their ethnicity. However, in conflict, gender intersects with other aspects of a woman's identity, such as ethnicity or religion. Here, the "humiliation, pain, and terror inflicted by the rapist is meant to degrade not just the individual woman but also to strip the humanity from the larger group in which she is a part."¹¹⁴

¹¹³ David Luban, Julie R. Sullivan & David P. Stewart, *International and Transnational Criminal Law*, 1180-81 (2010).

¹¹⁴ HUMAN RIGHTS WATCH, *supra* note 44, at 1.

The crime of genocidal rape carries with it a separate and more severe connotation, not to the individual woman necessarily, but to the group she may belong to. Because genocide is the most severe crime within international criminal law, and because women are so often raped as part of genocide, barring genocidal rape from being prosecuted essentially denies women the protection of international law.

Thus, the unwillingness to prosecute rape as a crime of genocide, when it clearly fits into the legal definition of genocide in many cases, demonstrates not only a reluctance to prosecute, but also, perhaps, a reluctance to protect and expand women's rights in the international sphere. Bridging the gap between rape and genocide for those cases which demonstrate that element is an essential protection that is needed from the ICC. Prosecuting genocidal rape successfully will increase awareness of rape in conflict and increase accountability for officials who allow or encourage rape to occur. Only when rape is fully recognized as a crime of genocide will the legal protection of genocide be realized by all under the jurisdiction of the ICC.

