

# CALL IT WHAT IT IS: GENOCIDE THROUGH MALE RAPE AND SEXUAL VIOLENCE IN THE FORMER YUGOSLAVIA AND RWANDA

CLAIRE BRADFORD DI CARO\*

*Genocide and its various iterations have repeatedly been contextualized in narratives assuming that victims are female. Part of this is due to the irrefutable data that shows the overwhelming number of victims are female. The United Nations 1948 treaty known as the Convention on the Prevention and Punishment of the Crime of Genocide provided for a definition for genocide that purposefully included other forms of genocide, particularly genocidal rape and sexual violence. Yet the two most comprehensive genocidal tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), refrained from charging criminals with genocide when their victims are male. This Article will address how males, similarly to female, have been victims of genocide in the forms of genocidal rape and sexual violence, and will argue that the ICTY and ICTR should have used the 1948 Convention’s definition of genocide to achieve the goals of the United Nations.*

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\* Associate Attorney with Richards Brandt Miller Nelson, 2019 Juris Doctorate graduate of the J. Reuben Clark Law School. I am grateful for my exceptional mentor, Professor Eric T. Jensen, without whose help and encouragement I would not have been able to complete this article. I am also grateful for the multiple rounds of editing by members of my family and the Duke Journal of Comparative & International Law, who made this article what it is.

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## I. INTRODUCTION

The witnesses testified that on June 18, 1922 they were compelled to sexually mutilate Fikret Haramba by biting off one of his testicles.<sup>1</sup> Witnesses G and H had been subjected to days of harassment and violence and had already been forced to pull Jasmin Hrni's body around the hangar of the Omarska Camp, where they were all being kept by Serbian soldiers.<sup>2</sup> Haramba was limp, naked, and bloody from previous beatings.<sup>3</sup> The soldiers had intentionally humiliated him in front of his Muslim brothers, and, to underscore his insignificance, they pushed him into the pit along with Witnesses G and H for further punishment.<sup>4</sup> There the three of them stood, guns pointed at their heads, Serbian soldiers screaming orders at them while their words echoed throughout the hangar.<sup>5</sup> Witness H was forced onto his knees and began to lick Haramba's naked bottom while G sucked his penis.<sup>6</sup>

The soldiers who were observing soon grew tired of the simple

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1. Prosecutor v. Tadić, Case No. IT-94-1-T ICTY, Opinion and Judgment, ¶ 198 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

2. *Id.* at ¶ 206.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

spectacle, and shouted at Witness H to bite Haramba's testicles.<sup>7</sup> Haramba screamed in agony, unable to stand still, and the soldiers forced all three victims to get out of the pit and lie on the hangar floor.<sup>8</sup> Thinking that the violence was done, they lay still on the ground until Witness H opened his eyes to see knives inches away from his pupils and a man barking that he would be blinded unless he held Haramba's mouth closed to muffle the noise.<sup>9</sup> Witness G would also participate, lying between Haramba's legs as he thrashed and tried to scream.<sup>10</sup> He bit off one of Haramba's testicles and spat it onto the ground.<sup>11</sup> His job then complete, he was told he was free to go.<sup>12</sup> Witness H dragged the bruised and bleeding body of Haramba to a nearby table before being sentenced back to his room.<sup>13</sup> Fikret Haramba "has not been seen or heard of since."<sup>14</sup>

Four decades before the International Criminal Tribunal for the former Yugoslavia (ICTY) would meet to hear the details of Haramba's mutilation in the trial of Duško Tadić—the organizer behind Haramba's victimization—several countries met to form a treaty to prevent and punish genocide. This was the origin for the United Nations' treaty known as the Convention on the Prevention and Punishment of the Crime of Genocide (1948 Convention), which was adopted by the U.N. General Assembly on December 9, 1948.<sup>15</sup> On the heels of the mass genocide experienced during World War II, treaty members immediately defined genocide in Article II as acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."<sup>16</sup> Acts constituting genocide would include 1) killing members of one of those groups, 2) causing bodily or mental harm to the group, 3) calculated action intended to bring about the physical destruction of the group in whole or in part,<sup>17</sup> 4) implementing measures intended to prevent births within the group,<sup>18</sup> and 5) forcing the transfer of children of one of the groups to another group.<sup>19</sup>

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 [hereinafter Convention on Genocide].

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

Under Article II, Haramba's butchering and death would satisfy the fourth form of genocide, which is that sexual mutilation, castration, or enforced sterilization would be a measure intended to prevent births within the Muslim Bosnian community.<sup>20</sup> While the removal of one testicle might not have made Haramba impotent, the practice of targeting male genitalia to humiliate as well as sterilize men was consistent with numerous incidents occurring in Bosnian prison camps that were meant to remove a male's capacity to procreate.<sup>21</sup> Tadić, however, would be sentenced to twenty years' imprisonment not under a conviction of genocide, but under general charges for violations of the laws and customs of war and crimes against humanity, which he aided, encouraged, and ordered.<sup>22</sup> Only later, in the International Criminal Tribunal for Rwanda (ICTR), would international law decide that sexual mutilation and sterilization are measures that prevent births, and therefore satisfy genocide.<sup>23</sup>

While customary international law imposes a duty on states "to intervene when genocide occurs," it fails to fully acknowledge male victims.<sup>24</sup> Though the 1948 Convention clearly provided a comprehensive definition of genocide and deliberately broadened it to include other forms of genocide such as genocidal rape and sexual violence, the ICTY and ICTR were under-inclusive in charging criminals with genocide under those subsets. Part of this under-inclusivity is due to the imprecise definitions of genocidal rape and sexual violence. However, both the ICTY and ICTR charged criminals with genocide when their victims were female. This Article argues that males have also been victims of genocide through genocidal rape and sexual violence in the former Yugoslavia and Rwanda and that both the ICTY and ICTR should have charged international criminals with these forms of genocide for their crimes consistent with the 1948 Convention. This Article argues that until international law adapts to acknowledge the prevalence of male sexual violence as genocide, it will not have truly achieved the goals of the 1948 Convention.

Had the ICTY and ICTR correctly applied the 1948 Convention definition of genocide, they would have found that 1) genocidal rape and sexual violence are genocide and 2) those forms of genocide occurred to male victims. Part II offers some contextual background on the events

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20. Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L LAW 350, 362 (2003).

21. *Landmark Cases*, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/features/ Crimes-sexual-violence/landmark-cases> (last visited Oct. 27, 2019).

22. *Id.*

23. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 507 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

24. RAPE AND INTERNATIONAL CRIMINAL LAW 67 (Irene Piccolo ed., 2013).

contributing to the genocides in the former Yugoslavia and Rwanda and explains why this Article only addresses the ICTY and ICTR. Part III analyzes the 1948 Convention's definition of genocide and the purpose for developing its scope. Part IV addresses genocidal rape as a subset of genocide, the genesis of the definition, why it has been disproportionately applied to females, why males were excluded from the application of the definition, and how genocidal rape can and does pertain to males. Part V discusses sexual and genital violence as a form of genocide, how it has been applied to females, and how males can also be victims of that same brutality. Part VI concludes that under the subsets of genocidal rape and sexual violence, international criminal tribunals should charge criminals who have committed rape or sexual violence against males with genocide in order to express the gravity of the crime.

## II. HISTORICAL BACKGROUND: THE YUGOSLAVIAN AND RWANDAN GENOCIDES

The genocides in the former Yugoslavia and Rwanda both occurred after decades of civil unrest.<sup>25</sup> While the culmination of that instability reached its peak with the outbreak of war, political volatility had been percolating in both countries for some time.<sup>26</sup> Part III will provide the current definition of genocide according to international law and acknowledge various genocides that have occurred outside of the former Yugoslavia and Rwanda, but the scope of this Article only encompasses those two genocides and their respective tribunals.<sup>27</sup>

The former Yugoslavia and Rwanda receive in-depth analyses in this Article because these are the only two instances in which the U.N. Security Council assigned individual criminal tribunals to countries affected by genocide. While it is unclear why the Security Council only created tribunals for the Yugoslavian and Rwandan genocides, the ICTY and the ICTR are the most current, definitive authorities on genocide.<sup>28</sup> These tribunals therefore provide the most logical context to analyze how the 1948 Convention has

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25. BRENDA FITZPATRICK, TACTICAL RAPE IN WAR AND CONFLICT: INTERNATIONAL RECOGNITION AND RESPONSE 106 (2016).

26. *Id.*

27. There is plenty of literature arguing on the one hand that the ICTY and ICTR were ineffective in responding to their respective genocides, and on the other hand that the Security Council should have responded with tribunals to the dozens of other examples of genocides that occurred post-World War II. Those arguments are outside the scope of this Article, but for more information, see generally Sandra L. Hodgkinson, *Are Ad Hoc Tribunals an Effective Tool for Prosecuting International Terrorism Cases?*, 24 EMORY INT'L L. REV. 515, 515–25 (2010).

28. *International Criminal Tribunal for the Former Yugoslavia*, U.N. INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <http://www.icty.org>.

been applied to various forms of genocide. What follows is a brief description of the development of both wars to emphasize the scale of the genocides and the need for criminal tribunals.

#### A. Genocide in the Former Yugoslavia: 1991-1995

The structure of the former Yugoslavia—now divided into Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia (including regions of Kosovo and Vojvodina), and Slovenia—was already vulnerable before the political upheaval in 1991. The country was fragile from significant upsets in the early twentieth century, namely the 1908 Bosnia-Herzegovina annexation to the Austrian-Hungarian Empire, the 1914 assassination of the Austrian Archduke Franz Ferdinand by a Bosnian Serb, Bosnia-Herzegovina becoming part of the Kingdom of Serbs in 1918, and the territory ultimately being subsumed by the Socialist Federal Republic of Yugoslavia in 1945.<sup>29</sup>

Leading up to 1991, Bosnian Muslims, Croats, and Serbs disagreed on how the federal republic should be structured. Muslim nationalists wanted a centralized, independent Bosnia-Herzegovina, Serb nationalists advocated for a Belgrade-dominated Yugoslavia, and Croats sought an independent Croat state.<sup>30</sup> When Bosnia declared its independence in March 1992, civil war commenced, and the Serb Republic also proclaimed itself an independent state.<sup>31</sup> By April of that year, the Serbs had already unleashed an ethnic cleansing campaign to eradicate both Bosnian Muslims and Croats by establishing prison camps somewhat similar to the concentration camps used during World War II.<sup>32</sup> The campaign aimed to render the country “ethnically homogenous by using force or intimidation to remove persons of given groups from the area.”<sup>33</sup> Between 1991 and 1995, 100,000 people were killed, eighty percent of whom were Bosniaks.<sup>34</sup> The ethnic cleansing campaign remains one of the largest massacres in Europe since the Holocaust, and in response the United Nations agreed to form the ICTY in 1993 to bring about justice for these crimes under international law.<sup>35</sup>

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29. *Bosnia-Herzegovina Profile*, BBC NEWS (Oct. 8, 2018), <https://www.bbc.com/news/world-europe-17212376>.

30. FITZPATRICK, *supra* note 25.

31. *Id.*

32. *Id.*

33. LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT 117 (2005).

34. *Bosnia-Herzegovina*, U.S. HOLOCAUST MEMORIAL MUSEUM (2018), <https://www.ushmm.org/confront-genocide/cases/bosnia-herzegovina>.

35. *Id.*; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, G.A. Res. 827, at 5 (May 25, 1993).

## B. Genocide in Rwanda: 1994

Rwanda has been comprised of three distinct groups since the fourteenth century: a majority Hutu population, a minority Tutsi, and very few Twa.<sup>36</sup> Though there is little information on how these groups co-existed before the twentieth century, colonizers in the 1920s left a lasting impact on the relations between the three groups. In 1926, the Belgian government issued compulsory ethnic identity cards that identified Rwandans by the group to which they belonged.<sup>37</sup> Inter-ethnic animosity soon followed. A 1959 Hutu uprising led to the deaths of hundreds of Tutsis.<sup>38</sup> As a result, more than 130,000 Tutsi refugees fled to the Belgian Congo, Burundi, Tanganyika, and Uganda.<sup>39</sup> In 1962, Rwanda was declared a republic.<sup>40</sup>

In 1987, Juvenal Habyarimana, a Hutu, was declared Rwanda's first president, though he had already taken control in a military coup before the official beginning of his presidential term.<sup>41</sup> The tensions between Hutus and Tutsis intensified as a result of his presidency, and in 1990, the Rwandan Patriotic Front (RPF)—a rebel Rwandan army comprised of mostly Tutsis—attempted to seize control from the Hutus.<sup>42</sup> President Habyarimana was pressured into signing a peace accord with the RPF in October 1993, but, in April of the following year, he died when his plane was shot down.<sup>43</sup> While the assassinator remains unknown, the shooting signaled the eruption of genocide, and the Hutus began to retaliate against the Tutsis for their supposed execution of President Habyarimana.<sup>44</sup> Though warfare only lasted three months, approximately eight hundred thousand to one million people died, which was nearly seventy-five percent of the entire Tutsi population.<sup>45</sup> The U.N. formed the ICTR in 1994 to prosecute the criminal acts that occurred during those three months.<sup>46</sup>

The conflicts that occurred in the former Yugoslavia and Rwanda have since been categorized as genocides, due to evidence of the calculated intent to target and destroy specific groups through various means. The following section will expound on the scope of the international definition of genocide.

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36. GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 5 (1995).

37. Fitzpatrick, *supra* note 25, at 132.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 133.

44. *Id.*

45. *Id.*

46. Statute of the International Criminal Tribunal for Rwanda, G.A. Res. 955, at 1 (Nov. 8, 1994).

### III. 1948 CONVENTION DEFINITION OF GENOCIDE

As mentioned in the introduction, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide was the first document to define the scope of genocide. Given what the 1945 Nuremberg Trials revealed about fascist leaders' involvement in the extermination of Jews, the Convention sought not only to clarify the meaning of genocide, but also to establish the penalty for a private individual's or a public official's involvement in genocide. Article II states the *mens rea*, or intent, for the crime, which is the intent to destroy a national, ethnical, racial or religious group by: 1) killing the members of that group, 2) causing harm to that group, 3) inflicting conditions meant to destroy a group, 4) preventing births within the group, and 5) transferring children from that group to another group.<sup>47</sup>

Article III then provides an explanation for the *actus reus*, or act, required to commit genocide: 1) genocide, 2) conspiracy to commit genocide, 3) public incitement to commit genocide, 4) attempt to commit genocide, and 5) complicity in genocide.<sup>48</sup> Article V then explains that the Contracting Parties undertake to enact "the necessary legislation to give effect to the provisions" and to "provide effective penalties for persons guilty of genocide" or any of the conspiracies or attempts to commit genocide.<sup>49</sup>

World War II directly created the idea that states were responsible for penalizing actors in genocide. Because of the horrific human rights violations seen and documented in the Holocaust, the 1948 Convention sought to address the "atrocities of modern genocide."<sup>50</sup> Furthermore, it was meant to recognize that civilized nations agree to define and punish genocidal participants because the acts are "contrary to the spirit and aims of the United Nations" and result in "great losses of humanity."<sup>51</sup> The 1948 Convention solicited international cooperation to "liberate mankind from such an odious scourge" as had been seen across Europe.<sup>52</sup>

The Holocaust of World War II, however, was not the first documented

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47. *Id.* In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, 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;
- Forcibly transferring children of the group to another group.

48. Convention on Genocide, *supra* note 15, at 280.

49. *Id.*

50. *Id.*

51. *Id.* at 278.

52. *Id.*

occasion of mass genocide.<sup>53</sup> Historians argue that genocide occurred as early as 149 to 146 BCE in the destruction of Carthage in the Third Punic War,<sup>54</sup> in 800 CE in the eradication of the Anasazi in the American Southwest,<sup>55</sup> and in 1222 CE in Afghanistan under the Mongol armies of Genghis Khan.<sup>56</sup> As stated in the Preamble of the 1948 Convention, genocide consistently took place throughout the twentieth century on every continent,<sup>57</sup> but at the time the Holocaust was arguably the most well-documented genocide and included statistics and photographs that had not existed in previous genocides.<sup>58</sup>

Not to be confused with mass killings, genocide is more restricted in scope and only covers “some specific actions if accompanied by the special intent to destroy a group.”<sup>59</sup> Because of the 1948 Convention, genocide is categorized as its own crime separate from crimes against humanity, even though the latter is the sentence that was applied at the Nuremberg Trials and the 1945 International Military Tribunal for the Far East (also referred to as the “Tokyo War Crimes Trials”).<sup>60</sup> Genocide is also similar, but not identical, to ethnic cleansing, defined as the forcible exclusion of persons from a territory.<sup>61</sup> Over time, and as a developed response to the pervasiveness of genocide, the ICTR added that “sexual mutilation, the practice of sterilization, forced birth control [and the] separation of the sexes and prohibition of marriages” could qualify as genocide.<sup>62</sup>

While non-legal sources limit genocide to “the deliberate killing of a large group of people, especially those of a particular nation or ethnic group,”<sup>63</sup> the 1948 Conventions consciously enlarged the definition so that eliminating members of a group would not be the only means of committing genocide.<sup>64</sup> Consequently, the 1948 Convention’s definition made it possible

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53. While only a few genocides are mentioned here, there are close to one hundred recorded genocides. See NORMAN M. NAIMARK, *GENOCIDE: A WORLD HISTORY* 1–2 (2016).

54. ADAM JONES, *GENOCIDE: A COMPREHENSIVE INTRODUCTION* 5 (3rd ed. 2017).

55. James M. Potter & Jason P. Chuipka, *Perimortem Mutilation of Human Remains in an Early Village in the American Southwest: A Case for Ethnic Violence*, 29 *J. ANTHROPOLOGICAL ARCHAEOLOGY* 507, 507–23 (2010).

56. DOEKE EISMA, *CHINGGIS QAN AND THE CONQUEST OF EURASIA* 100 (2006).

57. Convention on Genocide, *supra* note 15, at 278.

58. William A. Schabas, *Convention for the Prevention and Punishment of the Crime of Genocide*, U.N. AUDIOVISUAL LIBR. INT’L LAW (2008), [http://legal.un.org/avl/pdf/ha/cppcg/cppcg\\_e.pdf](http://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf).

59. THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 332 (Antonio Cassese et al. eds., 2009).

60. *Id.*

61. *Id.* at 333.

62. *Id.*

63. *Genocide*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/genocide>.

64. Convention on Genocide, *supra* note 15, at 277.

for genocidal rape and sexual violence to be forms of genocide, even if the victims are not killed in the process. However, while the term “genocide” had been defined decades prior to the atrocities in the former Yugoslavia and Rwanda, the ICTY and ICTR were detrimentally conservative in how they utilized the genocide standards from the 1948 Conventions. Not once has a criminal been internationally prosecuted of genocide after having raped or sexually mutilated a male victim.

With this historical background of both genocides and the 1948 Convention definition of genocide as a framework, the rest of this Article will address male victims of two forms of genocide: 1) genocidal rape and 2) sexual and genital violence.

#### IV. GENOCIDAL RAPE—FEMALES AND MALES

The 1948 Convention established both the *mens rea* and *actus reus* for the definition of genocide. With the special intent to destroy a group in whole or in part, an individual could be guilty of genocide in several different ways. The first way is through genocidal rape, which is an avenue of Article II(d) “imposing measures intended to prevent births within the group,”<sup>65</sup> and therefore a means of committing genocide.

##### A. Definition of Genocidal Rape as Genocide

Before the establishment of the ICTY and the ICTR, rape was “largely ignored as an international crime.”<sup>66</sup> The two other international tribunals to address genocide, the Nuremberg Trials and the Tokyo War Crimes Trials, failed to adequately address and prosecute both rape and crimes of sexual violence.<sup>67</sup> The term was incorporated into a genocidal context when it could be shown that perpetrators were targeting certain national or racial groups.<sup>68</sup>

While both the Nuremberg Trials and Tokyo War Crimes Trials alluded to sexual violence as having criminal consequences because it violated individual honor and one’s humanity, rape was not mentioned as a war crime in World War II.<sup>69</sup> As a result, no defendant was charged with rape, even though there was ample evidence of serial rapists targeting women in Japan and Germany.<sup>70</sup> Between 1936 and 1938, the Japanese Imperial Army raped

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65. *Id.* at 280.

66. THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 59, at 477.

67. *Id.*

68. *Id.*

69. Russell-Brown, *supra* note 20, at 359.

70. *Id.* There were also allegations of British, French, and American soldiers recurrently raping females. See Peter Schrijvers, THE GI WAR AGAINST JAPAN: AMERICAN SOLDIERS IN ASIA AND THE PACIFIC DURING WORLD WAR II 210 (2005).

twenty thousand Chinese women in the “Rape of Nanking,” well before the Tokyo War Crimes Trials.<sup>71</sup> Similarly, Japanese armies transformed the Bayview Hotel in Manila into a center where they raped and mutilated Filipino women.<sup>72</sup> There, some men were even castrated and compelled to eat their own penises.<sup>73</sup>

Soviet Ukraine soldiers in 1941 also kept journal entries stating that, when they had German female fighters surrounded by the Oder River Dam in Berlin, “our soldiers suggest[ed] stabbing them through their genitals.”<sup>74</sup> As the Russian armies occupied Berlin, they were encouraged to ravage the women who had been left abandoned or widowed.<sup>75</sup> The estimated number of victims is almost incalculable, with approximations ranging from tens of thousands to millions.<sup>76</sup> Just as Soviet soldiers were raping and mutilating German women, German armies “had been guilty of sexual violence and other horrors in the Soviet Union for almost four years.”<sup>77</sup> Neither Nuremberg nor Tokyo addressed rape as a war crime, and neither breached the possibility of rape with genocidal intentions.<sup>78</sup>

The Fourth Geneva Convention of 1949, as well as the 1977 Protocols I and II Additional to the Fourth Geneva Convention, cursorily addressed rape when it referred to countries’ obligation to guard women from “any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”<sup>79</sup> This statement, however, still did not adequately explain whether rape was more than a predictable product of war.

It would not be until the ICTR’s *Akayesu Judgment* in 1998 that rape would be somewhat recognized as an act of genocide<sup>80</sup> and that an individual would be convicted of crimes against humanity for encouraging the mass

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71. Joan Orendain, *February 1945: The Rape of Manila*, INQUIRER.NET (Feb. 16, 2014), <https://globalnation.inquirer.net/99054/february-1945-the-rape-of-manila>.

72. Dominique Mosbergen, *The Harrowing Story of Filipina Women Enslaved in Japan’s Wartime Rape Camps*, HUFFPOST (Aug. 29, 2017), [https://www.huffingtonpost.com/entry/comfort-women-philippines-m-evelina-galang\\_us\\_57232d48e4b0f309baf08490](https://www.huffingtonpost.com/entry/comfort-women-philippines-m-evelina-galang_us_57232d48e4b0f309baf08490).

73. Jane McMullen, *The House Where the Philippines’ Forgotten ‘Comfort Women’ Were Held*, BBC NEWS (June 17, 2016), <https://www.bbc.com/news/magazine-36537605>.

74. Lucy Ash, *The Rape of Berlin*, BBC NEWS (May 1, 2015), <https://www.bbc.com/news/magazine-32529679>.

75. *Id.* See also Heidi Matthews, *As We Remember VE Day, Remember Too the German Women Who Were Raped*, THE CONVERSATION (May 7, 2018), <https://theconversation.com/as-we-remember-ve-day-remember-too-the-german-women-who-were-raped-96196>.

76. Ash, *supra* note 74; Matthews, *supra* note 75.

77. Ash, *supra* note 74.

78. *Id.*

79. WOMEN’S RIGHTS: A HUMAN RIGHTS QUARTERLY READER 337 (Bert B. Lockwood ed., 2006); Russell-Brown, *supra* note 20, at 358.

80. *Id.*

rape of Tutsi women.<sup>81</sup> Jean-Paul Akayesu, a Rwandan citizen who was “bourgmestre of [the] Taba commune [and] Prefecture of Gitarama”<sup>82</sup> from April 1993 to June 1994, was responsible for executive functions, laws, regulations, and public order within his commune.<sup>83</sup> During his tenure as bourgmestre, displaced civilians were frequently murdered in plain sight of the communal premises.<sup>84</sup> The ICTR found that he facilitated the commission of sexual violence not only by “allowing the sexual violence . . . to occur on or near the bureau communal premises,” but also by encouraging the activity.<sup>85</sup> The ICTR was able to show that sexual violence was not an inevitable result of war, but that the act itself was an act of war “which brought harm to a group through the violation of women’s bodies.”<sup>86</sup> This unprecedented conclusion held that rape can be an act of genocide, even though none of the “leading instruments of international criminal law” on genocide mentioned rape.<sup>87</sup> In encouraging and orchestrating mass rape with the intent to eradicate Tutsis, Akayesu committed genocide.<sup>88</sup>

Following the *Akayesu* decision, the ICTR continued to recognize that more criminals had committed genocide. In *Prosecutor v. Kayishema*, Trial Chamber II held that the third form of genocide in the 1948 Convention’s Article II(c)—inflicting on the group “conditions of life calculated to bring about its physical destruction in whole or in part”<sup>89</sup>—included methods that can lead to death, such as “the act of rape.”<sup>90</sup> In the trial, a prefect and a commercial businessman were convicted of genocide by the ICTR when they deprived Tutsis of basic necessities such as food and water.<sup>91</sup> Furthermore, they raped several Tutsi women in the process, and the Trial Chamber II found that rape can constitute genocide by bringing about the destruction of a group if it is committed “(1) repeatedly, (2) over a substantial period of time, and (3) without the intent to kill the victim by any other

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81. DONJA DE RUITER, *SEXUAL OFFENSES IN INTERNATIONAL CRIMINAL LAW* 10 (2011).

82. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 507 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

83. *Id.* at ¶ 3, 4.

84. *Id.* at ¶ 12B.

85. *Id.*

86. DE RUITER, *supra* note 81.

87. CHILE EBOE-OSUJI, *INTERNATIONAL LAW AND SEXUAL VIOLENCE IN ARMED CONFLICTS* 159 (2012).

88. DE RUITER, *supra* note 81.

89. Convention on Genocide, *supra* note 15, at 280.

90. Shayna Rogers, *Sexual Violence or Rape as a Constituent Act of Genocide: Lessons from the Ad Hoc Tribunals and a Prescription for the International Criminal Court*, 48 *GEO. WASH. INT’L L. REV.* 265, 282 (2016).

91. *Id.*

means.”<sup>92</sup>

Similarly, in *Prosecutor v. Gacumbitsi*, a mayor of the commune of Rusumo was charged with genocide after enacting serious bodily harm on Tutsis, which Trial Chamber III recognized as including “torture and sexual violence.”<sup>93</sup> Citing to *Akayesu* in its decision, the court held that by driving around the commune with a megaphone announcing that Hutu members of his commune should “rape Tutsi girls that had always refused to sleep with Hutu[s]”<sup>94</sup> and by publicly instigating the rape of Tutsi women and girls—one “as young as twelve”—the mayor had committed genocide.<sup>95</sup> Lastly, in *Prosecutor v. Muhimana*, Trial Chamber III charged a municipal councilor with genocide when he killed several Tutsis and took part in attacks at Mugonero Complex in which “he raped Tutsi women and shot at Tutsi refugees.”<sup>96</sup> Because the councilor explicitly targeted Tutsi civilians by shooting and raping them and “specifically referred to the Tutsi ethnic identity of his victims when he did so,” Trial Chamber III concluded that he had intended to target a protected ethnic group.<sup>97</sup>

Though the decisions following *Akayesu* created a precedent of convicting criminals of genocide, they did not go so far as to explicitly define genocidal rape. Even though the ICTR concluded in *Akayesu* that his encouragement of sexual violence was genocidal, the Tribunal did not clarify if genocidal rape meant rape via penetration or if the gender of the victims had any impact on the definition.<sup>98</sup> While both the ICTY and ICTR defined rape, their definitions differ and do not state how the definitions would change in a genocidal context. The applicable rape standard makes a significant difference in determining if genocidal rape can apply to males as well.

The ICTY defined rape as even slight sexual penetration of the vagina or anus of the victim by the penis or an object used by the perpetrator.<sup>99</sup> The orifice could also be the mouth of the victim by the penis of the perpetrator, “where such penetration is affected by coercion or force or threat of force against the victim or a third person.”<sup>100</sup> Yet the ICTR contradicted that

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92. *Id.* at 283.

93. *Id.* at 283–84.

94. *Id.*

95. *Id.*

96. *Id.* at 284–85 (emphasis omitted).

97. *Id.* at 285.

98. See generally EBOE-OSUJI, *supra* note 87, at 177 (noting that the ICTR’s recognition of rape as genocide has not resolved debate regarding the *actus reus* requirements of genocidal rape).

99. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

100. *Id.*

definition because it stated that rape is not only realized through penetration. It states instead that rape is a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, including rape, is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”<sup>101</sup> Threats, intimidation, extortion, or any other form of duress can constitute coercion.<sup>102</sup>

These juxtaposed definitions of genocidal rape complicate any efforts to clarify what the applicable victim pool may be. If genocidal rape refers to forcible penetration, whether that be by a sexual organ or another object, victims could include both males and females.<sup>103</sup> If the rape standard encompasses “a systematically organized military tactic of terror and genocide” which is used to generate fear and humiliate both men and women, it could apply to both genders.<sup>104</sup> And if genocidal rape is defined as preventing births “within the targeted group via damage to the reproductive capabilities”<sup>105</sup> of the victims and the inability “to bear offspring of their own ethnic group,”<sup>106</sup> the victim pool might include males. If, however, genocidal rape is distinguishable because it is done to create “a cohort of mixed-ethnic children to maintain the humiliation/spoilage/domination,” or is “forced impregnation,”<sup>107</sup> then genocidal rape would not apply to males.

The foundation of genocidal rape has been a mosaic of numerous legal sources. Since *Akayesu*, international legal scholars have argued that genocidal rape should be both an accepted concept and a legitimate charge. Dr. Usta Kaitesi, current director for the College of Arts and Social Sciences of the University of Rwanda, has submitted that the crime includes both “gender and sexual violence committed with intent to destroy in part or in whole a national, ethnical, religious or racial group.”<sup>108</sup> Gender, in Dr.

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101. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 688 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

102. *Id.*

103. See *id.* at ¶ 10A (defining sexual violence using orifices that could apply to males or females).

104. Jessica Kruger, A Comparative Analysis of Genocidal Rape in Rwanda and the Former Yugoslavia: Implications for the Future 2 (June 1, 2011) (unpublished M.A. thesis, Eastern Michigan University) (on file with Eastern Michigan University Digital Commons) (quoting ROTHE & MULLINS, BLOOD, POWER, AND BEDLAM: VIOLATIONS OF INTERNATIONAL LAW IN POST-COLONIAL AFRICA 157 (2008)).

105. Carlyn M. Jorgensen, A Case Study Analysis of Dehumanization in Rwanda and Darfur 91 (Jan. 1, 2016) (unpublished Ph.D. dissertation, Nova Southeastern University) (on file with NSUWorks).

106. See 1 SAMUEL TOTTEN & PAUL R. BARTROP, DICTIONARY OF GENOCIDE 160 (2008) (noting that some legal scholars have argued mass rape constitutes genocide when it causes females of a community to be ostracized and, therefore, unable to reproduce within their ethnic group).

107. *Id.*

108. USTA KAITESI, GENOCIDAL GENDER AND SEXUAL VIOLENCE: THE LEGACY OF THE ICTR,

Kaitesi's theory, is neutral as defined by the International Criminal Court, which states that gender is "the two sexes male and female within the context of society."<sup>109</sup> The senior legal officer of the Open Society Justice Initiative, Dr. Kelly Dawn Askin, clarified that rape meets the elements of genocide both "when committed in massive proportions in an attempt to destroy a particular group" and "when committed to harm a single woman who is a member of the protected group."<sup>110</sup>

Neither the ICTY nor the ICTR included the term "genocidal rape" itself in their judgments and records. No U.N.-based treaty, convention, or tribunal has provided a scope for genocidal rape. This presents a significant difficulty to public international law: if or when future genocides occur, there is an abundance of literature on genocidal rape that would be irresponsible to ignore. At some point, an international criminal tribunal will likely have the task of defining the breadth of genocidal rape. One hurdle will be agreeing upon the definition of rape, which, depending on the participating bodies, might be controversial because many countries' domestic laws on rape differ significantly.<sup>111</sup>

References to gender in genocidal rape vary, and international legal bodies provide little clarity on which approach to take. As demonstrated in Dr. Askin's definition of genocidal rape, some explanations of genocidal rape narrow the scope by applying it to female victims. Others, like Dr. Kaitesi's definition, are gender-neutral in how they describe the victims of rape. The disparity in the classifications likely arises from the lack of definitional authority. Without an officially-recognized description of genocidal rape, international legal scholarship has created some uncertainty, and tribunals have failed to agree on any of this scholarship to inform their own determinations of rape.

Because of genocidal rape's unclear scope, due in part to the fact that international courts have not explicitly decided what genocidal rape is, its application to both genders remains undetermined. Though some legal

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RWANDA'S ORDINARY COURTS AND GACACA COURTS 15 (Peter Morris & Klaartje Hoeberechts eds., 2014).

109. *Id.*

110. KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 342 (1997).

111. U.S. domestic laws, which can still differ from state to state, typically includes penetration of a vagina or anus with a body part or object without the victim's consent. *See An Updated Definition of Rape*, U.S. DEP'T JUST. ARCHIVES (Jan. 6, 2012), <https://www.justice.gov/archives/opa/blog/updated-definition-rape> (describing new definition adopted within the FBI's Uniform Crime Report Summary Reporting System). The U.K. still narrows the definition of rape by requiring the penetration to occur with a penis. *See Sexual Offences Act 2003*, c. 42 (Eng.) (defining *actus reus* for rape). This is just one example of differing rape laws from two domestic perspectives—there are other countries with similarly incompatible definitions.

scholars have aimed to maintain the gender-neutrality in the definition as applied, the definition still excludes males.

### B. Genocidal Rape as Applied to Women

Though the lack of a settled definition of genocidal rape has caused disagreements in the legal community, the fact that international criminal law has tied rape to genocide has been a remarkable adjustment. The ICTR's bold assertion that rape could be a crime against humanity furthered the argument that sexual violence is often used to target a gender and stunt the group's ability to procreate.<sup>112</sup> Yet in the development of this new legal standard, it has only been applied under the assumption that the victims are female.<sup>113</sup> Tactical rape analysts like Brenda Fitzpatrick express concern that "there is too much focus on such violence against women to the detriment of concern for men and boys as victims of gender-based sexual violence."<sup>114</sup>

While female victims indisputably constitute a majority of victims,<sup>115</sup> the present statistics have not captured an accurate representation of the number of male victims in neither the former Yugoslavia nor Rwanda.<sup>116</sup> While Dr. Kaitesi, Dr. Askin, and other legal scholars might not unequivocally agree that both genders can be victims of genocidal rape, they have independently alluded to similar qualities in genocidal rape that can be condensed into three features of the crime and that are in harmony with the 1948 Convention's definition of genocide. They are: 1) the victim must be targeted as a member of a group, 2) the rape acts as a means to accomplish ethnic cleansings, and 3) there has to be an infliction of intentional harm to the victim.

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112. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 507 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) (explaining application to patriarchal societies where group identity is determined by the identity of the father).

113. See, e.g., KAITESI, *supra* note 108, at 96 (noting this limitation in the context of feminist theories).

114. FITZPATRICK, *supra* note 25, at 38.

115. See Danielle Paquette, *Turning Pain into Hope: Rwanda's Children of Rape Are Coming of Age—Against the Odds*, WASH. POST (June 11, 2017), [https://www.washingtonpost.com/sf/world/2017/06/11/rwandas-children-of-rape-are-coming-of-age-against-the-odds/?utm\\_term=.5aba969239b9](https://www.washingtonpost.com/sf/world/2017/06/11/rwandas-children-of-rape-are-coming-of-age-against-the-odds/?utm_term=.5aba969239b9) (noting estimates that 250,000 women were raped in Rwanda).

116. FITZPATRICK, *supra* note 25, at 79–80. See also ASKIN, *supra* note 110 (discussing rape in Yugoslavia); KAITESI, *supra* note 108 (discussing rape in Rwanda).

## 1. The Victim is Targeted

### a. Former Yugoslavia

Victims of genocidal rape are selected because of the group to which he or she belongs.<sup>117</sup> For example, in the judgments convicting Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic—the three of whom were convicted simultaneously—the ICTY found that, in Kunarac’s rape of a Muslim girl, he had targeted her out of “his awareness of an attack against the Muslim population of which his victim was a member.”<sup>118</sup> In general, women are selected as victims in war contexts because damage to women causes damage to the entire group—to “the women survivors, the military ‘protectors,’ the devastated family, the stunned witnesses, and the collective community as a whole, who have now been proven vulnerable.”<sup>119</sup>

### b. Rwanda

In *Akayesu*, rape and sexual violence were deemed genocidal in Rwanda because the attacks were targeted against all Tutsi women and were exclusively enacted against that group.<sup>120</sup> The court found the rape to be genocidal because “the target [was] women, due to their sexual reproductive roles.”<sup>121</sup> The violence in Rwanda demonstrated the pattern of raping women as an expression of conquest and using their destruction as a means of destabilization.<sup>122</sup>

## 2. Rape is Utilized as Ethnic Cleansing

For the act to be classified as genocide, the perpetrator must have intended for it to function as an ethnic cleanser: for it to destroy the continuation of the group being victimized.<sup>123</sup> “Ethnic cleansing” means forcefully rendering an area ethnically homogenous, often including systematic rape and torture of the members of that group.<sup>124</sup> The term is

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117. FITZPATRICK, *supra* note 25, at 116; KAITESI, *supra* note 108, at 15; Rogers, *supra* note 90, at 271; Miles Hewstone et al., *Why Neighbors Kill: Prior Intergroup Contact and Killing of Ethnic Outgroup Neighbors*, in EXPLAINING THE BREAKDOWN OF ETHNIC RELATIONS: WHY NEIGHBORS KILL 69, 69 (Victoria M. Esses & Richard A. Vernon eds., 2008); David Scheffer, *Rape as Genocide*, N.Y. TIMES (Nov. 3, 2008), <https://www.nytimes.com/2008/12/03/opinion/03iht-edscheffer.1.18365231.html>.

118. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 322 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); FITZPATRICK, *supra* note 25, at 116.

119. ASKIN, *supra* note 110, at 265.

120. KAITESI, *supra* note 108, at 121.

121. *Id.* at 118.

122. *Id.* at 262; Russell-Brown, *supra* note 20, at 364.

123. Hewstone et al., *supra* note 117, at 71; Rogers, *supra* note 90, at 268; Russell-Brown, *supra* note 20, at 363. See also Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT’L LAW 253, 270–75 (2007) (discussing rape against men as a tool for destroying procreation).

124. RAPE AND INTERNATIONAL CRIMINAL LAW, *supra* note 24, at 35.

attributed to M. Cherif Bassiouni, from when he was appointed by the U.N. Security Council to assemble materials that would be presented to the ICTY.<sup>125</sup> He proposed that, in the city of Sarajevo, “there was ethnic cleansing . . . [and] systematic rape as a policy.”<sup>126</sup> The term was noted by the Security Council in the minutes of their meetings, and was later adopted by the ICTR.<sup>127</sup>

a. Former Yugoslavia

Both the ICTY and ICTR found that the methods of accomplishing the ethnic cleansing in the two genocides addressed in this Article were different. In the former Yugoslavia, the genocidal rapes “were designed to impregnate the victim so that they would have a child that was of mixed parentage.”<sup>128</sup> Because ethnicity within Muslim cultures is established by the father, a child of mixed parentage (a Muslim mother and a Serbian father) would no longer be purely Muslim-Bosnian, but would now also be Serbian.<sup>129</sup> The woman’s womb would figuratively be sealed because of the rape, and her community would no longer see her as suitable to carry children.<sup>130</sup> The genocidal rape of Muslim women was thought to corrupt the ethnicity itself and, by extension, end the survival of that community.<sup>131</sup> Through the “pollution” of that blood line, the female victim would become isolated.<sup>132</sup>

b. Rwanda

In Rwanda, however, the Hutus did not resolve to pollute bloodlines through forced impregnation. Instead, the intended harm was to “kill Tutsi women whether it be through the transmission of AIDS, penetration with sharp objects, or as a result of the sheer number of times a woman was raped.”<sup>133</sup> Instead of destroying the group through its progeny, Tutsi women would be destroyed through their own extinction and procreative ability. Tutsi men with HIV/AIDS were often forced to rape other Tutsi women in order to transmit the disease to them, thus humiliating both men and women for the act of rape itself, and, furthermore, condemning previously healthy

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125. *Id.* at 36.

126. Harrison Smith, *M. Cherif Bassiouni, ‘Father of International Criminal Law,’ Dies at 79*, WASH. POST (Sept. 26, 2017), [https://www.washingtonpost.com/local/obituaries/m-cherif-bassiouni-father-of-international-criminal-law-dies-at-79/2017/09/26/7a5e736c-a2c5-11e7-8cfe-d5b912fab99\\_story.html?utm\\_term=.95e90ed9f7f9](https://www.washingtonpost.com/local/obituaries/m-cherif-bassiouni-father-of-international-criminal-law-dies-at-79/2017/09/26/7a5e736c-a2c5-11e7-8cfe-d5b912fab99_story.html?utm_term=.95e90ed9f7f9).

127. *Id.*

128. Russell-Brown, *supra* note 20, at 355.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 356.

Tutsi women to death.<sup>134</sup> Other times, female victims “were taunted by their [Hutu] genocidal rapists, who promised to infect them with HIV,” and then were left displayed on public roads, often with mutilated genitalia.<sup>135</sup> Though the methods of the rapists before the ICTY and ICTR differed, both tribunals acknowledged that the intent was the same—to eradicate the group.

### 3. An Intentional Infliction of Serious Harm

The third characteristic required for genocidal rape is that the act itself was intended to inflict serious harm on the victims.<sup>136</sup> Because the pain can be both physical and mental, it can result in the destruction of “women, their families and their communities.”<sup>137</sup>

#### a. Former Yugoslavia

The child that is the product of forced impregnation is often part of the intended harm of genocidal rape. In Bosnia, women who were raped and impregnated were easily identified by both the nature of being pregnant and the resulting child. Though the statistics are still incomplete, most orphanages, as of 2006, cited nearly a five-fold increase of children they cared for as a product of the genocide in Bosnia.<sup>138</sup> Where the average orphanage usually housed 150 children in pre-war Bosnia, the typical orphanage now houses seven hundred in post-war Bosnia.<sup>139</sup> Most of them “are the children of mass, military-conducted rape.”<sup>140</sup> These children of indefinite ethnic identity still cause the country difficulty because “you cannot be a citizen in Bosnia unless you have a fixed ethnic identity.”<sup>141</sup>

In *Prosecutor v. Kunarac*, Kunarac was a leader of a reconnaissance unit of the Bosnian Serb Army who raped one of his victims twice at the Hotel Zelengora, ejaculated on her face, and told her that “from now on she would be giving birth to Serb babies and that there would be no Muslims left.”<sup>142</sup> While that particular victim was not impregnated after the rape,

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134. *Id.*

135. Nancy Sai, *Conflict Profile: Rwanda*, WOMEN’S MEDIA CTR. (Feb. 8, 2012), <https://www.womensmediacenter.com/women-under-siege/conflicts/rwanda>.

136. FITZPATRICK, *supra* note 25, at 135; Rogers, *supra* note 90, at 307; Russell-Brown, *supra* note 20, at 352.

137. Russel-Brown, *supra* note 20, at 372 (quoting *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 731 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998)).

138. Doug Saunders, *Children Born of Rape Come of Age in Bosnia*, GLOBE & MAIL (Mar. 3, 2006), <https://www.theglobeandmail.com/news/world/children-born-of-rape-come-of-age-in-bosnia/article965582/>.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 322 (Int’l. Crim.

Kunarac's statement portrays the *mens rea* behind the act: to attempt to force impregnation, and therefore attempt to commit genocide.<sup>143</sup>

b. Rwanda

In Rwanda, the increase in females with HIV/AIDS was an intended consequence of the genocide.<sup>144</sup> Rwanda is still among the ten African countries most severely affected by HIV/AIDS.<sup>145</sup> Three percent of the population still suffers from HIV/AIDS, and by 2003,<sup>146</sup> approximately 160,000 people under the age of seventeen had lost one or more parents to the disease.<sup>147</sup> One of the considerations assigned to the spread of the disease was "the early onset of sexual activity and the overall crisis of the 1990s" in the Rwandan genocide.<sup>148</sup>

One victim, Françoise Nduwimana, revealed that she was raped for sixty days in front of her children and that her body "was used as a thoroughfare for all the hoodlums, militia men and soldiers in the district."<sup>149</sup> The soldiers would tell her that some of them had HIV and hoped to transmit the virus to her. Three years after the genocide, Nduwimana discovered she had HIV/AIDS. "There is no doubt in my mind that I was infected during these rapes," she said.<sup>150</sup> Many female victims in the genocide who were impregnated and tested positive for HIV abandoned their resulting children.<sup>151</sup> The children from the genocide are still referred to as "unwanted children," "children of bad memories," and "children of hate."<sup>152</sup>

Because victims of genocidal rape are targeted because of the group to which they belong, victimized so as to homogenize the area in which they reside, and subjected to intentional harm of a genocidal nature, genocidal rape is genocide under the 1948 Convention. But because there is a common

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Trib. for the Former Yugoslavia Feb. 22, 2001).

143. *Id.*

144. *Rwanda*, WORLD HEALTH ORG. [WHO] (2005), [http://www.who.int/hiv/HIVCP\\_RWA.pdf](http://www.who.int/hiv/HIVCP_RWA.pdf).

145. *Id.*

146. Unfortunately, there are insufficient statistics since 2003 as to the increase of HIV/AIDS within Rwanda. A 2000 study showed that 67% of rape survivors were HIV positive. Another 2007 study looked to the Democratic Republic of the Congo, southern Sudan, Rwanda, Uganda, Sierra Leone, Somalia, and Burundi, but ultimately determined that there was not enough reliable data to track the percentage of those with HIV/AIDS from the Rwandan Genocide. It is clear that "more time-sensitive information needs to be gathered in countries experiencing conflict." Sai, *supra* note 135.

147. *Id.*

148. *Id.*

149. Obijiofor Aginam, *Rape and HIV as Weapons of War*, UNITED NATIONS U. (June 27, 2012), <https://unu.edu/publications/articles/rape-and-hiv-as-weapons-of-war.html>.

150. *Id.*

151. *Id.*

152. Jorgensen, *supra* note 105, at 95.

assumption that the victims of genocidal rape are female, males have been excluded from much of the research that affects the prosecution of actors of genocide. Prominent feminist legal theorists like Catharine MacKinnon, one of the first people to propose the concept of genocidal rape, has asserted that women are the targets of genocidal rape precisely “because they are women” and submits that genocidal rape “is an act to destroy a people” and that “[w]hat is done to women defines that destruction.”<sup>153</sup>

The perhaps unintentional implication of this definition of genocidal rape is that the possibility of male victims is dismissed. Though most authorities acknowledge that sex crimes statistically occur against men “to a lesser extent than against women,” there have been many accounts of men being raped and sexually abused.<sup>154</sup> It is arguably this dismissal that contributes to a system where violations continue to take place against males and the perpetrators are not found to be responsible.<sup>155</sup>

### C. Exclusion of Male Victims

Much of the progress on the recognition of genocidal rape in international criminal law is due to the advocacy of feminist groups. It was in large part feminist non-governmental organizations (NGOs) that influenced the agenda of the U.N. World Conference on Human Rights in Vienna in 1993 to create a Global Tribunal on Violations of Women’s Human Rights.<sup>156</sup> Thirty-three women from twenty-five different countries disputed the failures of existing human rights laws and mechanisms.<sup>157</sup> These same NGOs relied on the argument that women’s rights are human rights, which transformed “the human rights concept from a feminist perspective.”<sup>158</sup> Scholars like MacKinnon participated in defining genocidal rape, submitting that it is “an expression of misogyny: women are targeted not simply because they are the ‘enemy’ but also because they are women. Gender is essential to the method of assault.”<sup>159</sup>

But in the process of promoting the much-needed awareness of rape being used to accomplish genocide, feminist advocacy unintentionally

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153. Catharine A. MacKinnon, *Rape, Genocide, and Women’s Human Rights*, 17 HARV. WOMEN’S L.J. 5, 10 (1994).

154. ASKIN, *supra* note 110, at 271.

155. WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW, ALL SURVIVORS PROJECT, LEGACIES AND LESSONS: SEXUAL VIOLENCE AGAINST MEN AND BOYS IN SRI LANKA AND BOSNIA & HERZEGOVINA 17 (2017).

156. TUBA INAL, LOOTING AND RAPE IN WARTIME 147 (2013).

157. *Id.*

158. *Id.* at 158.

159. WOMEN’S RIGHTS: A HUMAN RIGHTS QUARTERLY READER, *supra* note 79, at 279.

excluded male victims from the definition's implications.<sup>160</sup> Notably, female victims outnumber male victims in most international and domestic studies.<sup>161</sup> While the majority of the research argues that the number of male victims is inaccurately reflected—often due to patriarchal societies with high levels of shame that inhibit men from reporting<sup>162</sup>—it is likely that there are still more female than male victims of genocidal rape.<sup>163</sup> Feminist groups should not be criticized for their endeavors to raise awareness of the troubling concept of ethnic cleansing through sexual violence. But in the attempt to shape international criminal law, something was lost in what should have been a gender-neutral definition, and what should have been defined as a crime against persons became defined as a crime that men perform against women.<sup>164</sup>

Because of this, the main discourse dominated by feminists and women's rights activists does not include “sexually mutilated men, men forced to have intercourse with dead animals, men and young boys beaten to erection,” or Tutsi men forced to have intercourse with other Tutsi victims.<sup>165</sup> The consequence of these female-centric discussions is that little is known about male victims who were forced to “place their genital organs in sand-filled holes and other horrifying experiences [that] reveal some particular experiences of genocidal sexual violence.”<sup>166</sup>

In order to educate international legal bodies on the need to recognize genocidal rape, the emphasis was placed on rape as violence against women, rape as a form of torture, and rape as a crime against humanity.<sup>167</sup> While the 1948 Convention definition was gender-neutral, the implication consistently reflected in both the dialogue surrounding the definition and the research supporting it is that prosecuting criminals would deal primarily with female victims. Literature suggesting that *women* are “the targets and victims of egregious international crimes and have frequently been denied access to justice at both national and international levels”<sup>168</sup> displays the precise issue of the lack of conversations surrounding males as targets of genocidal rape.

The overwhelming assumption that victims of genocide and genocidal

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160. MARIA ERIKSSON, *DEFINING RAPE: MERGING OBLIGATIONS FOR STATES UNDER INTERNATIONAL LAW?* 173 (2011).

161. *Victims of Sexual Violence*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Oct. 27, 2019).

162. WILLIAMS INSTITUTE, *supra* note 155, at 23.

163. *Id.*

164. INAL, *supra* note 156, at 141.

165. KAITESI, *supra* note 108, at 92.

166. *Id.*

167. *WOMEN'S RIGHTS: A HUMAN RIGHTS QUARTERLY READER*, *supra* note 79, at 348.

168. INAL, *supra* note 156, at 139.

rape are female has been evidenced as recently as the 2018 Nobel Peace Prizes to Nadia Murad and Dr. Denis Mukwege. Murad became the voice and face of many women who had survived sexual violence at the hands of the Islamic State, and Mukwege treated thousands of women in the Congo, a country once called the “rape capital of the world.”<sup>169</sup> Chairwoman of the Norwegian Nobel Committee, Beit Reiss-Andersen, stated that the decision to award Murad and Mukwege was meant to send a message of awareness “that women, who constitute half of the population in most communities, actually are used as a weapon of war.”<sup>170</sup> The award, while undisputedly a landmark in terms of pivoting global attention to regions where women “have paid a devastating price for years of armed conflict,” repeated the pattern of the unconscious dismissal of male victims.<sup>171</sup>

There is an expectation that, since women are commonly the victims of genocidal rape, they are the exclusive victims. The literature also underscores the central concern that male victims of genocidal rape face: that they are frequently denied the access to justice in an international context that they deserve. The legal attention to genocidal rape has been “on women’s terms.”<sup>172</sup> Only recently have legal scholars considered the possibility of males as victims of genocidal rape, recognizing that there is a “lack of sufficient knowledge about men as victims of genocidal gender and sexual violence”<sup>173</sup> and that the present information, as it stands, “tells only a part of [the] story.”<sup>174</sup>

#### D. Male Genocidal Rape

Having established that the definition of genocidal rape implicitly and sometimes explicitly acknowledges only female victims and that, in application, it has favored women, this section looks to narratives where male victims have already met the criteria of genocidal rape. While sexual violence can be detrimental to male victims because of the taboo due in part to the cultural view of masculinity and the still pervasive view of homosexuality as immoral,<sup>175</sup> the effects extend beyond cultural or psychological trauma. Males in the former Yugoslavia and Rwanda have suffered from either physical or emotional rape-related trauma, causing them

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169. Rukmini Callimachi et al., *2018 Nobel Peace Prize Awarded to Yazidi Activist and Congolese Doctor*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/world/nobel-peace-prize.html>.

170. *Id.*

171. *Id.*

172. WOMEN’S RIGHTS: A HUMAN RIGHTS QUARTERLY READER, *supra* note 79, at 351.

173. KAITESI, *supra* note 108, at 122.

174. *Id.* at 96.

175. ERIKSSON, *supra* note 160, at 175.

to be victims of genocidal rape and, by extension, victims of genocide.

### 1. Former Yugoslavia

Bosnian Muslim men in the former Yugoslavia underwent sexual aggression that led “to psychological trauma which prevented victims from forming relationships and founding a family.”<sup>176</sup> In certain cases, it was the emotional distress that made the victims unwilling and unable to engage in a sexual relationship. Some Serbian detention camps housed both Muslim men and women and purposefully limited their interactions.<sup>177</sup> When the two groups were brought together, survivors recounted that the female prisoners were forced to undress in front of the male prisoners and that any male prisoner that had an erection “had his penis cut off.”<sup>178</sup> For those who were mutilated, sexual intercourse would no longer be possible.<sup>179</sup> But for the male prisoners who observed their fellow detainees castrated, they were deterred from engaging in future intimate relationships because of the psychological damage of seeing an erection met with violence.<sup>180</sup>

One male rape survivor, “Zihnija,” explained how his rape was not just a means of humiliating him, but was meant to physically impede his ability to procreate. A former soldier in the Bosnian army, Zihnija was taken by the military police and beaten for hours, until he was unconscious.<sup>181</sup> When he finally woke up, “one of the officers took a shovel, ripped [his] trousers and put it inside [him].”<sup>182</sup> Zihnija stated that the soldiers said they hoped the violent object penetration would kill him, that he would be one less Muslim to pass on his genes, and that “they thought [he] would probably bleed to death.”<sup>183</sup> In another instance in Kosovo, an eyewitness observed “two male detainees being raped by two policemen who declared that they had AIDS” and hoped to transmit it to them.<sup>184</sup> Just as female victims were targeted and infected with HIV/AIDS in Rwanda as a means to accomplish genocidal rape, male victims in the former Yugoslavia were sexually persecuted to further the goal of genocide.

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176. Anthony Marino, *Bosnia v. Serbia and the Status of Rape as Genocide Under International Law*, 27 B.U. INT’L LAW J. 205, 205–220 (2009).

177. RAPE AND INTERNATIONAL CRIMINAL LAW, *supra* note 24, at 39.

178. *Id.*

179. *Id.*

180. *Id.*

181. Stuart Hughes, *Bosnia Wartime Rape Survivors Losing Hope of Justice*, BBC NEWS (Apr. 1, 2014), <https://www.bbc.com/news/world-europe-26833510>.

182. *Id.*

183. *Id.*

184. Sivakumaran, *supra* note 123, at 264.

## 2. Rwanda

In Rwanda, the ICTR submitted that rape can be defined “as a measure intended to prevent births when the person raped refuses subsequently to procreate.”<sup>185</sup> A female client approached Rwandan therapy facilities after the genocide claiming that her husband could no longer engage in sexual intercourse because of the violent nature of the rape he underwent in 1993.<sup>186</sup> The psychological and physical pain was so severe—more than a decade later, he was still emitting pus and blood from his anus every time he sat down—that he did not want to engage in intercourse.<sup>187</sup>

In another example of physical and emotional pain preventing further sexual relations of men, outspoken male Rwandan rape survivor Faustin Kayihura claims that there are several instances of young boys who were “beaten into erection” in order to have sexual intercourse with them.<sup>188</sup> A seven-year-old Tutsi boy and his mother were attacked in their village by Hutu forces during the genocide.<sup>189</sup> After finding out that the mother was HIV-positive, the boy “was made to have sexual intercourse with his mother as a means of infecting him with HIV/AIDS.”<sup>190</sup> The aggressors then boasted that the boy would surely die with his mother, even as they both attempted to help each other survive.<sup>191</sup> Another fifty-year-old Rwandan male’s penis was infected when he was forced to have intercourse with dead animals while his wife, children, and neighbors watched.<sup>192</sup> The physical pain, emotional trauma, and stigma of shame “haunt[] them to this day,” making it difficult for the victim and his wife to entertain the possibility of sexual relations.<sup>193</sup> These are not isolated examples; many perpetrators “castrated Tutsi male children,” and on other occasions forced Tutsi men to have sex with known HIV-positive women, and sparing “neither the very old nor the very young.”<sup>194</sup> The forced rape and infection are indicative of genocidal rape as a means to impede the continued procreation and furtherance of the Tutsi people.

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185. Marino, *supra* note 176, at 214.

186. Will Storr, *The Rape of Men: The Darkest Secret of War*, THE GUARDIAN (July 16, 2011), <https://www.theguardian.com/society/2011/jul/17/the-rape-of-men>.

187. *Id.*

188. Anne-Marie de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, 48 CORNELL INT’L L.J. 639, 643 (2015).

189. KAITESI, *supra* note 108, at 89.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Anuradha Chakravarty, *Inter-ethnic Marriages, the Survival of Women, and the Logics of Genocide in Rwanda*, 2 GENOCIDE STUD. & PREVENTION: AN INT’L J. 235, 237 (2007).

Hutu military forces were reported to have targeted Tutsi communities where there were known males.<sup>195</sup> During these invasions of Tutsi villages, men and boys were “also being subjected to rape, genital mutilation, and sexualized torture.”<sup>196</sup> One of the survivors claimed that the Hutu male soldiers purposefully tried to severely injure the male victims during rape by marking them with deep bites.<sup>197</sup> The same survivor stated that he was raped by three males, who not only anally penetrated their victims, but also used knives and sticks to mutilate their reproductive organs.<sup>198</sup> As both the mutilation and rape were occurring, the victim heard the soldiers discussing how the Tutsis would die off if their men could no longer have erections.<sup>199</sup>

Through penetration and object rape in both Rwanda and Yugoslavia, the actions of these perpetrators invariably led many male victims to either be physically unable to procreate or be emotionally averse to sexual intimacy. Some victims cited being isolated from their communities after the wars because they publicly revealed the abuse they had experienced.<sup>200</sup> Just as with violence against women, perpetrators used sexual violence against men to change their position in society and their society’s attitudes towards them.<sup>201</sup> Moreover, on several occasions the rapists even verbalized their intent to force the slow death of victims through HIV/AIDS or internal bleeding and other times vocalized their hope that male victims would be unable to father children.<sup>202</sup>

Despite these included narratives, male victims were somehow still not part of the prosecutors’ cases in the ICTY and ICTR. Even though, per the 1948 Convention’s definition of genocidal rape, male victims were clearly subjected to measures intended to prevent births, neither tribunal defined this crime as genocide.<sup>203</sup>

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195. De Brouwer, *supra* note 188, at 108.

196. Ewelina U. Ochab, “*I Was Lucky I Was Only Raped by Three Men*” Says a Survivor of Myanmar Genocide, FORBES (Sept. 2, 2018), <https://www.forbes.com/sites/ewelinaochab/2018/09/02/i-was-lucky-i-was-only-raped-by-three-men-says-a-survivor-of-myanmar-genocide/#3282981577a3>.

197. *Id.*

198. De Brouwer, *supra* note 188, at 108.

199. Christopher W. Mullins, “*He Would Kill Me With His Penis*”: Genocidal Rape in Rwanda as a State Crime, 17 CRITICAL CRIMINOLOGY: AN INT’L J. 15, 19 (2009).

200. TOTTEN & BARTROP, *supra* note 106, at 159–60.

201. Sivakumaran, *supra* note 123, at 263.

202. *Id.*

203. Convention on Genocide, *supra* note 15, at 280.

## V. SEXUAL AND GENITAL VIOLENCE AS GENOCIDE—FEMALES AND MALES

Part IV discussed how genocidal rape is not only a form of genocide, but specifically a form of genocide that attempted to impose measures to prevent births of Bosnian Muslims and Tutsis by targeting and raping both females and males. The following section observes that sexual and genital violence were also methods of “imposing measures intended to prevent births within the group” in the former Yugoslavia and Rwanda, that males were targeted in such violent attacks, and that they were, therefore, victims of genocide.<sup>204</sup> While the following section still demonstrates how sexual violence is genocidal, it will not require the same discussion of its definition as genocidal rape did.

### A. Sexual Violence as Genocide

In the ICTY proceedings, Tadić was sentenced to twenty years’ imprisonment in 2000 for his participation in the Bosnian Genocide, specifically in the Omarska Camp, for cruel treatment and inhumane acts against male victims.<sup>205</sup> The landmark case redefined how sexual assault is viewed, making it no longer just a war crime, but also a crime against humanity.<sup>206</sup> The ICTY, however, refused to define the incident as an act of genocide or even discuss the possibility of it being genocidal.<sup>207</sup> Various investigative bodies have since found that many sex crimes occurred with Bosnian men in the detention camps where they were forced to commit sexual acts on each other.<sup>208</sup> While those like Tadić who arguably could have been charged with genocide were charged with other crimes, such as violations of the laws and customs of war, these crimes do not reflect the specific intent and brutality of genocide.

Contrasted to Tadić’s trial was the sentencing of General Major Radislav Krstić in *Prosecutor v. Krstić*. As commander of the Drina Corps, he was held responsible for the infamous Srebrenica Massacre in July 1995, where more than seven thousand Bosnian Muslim boys and men were executed outside of a U.N. military camp.<sup>209</sup> Twenty to thirty thousand Muslim residents fled to the village of Potočari to attempt to evade Bosnian Serb armies, but, when the soldiers entered the military camp, they

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204. *Id.*

205. *Prosecutor v. Tadić*, Case No. IT-94-1-T ICTY, Judgement, ¶ 198 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

206. *Landmark Cases*, *supra* note 21.

207. *Id.*

208. RAPE AND INTERNATIONAL CRIMINAL LAW, *supra* note 24, at 36.

209. *Landmark Cases*, *supra* note 21.

slaughtered and raped many women.<sup>210</sup> The Trial Chamber found Krstić “responsible for the crimes committed in Potočari, including the rapes” and provided a link between rape and ethnic cleansing or genocide by analyzing the relationship between the acts.<sup>211</sup> Though Krstić was not convicted of aiding and abetting genocide for the Potočari events—they were a prelude to the subsequent genocide—the court’s analysis acknowledged the conviction could exist.<sup>212</sup> When the 2004 Appeals Chamber upheld the sexual violence convictions amidst ethnic cleansing, Krstić was sentenced to thirty-five years’ imprisonment.<sup>213</sup>

The disparity in Tadić’s and Krstić’s charges reveals the weight that is allocated to the two crimes. In the former, cruel treatment and inhumane acts, while horrific, do not merit the same punishment as ethnic cleansing through sexual violence, or genocide. This discrepancy demonstrates the need for international bodies to recognize the importance of the definition. While the two cases had other disparities that contributed to the different length of their sentences (their range of authority, the number of victims, etc.), the Trial Chamber assessed their sentences considering the severity of their crimes.<sup>214</sup>

The weight that is attached to genocide versus other types of international crimes betrays how international law views the act itself. As the Preamble to the 1948 Convention affirms, genocide is a particularly atrocious, more so than other international crimes, because it is not simply a product of war, but an “odious scourge.”<sup>215</sup> While, arguably, war can occur as a means of self-defense, genocide cannot. Correctly categorizing sexual and genital violence as genocide per the 1948 Convention definition therefore recognizes the horrific inhumanity that males and females have suffered.

Acknowledging that an individual is a victim of genocide accepts not only that the *actus reus* was horrific, but that the *mens rea* was to target that individual for the group to which the victim belongs. Until international law sufficiently implements the 1948 Convention’s definition of genocide, male

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210. *Id.*

211. *Id.*

212. *See id.* (“The Trial Chamber held that Krstić was responsible for the crimes committed in Potočari, including the rapes, which were deemed as ‘natural and foreseeable consequences of the ethnic cleansing campaign’. The Judges noted that, although ‘ethnic cleansing’ was not a legal term, it had been used in various legal analyses before. The Trial Chamber concluded that there were ‘obvious similarities’ between a genocidal policy and the policy commonly known as ‘ethnic cleansing’. The rapes in Potočari did not form part of Krstić’s conviction for aiding and abetting genocide, as the events in Potočari were a prelude to the subsequent genocide.”)

213. *Id.*

214. *Id.*

215. Convention on Genocide, *supra* note 15, at 278.

victims will not be treated as a targeted group. If international law does not reflect the reality that rape and sexual violence are used to effect genocide, legal bodies will perpetuate an implicit myth that males are not victims of the same crime as females are.

Though neither the ICTY nor the ICTR explicitly addressed female victims of genital or sexual violence, both tribunals acknowledged the possibility and avoided discussing whether males could also be victims of genocide through sexual violence.

## B. Sexual Violence of Females as Genocide<sup>216</sup>

### 1. Yugoslavia

The ICTY implicitly recognized that sexual violence against women can be genocide. The ICTY proceedings also dealt with instances of genital mutilation that occurred in the notorious Omarska Camp. In April 1992, U.S. government officials received reports of “beatings, mutilations, and rape” in Bosnia.<sup>217</sup> The female victims in the Omarska Camps underwent genital mutilation, an essential practice in the regimented violence that was part of the larger strategy of extermination.<sup>218</sup>

Outside of the camps, Serbian troops would also arrive at towns with a list of Muslim residents that they were to execute.<sup>219</sup> Before the execution, women were often mutilated or raped, and sometimes both, before their homes were looted.<sup>220</sup> One Bosnian Muslim was raped and her vagina mutilated by a teenage neighbor who “so often . . . had sat at [her] place, [and] drank coffee with [her].”<sup>221</sup> Many women claimed they begged for death in hopes of avoiding Omarska because it had become notorious as “the location of an orgy of killing, mutilation, beating, and rape.”<sup>222</sup> The indictment of Milan Kovačević—who ordered and implemented the Omarska, Keraterm, and Trnopolje Camps’ extermination plans—referenced the genocidal intent of subjecting prisoners to conditions “intended to bring about their physical destruction with the intent to destroy,

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216. Female genital mutilation (“FGM”) is certainly an egregious violence in its own right. However, FGM is typically a tradition in certain cultures, not a means of accomplishing genocide. This Article will therefore not address FGM as a form of genital violence of females in a genocidal context.

217. Mark Danner, *The Horrors of a Camp Called Omarska and the Serb Strategy*, PBS FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/karadzic/atrocities/omarska2.html> (last visited Oct. 27, 2019).

218. *Id.*

219. *Id.*

220. *Id.*

221. Hewstone et al., *supra* note 117, at 61.

222. *Id.*

in part, the Bosnian Muslim and Bosnian Croat people.”<sup>223</sup> He was accused of having committed both genocide and having been complicit in genocide for the violence that occurred in the camps.<sup>224</sup>

## 2. Rwanda

Rwandan accounts of what occurred during the genocide provide examples of the difficult distinction between genocide through genocidal rape and genocide through sexual violence. One Tutsi survivor, “Therese,” describes how, when Hutu soldiers attacked her village, she and the women were separated from the men and children. She remembered that “there was one woman for five men . . . but it depended on their desire.”<sup>225</sup> When one woman refused to have sex, they cut her breasts off, and then proceeded to rape her along with most of the women.<sup>226</sup> Tutsi women were thereby subjected to two forms of genocide: genocidal rape through penetration and sexual violence through mutilation.

The genital mutilation of Tutsi women was often used to communicate their disposability and to humiliate them in front of their neighbors, sometimes their own families.<sup>227</sup> Yet beyond pure emotional aggression, “mutilation was used as a way to forcibly sterilize Tutsi women to stop them from having children.”<sup>228</sup> In some instances, genital mutilation occurred so that women would either be in too much pain to endure penetration or that their genitalia would be so deformed that they would no longer be able to have intercourse.<sup>229</sup> In other circumstances, women’s nipples and breasts would be so maimed that they could not breastfeed. Whereas 86.93% of Rwandan women breastfeed their own children, and 97.4% primarily breastfeed before using formula, the violence to breasts would make it near impossible to breastfeed.<sup>230</sup> Unable to feed their children, Tutsi women had to choose either to not have children or risk their children’s mortality from starvation.<sup>231</sup> Thus, mutilation was not just a means of destroying women’s

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223. Communications Service of the International Criminal Tribunal for the Former Yugoslavia, *Case Information Sheet: “Prijedor” (IT-97-24) Milan Kovačević*, [http://www.icty.org/x/cases/milan\\_kovacevic/cis/en/cis\\_kovacevic\\_milan\\_en.pdf](http://www.icty.org/x/cases/milan_kovacevic/cis/en/cis_kovacevic_milan_en.pdf).

224. *Id.*

225. Fiona Lloyd-Davies, *The Forgotten Women*, THE GUARDIAN (Sept. 25, 2002), <https://www.theguardian.com/world/2002/sep/25/congo>.

226. *Id.*

227. Sai, *supra* note 135.

228. *Id.*

229. *Id.*

230. *Rwanda: Exclusive Breastfeeding (% of Children Under 6 Months)*, TRADING ECON. (2015), <https://tradingeconomics.com/rwanda/exclusive-breastfeeding-percent-of-children-under-6-months-wb-data.html> (last visited Oct. 15, 2019).

231. *Id.*

bodies and removing “their uniquely Tutsi features,” but disfiguring their genitalia to further genocidal goals by preventing Tutsi women from procreating.<sup>232</sup>

The sheer volume of female rape victims in the Rwandan Genocide was central to the convictions at the ICTR. The United Nations reported to the ICTR that 250,000 women were raped between 1990 and 1994.<sup>233</sup> Many suffered from mutilation of their sexual organs by “machetes, boiling water, and acid.”<sup>234</sup> After Akayesu’s conviction in 1998, ICTR Prosecutor Arbia memorably stated that the case demonstrated the abstraction of “to kill without killing.”<sup>235</sup> She continued that his conviction, as well as that of Pauline Nyiramasuhuko—who instructed her subordinates to rape women before they killed them—were meant to acknowledge that women specifically were victims of crimes of genocide in its various forms.<sup>236</sup>

Both the ICTR and ICTY considered evidence of female victims who underwent mutilation of their breasts or genitalia. Though the narratives were sparse, female victims were at least studied and included in evidence during the trials of prominent Rwandan and Serbian criminal defendants, whereas men were not. The following section demonstrates how enforced sterilization and other forms of sexual violence against men occurred in the former Yugoslavia and in Rwanda and how that violence conforms to the 1948 Convention understanding of genocide.

### C. Sexual Violence of Males as Genocide

Enforced sterilization may amount to genocide “if the requisite intent is present.”<sup>237</sup> Though not an act of penetration, enforced sterilization and other male-targeted sexual violence has been used in a genocidal context to prohibit men from being able to procreate with the intent to destroy their ethnic group. Sometimes referred to as being “of comparable gravity” as rape,<sup>238</sup> enforced sterilization is its own form of sexual violence used to bring about the destruction of a group through affecting reproductive capacities.

Castration, penile amputation, and enforced sterilization in armed conflicts date back several centuries. In the armies of Ancient Persia, Greece,

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232. Sai, *supra* note 135.

233. Peter Landesman, *A Woman’s Work*, N.Y. TIMES (Sept. 15, 2002), <https://www.nytimes.com/2002/09/15/magazine/a-woman-s-work.html>.

234. *Id.*

235. *Id.*

236. *Id.*

237. Dustin Lewis, *Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law*, 27 WIS. INT’L L.J. 1, 39 (2009).

238. Sivakumaran, *supra* note 123, at 263.

China, Amalek, Egypt, and Scandinavia, male enemies and prisoners were often subjected to genital violence.<sup>239</sup> Phallic brutality “served to triumph victory of an armed group over the other,” and, in some societies, enemy male corpses were mutilated “with spears through the anus to simulate male rape” and announce the defeat of the army.<sup>240</sup> In predominantly patriarchal societies, the emasculation of males, especially ones in military leadership positions, has been used to establish order, to humiliate the victims as well as their families, and to remove procreative abilities to symbolically render males powerless.<sup>241</sup> This historical dynamic unfolded in both the former Yugoslavia and Rwanda.

### 1. Yugoslavia

As seen in the introduction, one of the landmark cases before the ICTY in *Tadić* revealed the humiliation and aggression surrounding castration. But the testimony in *Tadić* was hardly an isolated incident: one witness stated seeing “the corpses of 15 young men whose genitals had been mutilated” in one of the detention camps.<sup>242</sup> Others recounted having seen Muslims forced to bite each other’s testicles off, and guards cutting off prisoners’ hands and penises to frighten the other men.”<sup>243</sup>

Other sources also detailed the violence plaguing castration. The Report of the U.N. Commission of Experts for Yugoslavia found that castrations were performed “through crude means such as forcing one internee to bite off another’s testicles and tying one end of a wire to the testicles and the other end to a motorcycle, then using the motorcycle to yank off the testicles.”<sup>244</sup> While the ICTY would eventually only rely on limited evidence of sexual violence enacted against men, there were still several assertions from reliable sources, such as the Commission of Experts as well as the U.S.’ submission to the Security Council, which found that most of the guards at the Luka Camp “were regularly seen castrating male prisoners.”<sup>245</sup> Another witness testified that a female Serbian guard would beat the male prisoners on the genitals repeatedly for prolonged periods of time.”<sup>246</sup> One individual, while testifying before the International Court of Justice, stated that Serbian torturers “were deliberately aiming their beatings at our testicles saying,

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239. Valorie K. Vojdik, *Sexual Violence Against Men and Women in War: A Masculinities Approach*, 14 NEV. L.J. 923, 928 (2014).

240. *Id.*

241. *Id.*

242. Sivakumaran, *supra* note 123, at 265.

243. *Id.*

244. *Id.*

245. Marino, *supra* note 176, at 218.

246. *Id.*

‘you’ll never make Muslim children again.’”<sup>247</sup> The intent from this last statement is clear: males’ genitalia was aggressed or disfigured precisely for the purpose of preventing births within Muslim groups.<sup>248</sup>

The intent behind this mutilation was a pre-calculated policy of encouraging ethnic cleansing through sexual violence.<sup>249</sup> The logic behind these actions was that, by preventing further births of Muslim children and “forcing the birth of (in the opinion of the attacker) non-Muslim children,”<sup>250</sup> the country would then be cleansed of all “pure” Muslims. Though this reasoning was certainly applied to justify forced impregnation, it was also used to explain the need to castrate males.<sup>251</sup> Sterilized Bosnian Muslim men would be unable to participate in creating this “purely Muslim” community.<sup>252</sup> Their lack of procreative ability would be an intended result of forced sterilization, and would therefore further the purposes of genocide.

## 2. Rwanda

Tutsi men were similarly targeted by Hutu forces, and this abuse was not only a feature of the genocide, but a “prelude to the ‘root and branch’ extermination” of the community.<sup>253</sup> Though part of the reason for the targeting might have been to destroy “battle-age male non-combatants capable of joining the ranks of enemy soldiers,” Hutus also desired to eliminate further generations of Tutsis.<sup>254</sup> Not only were Tutsi males killed in public and violent demonstrations, they were also castrated in large numbers.<sup>255</sup> The Hutu mythic logic—which saw Tutsis as a “blockage” to a pure Rwandan population and therefore necessary to eliminate—pervaded the genocide.<sup>256</sup> Some victims were thrown into rivers to cleanse the country of the impure blood of the Tutsi, and others piled and burned in ritualistic fires.<sup>257</sup> Castration of Tutsi men “symbolically represented attempts to ‘block’ the flow of bodily fluids necessary to reproduce and sustain life.”<sup>258</sup>

In *Akayesu*, the ICTR submitted that measures intended to prevent

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247. Maite Vermeulen, *Hidden Victims: The Story of Sexual Violence Against Men in Armed Conflict*, E-INT’L REL. STUDENTS (Sept. 4, 2011), <https://www.e-ir.info/2011/09/04/hidden-victims-the-story-of-sexual-violence-against-men-in-armed-conflict/>.

248. Convention on Genocide, *supra* note 15, at 280.

249. Marino, *supra* note 176, at 225.

250. *Id.* at 228.

251. *Id.* at 219.

252. *Id.* at 223.

253. Chakravarty, *supra* note 194; JONES, *supra* note 54.

254. Chakravarty, *supra* note 194.

255. *Id.*

256. *Id.* at 242.

257. *Id.*

258. *Id.*

births within the group included sexual mutilation and the practice of sterilization.<sup>259</sup> Regardless of how likely “the attackers’ ultimate success would prove to be,” the Tribunal found that, for some, there was a specific intent to destroy the selected group.<sup>260</sup> Photographs presented to the ICTR showed corpses with their clothing pulled down to the knees, “presumably so the victim could be sexually abused before being killed” and before being castrated.<sup>261</sup> Other pictures showed a man who was castrated and then shot in the head.<sup>262</sup> In the Kibuye prefecture, a Tutsi policeman was castrated, and the Hutu soldiers hung his genitals on a lance as an exhibition.<sup>263</sup> When the entire town gathered, the prefecture’s bourgmestre stated that all male Tutsis “would suffer the same fate.”<sup>264</sup>

What becomes clear from these examples is that in both the former Yugoslavia and Rwanda, males were made victims of enforced sterilization and genital brutality with the intent of impeding their ability to procreate. While it is not always possible to have recorded statements of what the aggressors stated as they performed the sterilization or castration, some statements do display that there was the specific intent of destroying the group. That intent, coupled with actions aiming to prevent births within the group, satisfies the 1948 Convention’s definition of genocide.

## VI. CONCLUSION

The 1948 Convention has yet to be fully realized in international criminal law. The problem before future international criminal tribunals will not be if there is a clear definition on what constitutes genocide; the 1948 Convention has already established that. The issue is not if male victims have suffered from genocidal rape or sexual violence; this Article has already shown that it has happened. Future international legal bodies must learn how to apply the 1948 Convention definition of genocide to male victims, even though they have not traditionally been considered victims of genocides in crimes of a sexual nature. Male victims, along with female victims, must be acknowledged as individuals targeted in genocide. This does not need to come at a sacrifice to the substantial efforts of feminist legal scholars who have labored over the past century to have female victims recognized as victims of genocide. Both male and female victims can be acknowledged

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259. Marino, *supra* note 176, at 214.

260. *Id.* at 228.

261. Nicholas D. Kristof, *The Secret Genocide Archive*, N.Y. TIMES (Feb. 23, 2005), <https://www.nytimes.com/2005/02/23/opinion/the-secret-genocide-archive.html>.

262. *Id.*

263. Mullins, *supra* note 199, at 26.

264. *Id.*

under the 1948 Convention, and, if done appropriately, neither gender will be disregarded in the prosecution of war criminals.

While international criminal law cannot remedy the brutal harm that befalls victims of genocide, it can bring about justice by including their rapists and aggressors under the more severe charge of genocide. Both genocidal rape and sexual violence under the ICTY and ICTR have demonstrated the qualities of rape per the 1948 Convention's definition, but, while female victims have generally been considered during the prosecution in both tribunals, male victims have not. To fully achieve the purpose of the 1948 Convention, the crimes against male victims can no longer be dismissed. If and when future genocides occur, international legal bodies have a responsibility to include male victims in the scope of genocidal rape.

Many argue that "there have been *no* exemplary prosecutions of acts of sexual violence against men" (emphasis in original), which have under-recognized the gravity and breadth of genocidal crimes against men.<sup>265</sup> While some praise both the ICTY and ICTR for acknowledging sexual violence as it relates to genocide, many survivors of both genocides feel that neither tribunal 1) sufficiently held enough perpetrators accountable for their crimes or 2) correctly defined the crimes for what they were.<sup>266</sup> While the ICTY and ICTR may have charged some criminals for their actions during the genocides, acknowledging their acts as amounting to genocide is powerful for the collective memory of the survivors.<sup>267</sup> Furthermore, if future international criminal tribunals are successful in maintaining that genocidal rape and sexual violence occur to males as well as females, international criminal law will be able to remain consistent with the 1948 Convention. Only then will international law appropriately respond to atrocities contrary to the spirit and aims of the United Nations.<sup>268</sup>

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265. Anjali Manivannan, *Seeking Justice for Male Victims of Sexual Violence in Armed Conflict*, 46 N.Y.U. J. INT'L L. & POL. 661, 635–79 (2014).

266. Nidal Magrabi, *Bosnia 1992: The Omarska Camp*, AL JAZEERA MEDIA NETWORK (May 10, 2017), <https://www.aljazeera.com/programmes/aljazeeraworld/2017/05/bosnia-1992-omarska-camp-170508061724966.html>.

267. *Id.*

268. Convention on Genocide, *supra* note 15, at 278.