2007

Advances and Missed Opportunities in the International Prosecution of Gender-Based Crimes

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ADVANCES AND MISSED OPPORTUNITIES IN THE INTERNATIONAL PROSECUTION OF GENDER-BASED CRIMES

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INTRODUCTION

In the past decade, and particularly since 1998, there has been an incredible transformation in the treatment of sex-based and gender-based violence[1] in the fields of international humanitarian law and international criminal law. Before this, crimes committed exclusively or disproportionately against women and girls, in times of conflict, were largely either ignored, or at most, treated as secondary to other crimes.[2] Despite the fact that rape and other forms of sexual violence had been widely reported during World War II, for instance, the crime of rape was not expressly included in either the London Charter, establishing

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1. As leading commentators on international crimes against women have noted, "Gender-based crimes, reflected primarily in socially constructed roles, manifestations, and stereotypes, and sex-based crimes, reflected primarily in biological differences, to a great extent overlap and intersect." Dorean M. Koening & Kelly D. Askin, *International Criminal Law: The International Criminal Court Statute: Crimes Against Women*, *in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 5 (Askin and Koening eds., 2000). However, there is an increasing trend to use these terms more precisely. *Id.* Nevertheless, confusion remains as the terms still lack universally accepted definitions and are often subject to different meanings, usages and interpretations. *Id.*

2. *See* Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 294-96 (2003) [hereinafter *Prosecuting Wartime Rape*]; ANNE TIERNEY GOLDSTEIN, RECOGNIZING FORCED IMPREGNATION AS A WAR CRIMES UNDER INTERNATIONAL LAW 2 (1993) ("When . . . atrocities are perpetrated against men, or against women in the same form as they are perpetrated against men, they constitute and are universally recognized as war crimes. . . . But when they are committed against women in the form of sexual abuse, no matter how perfectly they fit the legal definition of a particular war crime, historically they have been treated as less serious than nonsexual atrocities.").

the International Military Tribunal (IMT) at Nuremberg[3] or the Charter of the International Military Tribunal for the Far East (IMTFE) at Tokyo.[4] In fact, the term rape is completely absent from the 179-page judgment of the IMT at Nuremberg,[5] and while rape was prosecuted in Tokyo, its prosecution was viewed as ancillary to other war crimes.[6]

Moreover, while rape was recognized as a violation of the law of war as far back as at least the fifteenth century— when "27 judges of the Holy Roman Empire judged and condemned Peter von Hagenbach . . . because he allowed his troops to rape and kill innocent civilians"[7]— international humanitarian law has traditionally linked sexual violence with crimes against honor or dignity, rather than with crimes of violence. For instance, Article 27 of the fourth Geneva Convention relating to the protection of civilian persons during time of war states that "[w]omen shall be especially protected against any attack on their *honour*, in particular against rape, enforced prostitution, or any form of *indecent* assault."[8] Similarly, Article 14 of the third Geneva Convention relating to the treatment of prisoners of war states that "[w]omen shall be treated with all the *regard due to their sex.*"[9] Although the phrase remains largely undefined, the commentary to the Convention notes that when interpreting the provision, the following should be borne in mind:

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3. Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279, *reprinted in* 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1947), *available at* http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm [hereinafter Nuremberg Charter].

4. Charter for the International Military Tribunal of the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, *reprinted in* TOKYO WAR CRIMES TRIAL (R. John Pritchard & Sonia Magbanuz Zaide eds., 1981), *available at* http://www.yale.edu/lawweb/avalon/imtfech.htm [hereinafter Tokyo Charter].

5. Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing The International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649, 665 (1995).

6. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 348 (1999).

7. G. SCHWARTZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 462 (1968), *cited in* M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT. & COMP. L REV. 1 (1991).

8. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 74 U.N.T.S. 287, 306 [hereinafter Geneva Convention IV] (emphasis added).

9. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 14, 75 U.N.T.S. 135, [hereinafter Geneva Convention III] (emphasis added).

> . . . B. Honour and modesty.—The main intention [being] to defend women prisoners against rape, forced prostitution and any form of *indecent* assault.[10]

However, overwhelming evidence of the systematic raping of women in conflicts over the last decade has helped to create unprecedented levels of awareness of rape as a method of war and political repression. As a result, great strides have been made in the condemnation and prosecution of sex-based and gender-based violence. Indeed, rape and other forms of sexual violence have been successfully prosecuted as war crimes,[11] crimes against humanity,[12] and even genocide[13] by the *ad hoc* international criminal tribunals established to prosecute war crimes in the former Yugoslavia (ICTY) and Rwanda (ICTR). The Rome Statue that gave rise to the International Criminal Court incorporates many of these advances and more, such as the inclusion of additional specific gender-based crimes under the crimes against humanity provision.[14]

Nevertheless, for the most part, the *ad hoc* international criminal tribunals have approached sexual violence as constituting the *actus reus*, or the material act, of the crime. A question that remains largely

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10. JEAN PICTET, CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 147-48 (1960).

11. *See, e.g.*, Prosecutor v. Delalic, Judgment, IT-96-21-T, ¶¶ 475-96, 511 , 544 (Nov. 16, 1998) [hereinafter Celebici Trial Chamber Judgment] (affirming that sex crimes are covered by the grave breaches provisions of the 1949 Geneva Conventions, in particular by the prohibitions of "torture," "inhuman treatment," "willfully causing great suffering," and "serious injury to body or health"); Prosecutor v. Furundzija, Judgment, IT-95-17/1-T, ¶¶ 165 n.192, 172 (Dec. 10, 1998) [hereinafter Furundzija Trial Chamber Judgment] (recognizing that rape may amount to violation of common Article 3 and a grave breach of the Geneva Conventions); Prosecutor v. Kunarac et al., Judgment, IT-96-23-T & IT-96- 23/1-T, ¶ 436 (Feb. 22, 2001) [hereinafter Kunarac Trial Chamber Judgment] (noting jurisdiction to prosecute rape as a violation of common Article 3 is "clearly established").

12. *See, e.g.*, Kunarac Trial Judgment, *supra* note 11, at 539-43 (recognizing rape as well as contemporary forms of slavery, such as sexual slavery, as crimes against humanity); Prosecutor v. Akayesu, Judgment, ICTR-96-4-T, ¶ 731 (Sept. 2, 1998) [hereinafter Akayesu Trial Judgment].

13. *See, e.g.*, Akayesu Trial Judgment, *supra* note 12, ¶ 731 (recognizing that "rape and sexual violence . . . constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such").

14. Rome Statute of the International Criminal Court, opened for signature July 17, 1998, art 7(g), 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute] (giving the ICC jurisdiction over the crimes against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, "and any other forms of sexual violence of comparable gravity").

unexplored is whether the systematic and/or widespread use of rape and other forms of sexual violence tells us anything about a perpetrator's mental state. In other words, can the *mens rea*, or mental element of these crimes, particularly of genocide, be inferred, at least in part, from pattern evidence of sexual violence? The question is significant because it may affect how crimes that disproportionately affect women are charged—and therefore, whether and how they are investigated and prosecuted.

The question is particularly relevant in light of the findings made last year by the United Nations Commission of Experts tasked with determining whether there was sufficient evidence to conclude that genocide had occurred in the Darfur region of Sudan. Despite finding that rapes had been used to terrorize, demoralize, and humiliate the targeted population,[15] the Commission concluded that there was not enough evidence of genocidal intent.[16] Had the Commission considered the question of what pattern evidence of sexual violence tells us about a perpetrator's intent, it might have come to a different conclusion. Indeed, the failure to consider this suggests that despite increased accountability for crimes perpetrated exclusively or disproportionately against women, there still seems to be a limited understanding of the various functions that sex-based and gender-based violence can play, particularly in times of conflict.

Sexual violence can function, as the landmark case of *Akayesu* recognized, as a *means* by which to eventually destroy a particular group of people.[17] Indeed, mass sexual violence can result (among countless other injuries) in permanent gynecological injury to large numbers of women in a particular group, thereby destroying their capacity to reproduce, and perhaps even, the potential of the group to

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15. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, ¶ 353, U.N. Doc. S/2005/60 (Jan. 25, 2005), *available at* http://www.ohchr.org/english/darfur.htm [hereinafter *Darfur Commission of Inquiry Report*] (noting that the evidence collected by the Commission "indicate[s] that rape and sexual violence have been used . . . as a deliberate strategy with a view to achieve [sic] certain objectives, including terrorizing the population, ensuring control over the movement of the IDP and perpetuating its displacement. . . . [The evidence] demonstrates that rape was used as a means to demoralize and humiliate the population.").

16. *Darfur Commission of Inquiry Report*, *supra* note 15, ¶ 518.

17. *See, e.g.*, Akayesu Trial Judgment, *supra* note 12, ¶ 732 (recognizing that "sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself").

survive. A poignant example of this is what happened to the "comfort women" subjected to sexual slavery by the Japanese military in WWII. According to at least one commentator, a majority of these women suffered such extensive damage to their reproductive organs as a result of the abuses inflicted upon them that they lost their reproductive capacity altogether.[18]

However, mass rape and other forms of sexual violence can, arguably, also function as a message to the targeted group. When committed on a mass scale and in certain patterns, such as in front of family members or in public, sexual violence can communicate an intent to destroy the very foundation of a particular group. This is particularly true in social, cultural or religious communities where acts of sexual violence not only shame and humiliate the victim and her family, but also tear at the fabric of her entire community.

As Fionnuala Ni Aolain, a commentator who has written about sex-based violence and the holocaust, has noted—and here she was referring to public nudity and the removal of bodily hair for selection into concentration camps during WWII—in certain types of contexts, there is "no confusion between victim and perpetrator over the content of the message."[19] As she explains:

> Taking away a woman's clothing and exposing her person to the gaze of [unfamiliar] men was a crude and effective act of sexual violation. Nudity in a public context was an abnormal and grotesque experience for these women and the perpetrators understood that it would be experienced as such by them.[20]

She further notes that because many of these women were religiously observant, these acts were all the more shameful and humiliating.[21] The acts were, therefore, not only debasing but also intended to communicate a message that was, as she notes, "organically linked to the enterprise of cultural eradication in which destruction of the carriers of the community was a central plank of policy."[22] It seems plausible,

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18. Kelly Askin, *Jurisprudence of International Criminal Tribunals: Securing Justice for Some Survivors, in* LISTENING TO THE SILENCES: WOMEN AND WAR 125, 145-46 (Helen Durham & Tracey Gurd eds., 2005).

19. Fionnuala Ni Aolain, *Sex-Based Violence and the Holocaust—Reevaluation of Harms and Rights in International Law,* 12 YALE J.L. & FEMINISM 1, 21 (2000).

20. *Id.*

21. *Id.*

22. *Id.*

therefore, that when committed on a mass scale and in certain patterns, sex-based and gender-based violence may have what Ni Aolain has termed "communicative value," and as such, may have something to say about the intent of the perpetrator.

I. PROVING GENOCIDAL INTENT

The prosecution of genocide involves proving the two basic elements of the offense: the *actus reus*, or the actual physical act or acts by which genocide can be committed, and the *mens rea*, the perpetrator's genocidal intent.[23] It is this last element, the perpetrator's intent, that has proven extremely difficult to demonstrate. Indeed, as mentioned earlier, it was the problem of proof surrounding the *mens rea* element of genocide that precluded the UN Commission of Experts from finding that there had been a state policy of genocide in Darfur.[24]

The *ad hoc* international criminal tribunals have distilled the *mens rea* of genocide into two major elements: (1) discriminatory intent, whereby victims are targeted on account of their membership in a protected group (e.g., a national, ethnic, racial, or religious group), and (2) the specific intent to destroy the protected group in whole or in part. Thus, proving genocidal intent demands a showing that perpetrators not only targeted members of a protected group, but also that they did so specifically seeking to destroy the group, in whole or in part. It is generally not enough to show that an accused is aware that his acts will

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23. The statutory provisions giving the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) jurisdiction to try the crime of genocide both use the definition of genocide found in the Convention on the Prevention and Punishment of the Crime of Genocide, which defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical [sic], racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S., *available at* http://www1.umn.edu/humanrts/instree/x1cppcg.htm [hereinafter Genocide Convention].

24. *See Darfur Commission of Inquiry Report*, *supra* note 15, ¶ 518 and accompanying text.

result in the destruction of the group;[25] the accused must "seek to achieve the destruction, in whole or in part, of a national, ethnical [sic], racial or religious group, as such."[26] It is this specific intent that, in part, is said to distinguish genocide from other crimes, such as the crime against humanity of persecution.[27]

Recognizing the difficulty of proving genocidal intent, the *ad hoc* tribunals have determined that, in the absence of a confession, genocidal intent can be inferred from other "facts, the concrete circumstances, or a 'pattern of purposeful action.'"[28] Nevertheless, when inferential evidence is relied upon to prove genocidal intent, the tribunals have cautioned that the "inference must be the only reasonable inference available on the evidence."[29]

The *ad hoc* tribunals have enumerated a number of relevant factors when determining whether genocidal intent can be inferred from the evidence, including speeches or statements condemning or disparaging the targeted group, acts of violence against cultural symbols associated with the group, other policies of discrimination against members of the group, sheer number of victims/scale of atrocities, the repetitive and/or systematic nature of the abuses against the particular group, and the

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25. *See* Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment, ¶ 85 (Dec. 14, 1999) [hereinafter Jelisic Trial Judgment] (rejecting prosecution's argument that genocide exists where a defendant "*knows* that his acts will inevitably, or even only probably, result in the destruction of the group in question"). *See also* Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60-T, Judgment, ¶ 656 (Jan. 17, 2005).

26. Prosecutor v. Jelisic, Case No. IT-95-10-A, Judgment, ¶ 46 (July 5, 2001) [hereinafter Jelisic Appeals Judgment].

27. Jelisic Trial Judgment, *supra* note 25, ¶ 79. *See also* International Law Commission, 6 May-26 July 1996, *Report of the International Law Commission on the work of its forty-eigth session*, UN Doc. A/51/10, at 87-88 (1996) (identifying genocide's specific intent as the " distinguishing characteristic of this particular crime under international law").

28. Prosecutor v. Brdjanin, Case No. Case No. IT-99-36-T, Judgment, ¶ 704 (Sept. 1, 2004) [hereinafter Brdjanin Trial Judgment], *citing* Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment , ¶ 526 (July 31, 2003) [hereinafter Stakic Trial Judgment]. *See also* Prosecutor v. Krstic, Case No: IT-98-33-A, Judgment, ¶¶ 33-34 (Apr. 19, 2004) [hereinafter Kristic Appeals Judgment]; Jelisic Appeals Judgment, *supra* note 25, ¶ 47; Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgment (Reasons), ¶ 159 (June 1, 2001) [hereinafter Kayishema Appeals Judgment]; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment & Sentence, ¶ 63 (Dec. 6, 1999) [hereinafter Rutaganda Trial Judgment]; Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 93 (May 21, 1999) [hereinafter Kayishema Trial Judgment].

29. Kristic Appeals Judgment, *supra* note 28, ¶ 41.

brutality or gratuity of the violence employed.[30] Significantly, genocidal intent can also be inferred from "the perpetration of acts which violate, or which perpetrators themselves consider to violate, the very foundation of the group . . ."[31] Thus, the character and the nature of the acts in question, as well as the manner in which they are carried out, can constitute strong evidence of intent. However, few cases have recognized the existence of systematic sexual violence as evidence of genocidal intent.

One notable exception to this is a decision in the case of *Prosecutor v. Karadzic & Mladic.*[32] There, the ICTY found that the specific nature of the means used to achieve the objective of what the tribunal termed "ethnic cleansing" in the Bosnian conflict, including the systematic rape of women, tended to show that the acts were designed to reach "the very foundations of the group."[33] Noting that the systematic rape of women was in some cases committed to "transmit a new ethnic identity to the child" and in others to "dismember the group" through terror and humiliation, the Tribunal concluded that in combination with other factors, the systematic rape of the kind perpetrated during the Bosnian conflict could provide evidence of genocidal intent.[34]

In light of the mass scale, the extremely public and humiliating nature of the rapes, and the systematic manner in which acts of sexual violence were reportedly committed against Bosnian Muslim and Bosnian Croat women during the Bosnian conflict,[35] it seems reasonable that the Tribunal would have come to this conclusion. Indeed, the character and

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30. *See, e.g.*, Kristic Appeals Judgment, *supra* note 28, ¶ 33; Jelisic Appeals Judgment, *supra* note 27, ¶ 47; Kayishema Trial Judgment, *supra* note 25, ¶ 93; Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 580 (Aug. 2001) [hereinafter Kristic Trial Judgment]; Akayesu Trial Judgment, *supra* note 12, ¶ 523.

31. Prosecutor v. Karadzic & Mladic, Case nos. IT-95-5-R61 & IT-95-18-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 94 (July 16, 1999) [hereinafter Karadzic & Mladic Rule 61 Decision].

32. *Id.*

33. *Id.*

34. *Id.* ¶¶ 94-95.

35. *Id.* at 64; *Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia*, G.A. Res. 48/143, U.N. Doc. A/RES/48/143 (Jan. 5, 1994); *Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia*, G.A. Res. 49/205, U.N. Doc. A/RES/49/205 (Mar. 6, 1995); *Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia*, G.A. Res. 50/192, U.N. Doc. A/RES/50/192 (Feb. 23, 1996); *Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia*, G.A. Res. 51/115, U.N. Doc. A/RES/51/115 (Mar. 7, 1996).

the nature of the acts, as well as the manner in which they were carried out, indicate that they were likely linked to the aim of destroying or violating "the very foundation of the [victims'] group."[36]

Similarly, in the Rwandan conflict, Tutsi women were raped in public, gang raped, and raped using recurring methods, such as with foreign objects or in specially humiliating ways.[37] As the Trial Chamber in *Akayesu* described, "acts of rape and sexual violence . . . were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. . . "[38]

These patterns show that this was not the kind of rape that some would argue accompanies the lawlessness that exists in times of conflict. The accounts of many of the victims from the conflicts in the former Yugoslavia and Rwanda suggest that these rapes were conducted in a systematic manner under a plan conceived to wipe out the victims' group. As the Tribunal in *Akayesu* noted, the "rapes resulted in the physical and psychological destruction of the Tutsi women, their families and their communities."[39] Recognizing the devastating impact of sexual violence, the Tribunal concluded that the "sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself."[40]

II. "COMMUNICATIVE VALUE" OF PATTERN EVIDENCE OF SEXUAL VIOLENCE

Although the Tribunal in *Akayesu* did not use evidence of sexual violence in its analysis of genocidal intent, the context and manner in

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36. *See* Sharon A. Healey, *Prosecuting Rape under the Statute of the War Crimes Tribunal for the former Yugoslavia,* 21 BROOK. J. INT'L L. 327, 339 (1995) (noting that in the Bosnian conflict, rape was "used not only as an attack on the individual victim, but [was] intended to humiliate, shame, degrade and terrify the entire ethnic group").

37. For an account of the sexual violence perpetrated against Tutsi women during the Rwandan conflict see HUMAN RIGHTS WATCH, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath* (1996), *available at* http://www.hrw.org/reports/1996/Rwanda.htm.

38. Akayesu Trial Judgment, *supra* note 12, ¶ 731.

39. *Id.*

40. *Id.* ¶ 732.

which the rapes were committed suggests that the rapes themselves had what Ni Aolain has termed "communicative value."[41]

Not only did the rapes often result in severe physical injuries, sometimes causing permanent gynecological injury and destroying women's capacity to reproduce, but some rapes also resulted in what both victim and perpetrator considered to be children of a new ethnicity.[42] In patriarchal societies, such as in the Balkans, where the family name passes through the male, the perpetrators of rape no doubt knew that the victim and her community would experience forced pregnancy as a way to transmit a new ethnic identity to the child.[43] Perpetrated on a systematic scale, this pattern arguably provides persuasive evidence of an intent to "violate the very foundation of the group."[44]

Second, having lived among many of their victims in societies which place a high value on the chastity and purity of women, the perpetrators no doubt *knew and understood* that women raped or impregnated as a result of rape would likely be viewed in their own community as "tainted" and/or unworthy of marriage. There were reports, for instance, coming out of the former Yugoslavia that some husbands abandoned their wives after learning that they had been raped.[45] The public and systematic nature of these rapes, resulting in what perpetrators no doubt assumed would be the rejection and ostracizing of the victims by their families and communities, arguably *communicated* a clear message that the perpetrators intended to destroy not only the individual victim's physical and mental integrity, but also the group's internal cohesion and capacity to exist as such. Although *Akayesu* found this pattern to be evidence that the rapes constituted "genocide in the same way as any other *act*"[46] rather than as evidence of intent, the analysis demonstrates the communicative value of group

41. Ni Aolain, *supra* note 19, at 63.

42. *See, e.g.*, Karadzic & Mladic Rule 61 Decision, *supra* note 31, ¶ 64.

43. *Id.*

44. *Id.* ¶ 94.

45. Healey, *supra* note 36, at 340 (describing that in some instances "rape survivors who have spoken about being raped were asked to leave the community because the community did not want to be known as being a community of 'raped women'"); *see also* Karadzic & Mladic Rule 61 Decision, *supra* note 31, ¶ 94.

46. Akayesu Trial Judgment, *supra* note 12, ¶ 731 (emphasis added).

destruction that accompanies the perpetration of sexual violence in these kinds of circumstances.

Indeed, as the Tribunal noted in the *Karadzic & Mladic* Decision, the fact that the rapes were "performed with an effort to displace civilians . . . and to increase the shame and humiliation of the victims and of the community in order to force them to leave" was seen as evidence of a clear link to the intended policy of "ethnic cleansing."[47] The nature of these acts, in combination with the speeches justifying them and the massive scale of their destructive effect, was thus deemed sufficient evidence from which genocidal intent could be derived.[48]

III. Is Pattern Evidence of Sexual Violence Enough to Show Intent to Destroy "In Whole or In Part"?

However, genocidal intent requires the intent to destroy a group, *in whole or in part.* Is violating the reproductive capacity of women in a certain community and tearing at the social fabric of that community through humiliation and terror sufficient to show an intent to destroy a group, "in whole or in part"?

Although there is still much debate about the meaning of that phrase, the ICTY Appeals Chamber made clear in the *Kristic* case that "where a conviction for genocide relies on the intent to destroy a group 'in part,' the part must be a substantial part of the group."[49] The Chamber went on to explain that the "part targeted must be significant enough to have an impact on the group as a whole."[50] In assessing whether the targeted part of the group is substantial enough to meet this standard, the Chamber highlighted the need to consider not only the number of people targeted, but also the prominence within the group of the part targeted.[51] Elaborating on this last factor, the Chamber noted that "[i]f a specific part of the group is . . . essential to its survival, that may support a finding that the part qualifies as substantial."[52]

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47. Karadzic & Mladic Rule 61 Decision, *supra* note 31, ¶ 64.
48. *Id.* ¶¶ 64, 95.
49. Kristic Appeals Judgment, *supra* note 28, ¶ 8.
50. *Id.*
51. *Id.* ¶ 12.
52. *Id.*

Whether the destruction of a particular *part* of a group would have the necessary impact on the entire group's viability will, therefore, depend on the circumstances of each case. However, it is certainly arguable that destroying the lives and/or reproductive capacity of a significant number of women of a particular group may threaten the future survival of that particular group. Committing crimes against women of a protected group on a mass scale could, therefore, be strong evidence of the intent to commit genocide.

Although the ICTY Appeals Chamber ultimately reversed the Trial Chamber's genocide conviction in the *Kristic* case, the Appeals Chamber came to a similar conclusion with respect to the potential long-term impact of the destruction of part of a group on the group's reproductive capacity and therefore, potential to survive.[53] As the Camber noted,

> The Trial Chamber was . . . entitled to consider the long-term impact that the elimination of seven to eight thousand men from Srebrenica would have on the survival of that community. In examining these consequences, the Trial Chamber properly focused on the likelihood of the community's physical survival. As the Trial Chamber found, the massacred men amounted to about one fifth of the overall Srebrenica community. The Trial Chamber found that, given the patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of such a sizeable number of men would "inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica." Evidence introduced at trial supported this finding, by showing that, with the majority of the men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction.[54]

The Appeals Chamber went on to conclude,

> [t]his is the type of physical destruction the Genocide Convention is designed to prevent. The Trial Chamber found that the Bosnian Serb forces were aware of these consequences when they decided to systematically eliminate the captured Muslim men. The finding that some members of the VRS Main Staff devised the killing of the male prisoners with full knowledge of the detrimental consequences it would have for the physical survival of the Bosnian Muslim community in Srebrenica further supports the Trial

53. *Id.*
54. *Id.* ¶ 28 (citations omitted).

> Chamber's conclusion that the instigators of that operation had the requisite genocidal intent.[55]

Similarly, the perpetrators of mass rape in the former Yugoslavia and Rwanda had to be aware of the long-lasting impact sexual violence would have not only on individual women, some of whom were killed following the acts of sexual violence, but also on the capacity of the community as a whole to survive. Destruction of a significant part of the group, through physical and psychological injuries, social stigmatization and isolation, as well as the communication of sexually transmitted life-threatening diseases, could, therefore, constitute compelling evidence of the intent to destroy the group as a whole.

IV. CONSEQUENCES OF FAILURE TO PERCEIVE PATTERN EVIDENCE OF SEXUAL VIOLENCE AS EVIDENCE OF INTENT

The question, of course, is why does this matter? Why should we worry about the use of systematic rape and sexual violence as evidence of intent? One reason is that the way in which criminal conduct is charged and prosecuted matters. It matters not only because of the symbolic value and the message that prosecuting such crimes as genocide sends to both victims and perpetrators—that is, that crimes perpetrated exclusively or disproportionately against women and girls are just as serious as other offenses rising to the level of genocide[56]—

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55. *Id.* ¶ 29 (citations omitted).

56. The jurisprudence of the *ad hoc* tribunals has been inconsistent on the question of whether genocide should be considered more serious than other international crimes. *Compare* Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Judgment, ¶ 53 (July 9, 2004) (referring to genocide as the "crime of crimes"); Stakic Trial Judgment, *supra* note 28, ¶ 502 ("recall[ing] and adopt[ing] the description of genocide as 'the crime of crimes'") *with* Kayishema Appeals Judgment, *supra* note 28, ¶ 367 (noting that "there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are 'serious violations of international humanitarian law,' capable of attracting the same sentence"). Nevertheless, commentators point out that describing conduct as genocide rather than as war crimes or crimes against humanity continues to carry weightier consequences. *See, e.g.*, William A. Schabas, *Genocide, Crimes against Humanity, and Darfur: The Commission's Findings of Inquiry on Genocide*, 27 CARDOZO L. REV. 1703, 1717 (2006) (noting that "[l]egal arguments aside, describing acts as genocide has the consequence of stigmatisation to an extent that simply does not work in the same way with respect to crimes against humanity"). Many commentators, in fact, still view genocide as properly reserved for the "most heinous crime against humanity, namely the intentional physical destruction of an ethnic group." *Id.* at 1720. *See also* Allison M. Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 483 (2001)

but also because sanctions for perpetrators of genocide may be stiffer than for perpetrators of other types of international crimes.[57] Without a full understanding of the various functions that sex-based and gender-based violence perpetrated on a mass scale can play, these crimes are unlikely to be adequately investigated, charged or prosecuted.

As mentioned earlier, the report by the UN Commission of Experts on Darfur is a good example of the possible consequences of failing to consider pattern evidence of sexual violence in an analysis of genocidal intent. The Commission found evidence of genocidal intent lacking.[58] It could have examined whether the nature, scale and context in which the sexual violence occurred in Darfur was intended to communicate a message from which an intent to destroy the targeted group could be inferred. However, it chose not to.

Indeed, the Commission's report failed to recognize the multiple functions that rape can play in a genocidal scheme. As in Rwanda and the former Yugoslavia, the rapes committed in Darfur have been described as "often flagrant, occurring in full view of many people."[59] A recent report by Physicians for Human Rights suggests that, as in these other conflicts, the tactic of raping women in front of family members or "out in the open where people fleeing violence could see" was used intentionally "to publicly humiliate the husbands and shame the women, thus weakening familial and societal bonds."[60] In a society

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("Genocide poses more harm than crimes against humanity or war crimes because of the explicit intent to destroy a group, the discrimination animating the perpetrator's action, and the implicit element of collective action inherent in the commission of the crime."). Significantly, the Rome Statute reserves the crime of "direct and public incitement" for genocide, but not for crimes against humanity and war crimes. Rome Statute, *supra* note 14, art. 25(3)(e).

57. Again, though the practice of the tribunals has varied with respect to sentencing, the ICTY has recognized that "[t]he seriousness of the crime must weigh heavily in the sentence imposed irrespective of the form of the criminal participation of the individual." Celebici Trial Chamber Judgment, *supra* note 12, ¶ 1225.

58. *Darfur Commission of Inquiry Report*, *supra* note 15, ¶ 518.

59. Physicians for Human Rights, *Darfur Assault on Survival: A Call for Security, Justice and Restitution*, 29 (2006).

60. *Id.* at 30.

where "a profound social stigma is attached to rape,"[61] such conduct could arguably be read as evidencing an intent to destroy the group.

Similarly, as in the former Yugoslavia and Rwanda, identity is traced through patrilineal lines in Darfurian Society.[62] As a result, mass rape can be used as a way to communicate an intention to transmit a new identity to offspring and alter the ethnic composition of a community.[63] There have been reports, for instance, of rapes accompanied by "statements made by the *Janjaweed* perpetrators suggesting their intent to make a 'free baby' (implying that the non-Arabs are slaves) and to 'pollute' the tribal blood line . . ."[64] Although this pattern of sexual violence may well suggest an intent to destroy the targeted group of non-Arab tribes, this issue was not addressed by the Commission.[65]

Instead, the Commission focused its analysis of intent on the fact that the perpetrators of the atrocities in Sudan targeted primarily young men feared to be rebels or potential rebels[66] and concluded that the primary

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61. *Id.* at 29. *See also* AMNESTY INTERNATIONAL, *Darfur: Rape as a Weapon of War: Sexual Violence and its Consequences*, § 4.1 (July 19, 2004) [hereinafter Amnesty International, *Darfur: Rape as a Weapon of War*] ("The stigma attached to women who have been raped has far-reaching social and economic consequences on the rape victims. Married women can be 'disowned' by their husbands, although this is not always the case. As for unmarried survivors of rape, they may never be able to marry because they are stigmatized or considered to be 'spoiled' by their communities.").

62. Tara Gingerich & Jennifer Leaning, *The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan*, 18, Harvard School of Public Health (Oct. 2004), *available at* http://www.phrusa.org/research/sudan/pdf/report_rape-in-darfur.pdf.

63. *See* AMNESTY INTERNATIONAL, *Darfur: Rape as a Weapon of War, supra* note 61, § 4.1 ("In the specific social context of Darfur, in a society where rape is considered a taboo and a shame for the survivor of this violence, the child who is a result of rape will mostly be considered as a child of the 'enemy', a 'Janjawid child.'"); Gingerich & Leaning, *supra* note 62, at 27 (noting that "[r]ape has been a critical element in the sweeping, scorched-earth campaign launched by the Janjaweed and the GOS [Government of Sudan] against the non-Arab Darfurians" and that "[i]n using rape as a weapon of war, the Janjaweed and GOS military have sought to . . . tear apart the community by engaging in ethnic cleansing through 'pollution' of the blood line and by breaking family and community bonds").

64. *See, e.g.*, Gingerich & Leaning, *supra* note 62, at 18. *See also* Emily Wax, *"We Want to Make a Light Baby": Arab Militiamen in Sudan Said to Use Rape as Weapon of Ethnic Cleansing*, WASH. POST, June 30, 2004, at A01; Samantha Power, *It is Not Enough to Call it Genocide*, TIME MAG., Oct. 2004, at 1.

65. Although the Commission conceded that the systematic nature of rape, among other factors, "could be indicative of genocidal intent," *Darfur Commission of Inquiry Report, supra* note 15, ¶ 513, it offered no further analysis on this point and instead concluded that "there are other more indicative elements that show the lack of genocidal intent." *Id.*

66. *Darfur Commission of Inquiry Report, supra* note 15, ¶¶ 513-14.

purpose of these attacks, as well as the forcible expulsion of large sections of the population from their villages, amounted to "counter-insurgency warfare."[67]

In arriving at its conclusion that genocidal intent was lacking, the commission pointed out that not everyone who was targeted was killed.[68] However, as the jurisprudence of the ICTY indicates, the failure to kill every member of the group that the perpetrators have access to does not necessarily negate other evidence of genocidal intent.[69] As the Tribunal in *Kristic* pointed out:

> In determining that genocide occurred at Srebrenica, the cardinal question is whether the intent to commit genocide existed. While this intent must be supported by the factual matrix, the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent.[70]

In this case, the Commission could have explored whether the sexual violence committed against women and girls in these villages, in combination with the other abuses, indicated an intention to destroy the group, but it chose not to. Indeed, the Commission chose not to examine whether the systematic rape it characterized in an earlier part of the report as a means to terrorize, demoralize and humiliate the population was intended not only to harm the women but also to tear apart their community, thereby providing persuasive evidence of intent on the part of the perpetrators to eventually destroy the group. Had it done so, the Commission might have reached a different conclusion.

Unfortunately, the report by the UN Commission of Experts on Darfur is not the only example of the possible consequences of failing to consider pattern evidence of sexual violence in an analysis of genocidal intent. The case of *Prosecutor v. Kunarac et al.*, heard by the ICTY, provides another case in point. The indictment in that case focused almost exclusively on sex-based and gender-related crimes

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67. *Id.* ¶ 518.
68. *Id.* ¶ 513.
69. *Id.* ¶¶ 513-18.
70. Kristic Appeals Judgment, *supra* note 28, ¶ 32.

committed in the town of Foca.[71] The allegations included gang rapes,[72] rapes in detention,[73] rapes leading to permanent gynecological harm[74] and rapes accompanied by statements such as you will "now give birth to Serb babies."[75] The character and the nature of the acts in question, as well as the manner and context in which they were carried out, might well have been sufficient to permit an inference of genocidal intent. However, genocide was not charged. Although recognized by many commentators as a landmark indictment because of its near exclusive focus on gender-based crimes, at least one commentator has concluded that "[t]he primary shortcoming of the indictment was the omission of appropriate charges of genocide."[76]

Indeed, the prosecutor could have argued that the attempts of forcible impregnation and the systematic nature of the rapes in Foca suggested a clear link to a policy of destruction of the women and their associated group. Had the *nature, scale and context* in which the sexual violence occurred been recognized not only as evidence of criminal acts, but also as evidence of intent, perhaps charges of genocide would have been filed. As it was, the indictment was limited to crimes against humanity and violations of the laws of war.[77]

V. UNINTENDED CONSEQUENCES OF RECOGNIZING PATTERN EVIDENCE OF SEXUAL VIOLENCE AS EVIDENCE OF INTENT

Some feminist scholars have argued that highlighting the harm to the targeted group done by crimes committed against women of the group risks diminishing the harm done to all women in a conflict, regardless of the group to which they belong.[78] However, recognizing the many

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71. Prosecutor v. Kunarac et al., Case No. IT-96-23-PT, Third Amended Indictment (Nov. 8, 1999) [hereinafter Kunarac Third Amended Indictment].

72. *See, e.g., id.* ¶ 5.3.

73. *Id.* ¶ 1.3.

74. *Id.* ¶ 1.8.

75. *Id.* ¶ 6.1.

76. Kelly Askin, *Sexual Violence in Decision and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 119 (1999). Although Askin was referring to the original indictment in the case, the amended indictment retains many of the same types of allegations from which an intent to destroy could be inferred.

77. Kunarac Third Amended Indictment, *supra* note 71.

78. Karen Engle, *Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 785-86 (2005) (summarizing debate among

functions sexual violence perpetrated on a mass scale against a particular group can play arguably does quite the opposite. Acknowledging the dual functionality of rape and sexual violence as being relevant to proving both the pervasive extent to which women are harmed during these conflicts and the mental state of a perpetrator accused of genocide may help to more accurately describe the multiple harms that women and their communities experience, and to ensure that, unlike in the case of *Kunarac* and the report by the UN Commission of Experts on Darfur, the harms are fully investigated, considered, and sanctioned in an appropriate way.

A more powerful contention, and one that deserves some attention, is that *not all* women who suffered sexual violence in these conflicts were shamed, ostracized, or rejected by their communities. In fact, a recent article on wartime rape in Bosnia-Herzegovina notes that when one survivor was asked whether she felt shame or guilt because of what happened to her, she responded "The shame is theirs, not mine."[79] Nevertheless, very rarely do prosecutors have smoking-gun evidence of genocidal intent, and when the facts support an inference of intent with respect to a particular defendant, those facts should not be ignored. While care must be taken not to exaggerate claims or to allow the trauma that victims experience to define them or their communities in an overstated way, survivors of rape and sexual violence deserve to have the injuries they and their communities have suffered recognized and remedied as fully as possible.

CONCLUSION

I would submit that sex-based and gender-based violence committed in times of conflict or mass violence may, under certain circumstances, have "communicative value" and, as such, may have something to say about a perpetrator's mental state. In light of the extraordinary progress made in the last decade regarding the recognition of sexual violence as an international crime, this may be a propitious moment to take stock of these advances while also examining more closely how crimes committed against women and their communities can be more

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feminists scholars about "whether a focus on genocidal rape [in the Bosnian conflict] functioned to downplay the extent to which all women raped during war were victims").

79. *Id.* at 796, n.107.

appropriately sanctioned. Recognizing the many functions sexual violence can play in times of conflict, including the "communicative value" of such conduct, may help ensure that such crimes are adequately investigated and prosecuted.

On a final note, it is important to recognize that minimizing missed opportunities requires more than a creative interpretation of the law. It requires the will to interpret and implement that law in a way that effectively responds to the crimes committed. Although there has been overwhelming evidence of the systematic raping of women in nearly every conflict that has occurred since the beginning of time, those tasked with investigating, prosecuting and adjudicating culpability for such crimes have rarely been women. Though the record is improving, one need look no further than the tribunal set up in Iraq to try Saddam Hussein and other members of his regime. Despite "Iraq's long tradition of women in public life, dating back to the monarchy, and continuing into the Saddam years," [80] it appears that not a single judge, prosecutor or defense attorney involved in the tribunal is a woman.[81]

Although certainly no guarantee, recent experience has shown that the participation of women in war crimes tribunals can make a difference. The early experience of the ICTY and ICTR is instructive. Sexual violence charges did not appear in many of the original indictments brought before these tribunals.[82] Significantly, it was not until female judges—Judge Elizabeth Odio-Benito in the case of the ICTY and Judge Navantham Pillay in the case of the ICTR—highlighted the absence of such charges to the parties litigating before them that the indictments were amended to include charges of sexual violence.[83]

Taking into account some of the lessons learned from the ICTR and ICTY, the Statute of the International Criminal Court requires that, in the selection of judges, prosecutors and other staff, the need for legal expertise on gender-related crimes be taken into account.[84] This lesson

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80. *See, e.g.,* Simone Monasebian, *Sex Matters: The Invisibility of Women at the Iraqi Tribunal,* Jan. 30, 2006, *available at* http://www.law.case.edu/saddamtrial/entry.asp?entry_id=72.

81. *Id.*

82. Richard Goldstone & Estelle Dehon, *Engendering Accountability: Gender Crimes Under International Law*, 19 NEW ENG. J. PUB. POL'Y 121, 123-24 (2003).

83. *Id.*

84. Rome Statute, *supra* note 15, arts. 36(8) and 44(2).

should apply not only to the ICC, but also to all other international or internationalized efforts to hold perpetrators accountable for atrocities committed in times of armed conflict or mass violence. Until then, we risk missing critical opportunities to bring justice to victims of gender-based and sex-based crimes and their communities.