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How Sex Destroys People: Genocidal Rape in the Bosnian War (1992-95), and the Legacy of the ICTY*

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«*Bosnian Muslim refugees nearby could see the rape but could do nothing about it because of Serb soldiers standing nearby. Other people heard women screaming, or saw women being dragged away. Throughout the night and early the next morning, stories about the rapes and killings spread through the crowd and the terror in the camp escalated*».

(ICTY, Trial Chamber, *Prosecutor v. Krstić*, 2001).

1. Introduction

Sexual violence in wartime has been considered throughout the history as an unfortunate but inevitable consequence of armed conflicts. As such, it has been long seen by the international community as a by-product of war, rather than a war crime

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or a crime against humanity[1]. The first attempt aimed at dealing with sexual violence under international humanitarian law can be found in the 1907 Hague Convention. Although it did not enumerate rape or other forms of sexual violence as a violation of the laws and customs, under the broad interpretation of its Article 46 rape could be deemed as a crime against «family honor and rights»[2]. This noble but subtle attempt was not sufficient to prevent the mass rapes against women that occurred in WWII, yet neither the Nuremberg Tribunal nor the Tokyo Tribunal had fully addressed these abuses[3]. The subsequent 1949 Geneva Conventions and the 1977 Additional Protocols – also called the law of armed conflict – did not classify sexual violence within the categories of «grave breaches» or «war crimes» subject to universal jurisdiction and, therefore, capable to be prosecuted by an international tribunal or domestic courts. Rape, enforced prostitution, and indecent assault were designated as attacks against the "honor" of women or as an «outrage upon personal dignity»[4].

The turning point in treating sexual violence under international law arrived only in the early 1990s, with the conflict that exploded in the former Yugoslavia. Stories about mass rapes and other forms of sexual atrocities that took place, especially in the Bosnian war (1992-95), received extraordinary worldwide attention, thus putting the UN under pressure to condemn and end the violence[5]. The UN answer was the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993[6], which formation – along with its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR) set up in 1994[7] – signaled the advent of a new understanding of sexual violence in war. ICTY's creators explicitly envisioned the tribunal as a place to prosecute sex crimes under international criminal law[8], while

[1] See generally S.L. Russell-Brown, *Rape as an Act of Genocide*, in *Berkeley Journal of International Law*, 21, 2, 2003, p. 350.

[2] See T. Meron, *Rape as a Crime under International Humanitarian Law*, in *American Journal of International Law*, 87, 3, 1993, p. 425, noting that in practice it has seldom been so interpreted.

[3] Sexual violence was not classified as a war crime or a crime against humanity in the Nuremberg and Tokyo Charters. Despite this, the Tokyo Tribunal specifically included rape as a violation of recognized customs and conventions of war. Although merely as secondary offense, it had also prosecuted rape as a war crime with the result that some Japanese military and civilian officers were found guilty of rape. See N.E. Erb, *Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court*, in *Columbia Human Rights Law Review*, 29, 2, 1998, p. 410.

[4] *See* J. Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, in *International and Comparative Law Quarterly*, 46, 1, 1997, p. 57, noting that in reality, a woman's honor is a concept constructed by men for their purposes and that it has very little to do with women's perception of sexual violence, who experience it as torture.

[5] M. Brashear, *"Don't Worry. These girls have been raped once." Analyzing Sexual Violence in the Bosnian Genocide and the Response of the International Criminal Tribunal for the Former Yugoslavia*, in *Voces Novae*, 9, 5, 2018, p. 1.

[6] S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/827/1993 (1993).

[7] S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/INF/50 Annex (1994).

[8] C. Powell, *"You Have No God": An Analysis of the Prosecution of Genocidal Rape in International Criminal Law*, in *Richmond Public Interest Law Review*, 2017, p. 31.

Article 5 of its founding Statute expressly included rape as a crime against humanity[9]. At the same time, sexual violence seemed to have taken on a new form in the Bosnian conflict. It appeared not only as gender-based violence but also as an official policy of war aimed at destroying an unwanted ethnic/national group[10]. This urged to consider wartime rapes not only as war crimes and human rights violations but also as genocidal acts. The concept of «genocidal rape» first emerged in the feminist debates of the early 1990s[11], and later started to be prosecuted in international criminal tribunals. In 1998, the ICTR became the first international court that successfully prosecuted rape and sexual assault as constituent acts of genocide[12].

This article aims to explore the link between sexual violence and genocide in relation to the 1992-95 Bosnian war. The focus is on three main issues. First, the article discusses the nature of sexual violence in the Bosnian conflict and in relation to this introduces the feminist debate about «genocidal rape». Second, it explores how and in which ways sex crimes may function as a constituent act of genocide under international law by referring to the 1948 Genocide Convention and the seminal ICTR's *Akayesu case*. Finally, starting from the 2001 *Krstić case* – the first ICTY's genocide conviction – the article addresses the extent to which the Yugoslav Tribunal has prosecuted rape and other forms of sexual violence as constituent acts of the Bosnian genocide[13]. It is argued, on the one hand, that contrary to the ICTR, the ICTY has failed to prosecute sex crimes as genocidal acts, and some reflections on the possible reasons for this failure are introduced. On the other hand, the article maintains that the concept of «genocidal rape» remains relevant under international law as it helps to clarify the massive rapes politics that systematically occurs in what Mary Kaldor calls «new wars» driven by nationalist politics[14], and in which sex crimes do not amount solely to gender crimes but also to a crime against the group to which a woman is assumed to belong[15].

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[9] Under the weight of the events in the former Yugoslavia, a broader view that the Geneva Conventions and customary international law provide a legal basis for criminalizing rape has been accepted. For example, the International Committee of the Red Cross (ICRC), which played an influential role in drafting the Conventions, included rape under the grave breach of «willfully causing great suffering or serious injury to body or health». In addition, the US Department of State declared that it considers rape a war crime or a grave breach under customary international law and the Geneva Conventions and that it can be prosecuted as such. See T. Meron, *op. cit.*, p. 426.

[10] *See* J. Campanaro, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, in *Georgetown Law Journal*, 89, 8, 2000, p. 2557.

[11] See generally R. Jaleel, *Weapons of Sex, Weapons of War. Feminisms, ethnic conflict and the rise of rape and sexual violence in public international law during the 1990s*, in *Cultural Studies*, 27, 1, 2013, p. 115.

[12] ICTR, 2 September 1998, Case No. ICTR-96-4-T, *Prosecutor v. Jean-Paul Akayesu*, Trial Judgment.

[13] IT, *Prosecutor v. Radislav Krstić* Case No. IT-93-33-T, Trial Judgment, August 2, 2001.

[14] M. Kaldor, *New and Old Wars. Organised Violence in a Global Era*, Cambridge, 2012.

[15] Although men were also raped in the Bosnian war, this article focuses limitedly on the mass rapes against women. For an attempt to apply the concept of "genocidal rape" to males who have been victims of sexual violence see C. Bradford Di Caro, *call it what it is: Genocide through male rape and sexual*

2. The Nature of Wartime Sex in the Bosnian Conflict (1992-95)

Sexual violence in armed conflicts may take different forms, including acts such as rape, sexual assault, sexual slavery, forced prostitution, forced sterilization, forced abortion, and forced impregnation[16]. While these different forms of sexual violence have historically represented a recurring phenomenon in all types of armed conflicts, regardless of nationality or geographic location, sexual atrocities that took place in the Bosnian war have been frequently considered unique or different from those committed in previous conflicts[17]. Several interconnected reasons may explain why the events in Bosnia were set apart from the rapes from earlier conflicts.

On the one hand, the Yugoslav Wars of the 1990s have represented the major conflict in Europe since WWII. The Bosnian war, in particular, became the archetypal example of the new post-Cold war model of warfare – ethnic and interstate conflicts largely originating from identity politics[18]. As Nicholas R.L. Haysom argues, the identity-driven nature of these conflicts renders them, in terms of intensity, more brutal, cruel, and emotionally charged than previous types of warfare, with civilians (especially women and children) as principal targets[19]. Inger Skjelsbæk further observes that these are wars where friends and family could turn against each other simply with the recognition that the Other is a Serb or Bosniak, and in which the weapons of war are not the latest in military technology, but knives, Kalashnikovs, and rape[20]. In this sense, the Bosnian war was especially violent. It resulted in more than 100,000 individuals killed[21], 350,000 wounded[22], 20,000 to 60,000 women and girls raped[23], and more than 7,000 Bosnian Muslim men and boys executed in Srebrenica[24]. During the

violence in the former Yugoslavia and Rwanda, in *Duke Journal of Comparative & International Law*, 30, 2019, p. 79.

[16] See generally K.D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, in *Berkeley Journal of International Law*, 21, 2, 2003, p. 305.

[17] I. Skjelsbæk, *The Elephant in the Room. An Overview of How Sexual Violence came to be Seen as a Weapon of War*, Peace Research Institute Oslo (PRIO), Report to the Norwegian Ministry of Foreign Affairs, May 2010, p. 2.

[18] M. Kaldor, *op cit*., p. 32.

[19] N.R.L. Haysom, *Constitution Making and Nation Building*, in R. Blindenbacher, A. Koller (eds.), *Federalism in a Changing World – Learning from Each Other*, London, 2003, p. 216.

[20] I. Skjelsbæk, *The Elephant in the Room*, cit., p. 2.

[21] BBC, Bosnia war dead figure announced, 21 June 2007, in http://news.bbc.co.uk/2/hi/europe/6228152.stm.

[22] Center for Justice and Accountability (CJA), *Bosnia and Herzegovina: Torture and Ethnic Cleansing in the Bosnian War*, in https://cja.org/where-we-work/bosnia/.

[23] M. Lent Hirsch, *Conflict Profile: Bosnia*, WMC's Women Under Siege Project, The Women's Media Center, US, 2012, in http://www.womenundersiegeproject.org/conflicts/profile/bosnia.

[24] United States Holocaust Memorial Museum (USHMM), *Confront Genocide-Cases-Bosnia Herzegovina*, USHMM, Washington DC, 2015, in http://www.ushmm.org/confront-genocide/cases/bosnia-herzegovina.The Srebrenica-Potočari Memorial Center and Cemetery for the

war severe atrocities were committed: mass killings, detention camps, torture, ethnic cleansing, sexual violence, and genocide[25].

On the other hand, the issue of wartime sexual violence became public within the first months of the conflict. It was *Newsday*'s journalist, Roy Gutman, the first who reported about mass rapes in the Bosnian war. In August 1992, Gutman launched a series of articles suggesting that Serb forces were engaged in systematic and organized rapes of Muslim and Croat women in a campaign of ethnic cleansing. He also unveiled to the world the existence of rape camps, where women were detained and routinely raped[26]. By the end of 1992, the world was stunned by numerous other media stories exposing and denouncing the widespread sexual violence in the Bosnian conflict[27]. This led international organizations and other human rights groups to set up their fact-finding missions and investigate the abuses. For example, in April 1992, the UN Commission on Human Rights appointed Tadeusz Mazowiecki as Special Rapporteur about Human Rights in former Yugoslavia. After requesting an international team of medical experts to investigate rape, the 1993 Mazowiecki Report concluded that there was «clear evidence that Croat, Muslim, and Serb women have been detained for extended periods of time and repeatedly raped» and that «in Bosnia and Herzegovina and in Croatia, rape has been used as an instrument of ethnic cleansing» with no attempts made by Serb leaders to stop or punish rape[28].

The (then) European Community (EC) also set up its mission to investigate the treatment of Bosnian Muslim women in the former Yugoslavia. The 1993 EC Report concluded that the rapes of Muslim women were perpetrated on a wide scale and pointed towards a deliberate pattern. It also stressed that rapes were committed with the intent to ethnically cleanse regions in Bosnia and Herzegovina and that Serb

victims of the 1995 genocide indicates that at least 8,372 men and boys were killed. See *https://srebrenicamemorial.org/en.*

[25] L. Gačanica, C. Finkeldey, *Calling war atrocities by their right name. Regulating a Ban on Denial, Trivialisation, Justification or Condonation of Genocide, the Holocaust, Crimes against Humanity or War Crimes*, Sarajevo, 2019, p. 6.

[26] See R. Gutman, *Bosnia Rape Horror*, in *New York Newsday*, 9 August 1992, p. 5.

[27] See M. Brashear, *"Don't Worry. These girls have been raped once"*, cit., 14, noting that at one point, approximately 5,000 journalists were reporting on the war in Bosnia and Herzegovina and that between April 1992 and September 1993, approximately 139 media stories ran in major world publications with «rape in Bosnia» in the headline of their story. At first, this unusual visibility given to the mass rapes in Bosnia was welcomed, but the media coverage became soon sensationalist, with the graphic depiction of atrocities and women shown on television without protecting their identities asked to talk about their horrible experiences. See D. Knezevic, *Abused and Misused: Women and Their Political Exploitation,* in *Connexions*, 42, 1993, p. 12, who argues that journalists raped symbolically women again. See also A. Doja, *Politics of mass rapes in ethnic conflict: a morphodynamics of raw madness and cooked evil*, in *Crime, Law and Social Change*, 71, 5, 2019, p. 547, stating that raped Bosnian women possibly pregnant and speaking English were in great demand.

[28] United Nations, *Report on the Situation of Human Rights in the former Yugoslavia*, Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission of Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, (E/CN.4/1993/50), 1993.

soldiers forcibly impregnated and detained women until the pregnancy could not be terminated. These acts were denounced as war crimes[29]. The 1993 CIA Report further uncovered 34 facilities throughout Bosnian territory where women were held and raped[30]. Similar evidence can be found in the 1993 Helsinki Watch Report, which concluded that rape was used by all warring parties and listed different ways in which the rapes were carried out, including rape camps, concentration camps, people's homes, and brothels[31]. The 1993 Amnesty International Report also stressed the organized and systematic use of sexual violence in rape camps and specified that «all sides have committed these abuses, but concluded that […] Muslim women have been the chief victims, while Serb armed forces the main perpetrators»[32]. The 1994 CEDAW Concluding Comments additionally specified that «Serbs had a variety of goals in mind when they systematically rape Bosnian women. The factual accounts support the assertion that rape in the Serb-Bosnian war is a display of the conquest of Bosnian women, acts as a tool of terror and humiliation, serves as a form of revenge against other men, and facilitates genocide»[33].

Yet the most influential international document about sexual violence in the Bosnian war is the 1995 Final Report of the UN Commission of Experts (also known as the Yugoslav Commission) set up by the UN Security Council to investigate violations of international humanitarian law committed in the former Yugoslavia[34]. In its Final Report, the Commission of Experts concluded that although all sides to the conflict had perpetrated sexual violence, the vast majority of the victims were Bosnian Muslims, the vast majority of the perpetrators were Bosnian Serbs and that Serbs reportedly ran over 60 per cent of the detention sites where sexual assault occurred. Accordingly, there was strong, although not conclusive, evidence of a systematic pattern of sexual assault by the Bosnian Serbs. The same Report indicated that rape was used as a part of the policy of ethnic cleansing, especially in rape camps, where forced impregnation was institutionalized. It also introduced the definition of ethnic cleansing by describing it as relatively new expression that, in the context of the conflicts in the former Yugoslavia, means «rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area»[35].

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[29] EC Investigative Mission into the Treatment of Muslim women in the Former Yugoslavia, *Report on Rape in Bosnia and Herzegovina*, European Council, Copenhagen, 1993.

[30] CIA Directorate of Intelligence Memorandum, *Rape as an Instrument of Ethnic Cleansing*, 2 April 1993. Released October 2013 by CIA Historical Collections Division.

[31] Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, vol. II, Human Rights Watch, 1993.

[32] Amnesty International, *Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces*, January 1993, 8, AI Index: EUR 63/01/93 (1993).

[33] United Nations, *Concluding comments of the Committee on the Elimination of Discrimination Against Women: Bosnia and Herzegovina*, February 1994, p. 4.

[34] M. Cherif Bassiouni, *Investigating War Crimes in the Former Yugoslavia War 1992–1994. The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Cambridge, 2017.

[35] United Nations, *Final report of the Commission of Experts established pursuant to Security Council resolution 780 (1992),* doc. S/1994/674/Add. 2, vol. V, 28 December 1994, *Rape and sexual attacks*, 12,

There are at least three common features in relation to the Bosnian rapes that emerged from the above-mentioned media reports and international documents. First, although all sides to the conflict have committed rapes, Muslims comprised most victims, and the Serbian military and paramilitary forces bore the responsibility for most human rights abuses, including rape. Second, rape was used as a weapon of war, meaning that it appeared systematic and organized, or as Catharine MacKinnon put it: «this is ethnic rape as an official policy of war [...]. It is rape under orders: not out of control, under control»[36]. In other words, rape and other sexual atrocities did not appear as random acts but as a policy planned at the highest levels of the Bosnian Serb military structure. Finally, rape and sexual violence seemed to be used as an integral part of the policy of ethnic cleansing, considered by many, especially in the early 1990s, as a euphemism for genocide[37]. The parallelism between ethnic cleansing and genocide was probably facilitated by the UN Security Council, which passed a Resolution in December 1992 stating that the ethnic cleansing carried out by Serb military forces was a form of genocide[38]. Therefore, it was because ethnic cleansing was the purpose behind the rape of Muslim women and because the ethnic cleansing was associated with the genocide that sexual violence in the Bosnian war received so much attention and was differentiated from the rapes that occurred in earlier armed conflicts.

Estimates of the number of women and girls who had been raped vary widely from 20,000 to 60,000[39]. The exact number of raped women remains unknown because

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para. 84. The use of rape and sexual assault as a tool of ethnic cleansing was further confirmed by the so-called RAM Plan, with which the Serb military policy to ethnically cleanse Bosnia and Herzegovina was developed, and which mentioned raping women and children as an efficient and integral tool in the process of ethnic cleansing of Muslims in Bosnia and Herzegovina. See T.A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, in *Human Rights Quarterly*, 20, 2, 1998, p. 356.

[36] See C.A. MacKinnon, *Crimes of War, Crimes of Peace*, in *UCLA Women's Law Journal*, 4, 1, 1993, p. 65, who described death camps and rape camps as instruments of genocide and ethnic cleansing.

[37] See generally R. Gutman, *A Witness to Genocide: The First Inside Account of the Horrors of "ethnic cleansing" in Bosnia*, Shaftesbury, 1993.

[38] GA Res 47/121, *The Situation in Bosnia and Herzegovina*, UN Doc A/RES/47/121, 18 December 1992.

[39] At the end of 1992, the Bosnian government stated that the number of women who had been raped was about 14,000, while the Bosnian Ministry of the Interior set the number at around 50,000. The 1993 EC Report estimated that 20,000 women of Muslim ethnicity were raped by Bosnian Serb soldiers – a number which has been criticized by UNHCR representatives who considered it as subjective and superficial, believing that the number was probably lower. The Commission for Gathering Facts on War Crimes in Bosnia and Herzegovina set the number of raped women at 20,000. The Sarajevo State Commission for Investigation of War Crimes estimates that the number up until October 1992 was 50,000, while the Coordinative Group of Women's Organizations of Bosnia and Herzegovina estimates that between 20,000 and 50,000 women were raped. See I. Skjelsbæk, *Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina*, in *Bosnia-Herzegovina*, *Feminism & Psychology*, 16, 2006, p. 398. Catharine MacKinnon estimated that more than 50,000 women and girls had been raped and another 100,000 had been killed, without providing,

during the war, alongside the attempts to document the crimes, the estimation of numbers has been used and misused for political reasons, while the post-conflict response to the wartime rape has been marked by amnesia and silence[40]. Yet the exact number of women that suffered that form of violence seems also less important, considering that, especially in rape camps, women were repeatedly gang raped until impregnated, sometimes by more than forty men in one day[41].

3. Theorizing Genocidal Rape: A Feminist Debate

The international attention given to sexual violence in the Bosnian war and the special place it assumed for the first time in human rights discourses represented a crucial moment for feminists around the world to intervene and play a concrete role in reconsidering the treatment of rape under international law[42]. However, feminist international legal theorists and activists did not always share the same views, and a debate developed about how to approach and prosecute Bosnian rapes under international criminal law. The most contentious issue was whether the mass rapes should be viewed as genocidal acts[43]. Two opposite positions dominated the discussion. The first, called the «global feminist»[44] (or rape-on-all-sides)[45] view, has positioned at the center of the analysis the gendered nature of the crime of rape, viewing it as a common weapon of war used by all parts of the conflict, and directed against women because women. The second, known as «genocidal rape» view, positioned the emphasis on ethnicity and viewed the rapes by Serbs against Muslim women (and to a lesser extent Croat women) not only as a weapon of war but also as a form of genocide[46].

The term «genocidal rape» was firstly used by Beverly Allen, who defined it as «a military policy of rape for the purpose of genocide currently practiced in Bosnia-Herzegovina and Croatia by members of the Yugoslav Army, the Bosnian Serb forces,

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however, any evidence to support these estimates. See S.A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, in *Brooklyn Journal of International Law*, 21, 1995, p. 361.

[40] See T. Todorova, *'Giving Memory a Future': Confronting the Legacy of Mass Rape in Post-conflict Bosnia-Herzegovina*, in *Journal of International Women's Studies*, 12, 2, 2011, p. 3, noting that ensuing silence on the mass rapes has been considered necessary for the reconciliation and the establishment of an inclusive Bosnian national identity.

[41] See P.A. Weitsman, *The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda*, in *Human Rights Quarterly*, 30, 3, 2008, p. 569.

[42] See J. Batinic, *Feminism, Nationalism, and War: The 'Yugoslav Case' in Feminist Texts*, in *Journal of International Women's Studies*, 3, 1, 2001, p. 1.

[43] K. Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, in *The American Journal of International Law*, 99, 4, 2005, p. 779.

[44] R.M. Hayden, *Rape and Rape Avoidance in Ethno-National Conflicts: Sexual Violence in Liminalized States*, in *American Anthropologist*, 102, 1, 2000, p. 28.

[45] K. Engle, *op. cit.*, p. 790.

[46] See e.g. R.M. Hayden, *Rape and Rape Avoidance in Ethno-National Conflicts*, cit., p. 28.

Serb militias in Croatia and Bosnia-Herzegovina, the irregular Serb forces known as Chetniks, and Serb civilians»[47]. Catharine MacKinnon – one of the most prominent proponents of the «genocidal rape» position – further developed a distinction between every day wartime rape and the rapes committed by Serb forces by comparing the latter with the Holocaust[48]. MacKinnon never denied the gendered nature of the crime of rape or suggested that the rapes of Serbian women should not be prosecuted. She tried to stress the intersectionality of genocidal rape, considering it a crime that implicates both gender and ethnicity. According to MacKinnon, feminists who viewed the Bosnian rapes as just another instance of aggression of all men against all women were involved in whitewashing the atrocities[49].

The opposite side of the debate expressed numerous concerns in relation to this focus on «genocidal rape». For example, Susan Brownmiller claimed that «Balkan women, whatever their ethnic and religious background, and in whatever fighting zone they happen to find themselves […] are victims of rape in war»[50]. Rhonda Copelon further stressed that rape and genocide are each atrocity and that an emphasis on genocidal rape risks rendering rape invisible once again. What Copelon feared was that an overemphasis on genocidal rape could result in an «elision of rape in genocide», thus obscuring the gendered nature of the crime of rape. She also feared that raped victims will lose their subjectivity because the crime of genocidal rape would be viewed primarily as a crime perpetrated against the group and not against individual women, as well as that the rape in armed conflicts, outside the context of genocide, would not get appropriate attention. Copelon, however, never argued that rape should not be

[47] See B. Allen, *Rape Warfare. The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Minneapolis-London, 1996, p. VII, claiming that three main forms of genocidal rape existed: a) rapes in public to force Bosnian Muslims to leave their villages, thus furthering the genocidal plan of ethnic cleansing; b) rapes in concentration camps, often as part of torture preceding death, and c) rapes in rapes camps, as either part of the torture preceding death or part of torture leading to forced pregnancy.

[48] See C.A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, in A. Stiglmayer (ed.), *Mass Rape. The War Against Women in Bosnia-Herzegovina*, Lincoln and London, 1994, p. 186, noting that «Genocide does not come from nowhere, nor does rape as a ready and convenient tool of it […]. These rapes are to everyday rape what the Holocaust was to everyday anti-Semitism. Without everyday anti-Semitism a Holocaust is impossible, but anyone who has lived through a pogrom knows the difference […]. What is happening here is first a genocide, in which ethnicity is a tool for political hegemony; the war is an instrument of the genocide; the rapes are an instrument of the war […]. This is ethnic rape as an official policy of war in a genocidal campaign for political control».

[49] See C.A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, cit., p. 188, emphasizing that «The result is that these rapes are grasped in either their ethnic or religious particularity, as attacks on a culture, meaning men, or in their sex specificity, meaning as attacks on women. But not as at once. Attacks on women, it seems, cannot define attacks on a people. If they are gendered attacks, they are not ethnic; if they are ethnic attacks, they are not gendered. One cancels the other. But when rape is a genocidal act, as it is here, it is an act to destroy a people. What is done to women defines that destruction. Also, aren't women a people?».

[50] S. Brownmiller, *Making Female Bodies the Battlefield*, in A. Stiglmayer (ed.), *Mass Rape*, cit., p. 180.

prosecuted as genocide but claimed instead that genocidal rape should be defined more broadly, and that it can happen on all sides of the conflict[51].

In other words, one side of the debate insisted that the international criminal system should respond equally to rapes committed on all sides; the other side promoted the idea of the uniqueness of genocidal rape by claiming that only rapes committed by Serbs should be prosecuted as genocide[52]. Although probably less studied, feminists in former Yugoslavia also split into two branches, called by Jelena Batinic the «patriotic» (or nationalist) group and the «non-nationalist» (or anti-nationalist) group[53]. The patriotic group gave greater priority to national affiliations and draw an analogy between «women as victims» and «nation as victim», thus moving toward a sort of feminist nationalism. This branch accepted the genocidal rape position and viewed the mass rapes under the orders of Serb forces as a policy of genocide against non-Serbs. The non-nationalist branch disagreed and stressed that women were harmed on all sides of the conflict. The latter group favored women's solidarity regardless their nationality and condemned men on all sides of the conflict for the rapes[54].

Paradoxically, both positions ended up resembling the approaches to the rapes propagated by the Balkans' nationalisms. On the one hand, the notion of ethnic rape was often invoked by nationalist governments for propaganda purposes. For example, in Serbia, with the aim to justify the military action in Bosnia, the Serbian women were constructed as a symbol of suffering, and Croats and Muslims as the rapists of "our" mother, daughters, and sisters. The same propaganda pattern was used in Croatia, where Muslim and Croat women became the symbol of victimhood, while Serb men were turned into the symbol of all rapists[55]. Anti-nationalist feminists who wrote critically about ethnic rapes and maintained gender central in their analysis were proclaimed witches and traitors of the nation[56]. On the other hand, the feminist insistence that women of all ethnic groups were victims of rape perpetuated the position of everyone is guilty, which turned out to be a moral obfuscation and the final position of Serbian nationalism[57].

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[51] R. Copelon, *Surfacing Gender: Reconceptualizing Crimes against Women in Time of War*, in A. Stiglmayer (ed.), *Mass Rape*, cit., p. 197 ff.

[52] In this sense, see also S.L. Russell-Brown, *op. cit.*, p. 363.

[53] J. Batinic, *Feminism, Nationalism, and War*, cit., p. 3 ff.

[54] *Ibidem*.

[55] *Ivi*, p. 9.

[56] The reference is to the case of «Witches from Rio». It started in 1992 with an article published in the Croatian weekly news magazine *Globus*, entitled *Croatian Feminists Rape Croatia*. The article accused five women intellectuals (Jelena Lovrić, Rada Iveković, Slavenka Drakulić, Vesna Kesić and Dubravka Ugrešić) to hide the truth about the use of sexual violence by Serb forces due to their insistence that Croatian soldiers also committed rapes in war. See C. Pistan, *Satira e libertà di espressione tra comunismo, democrazia e nazionalismo: i casi dell'Ungheria e della Croazia*, in *Percorsi costituzionali*, 1, 2018, p. 149.

[57] See A. Doja, *Politics of mass rapes in ethnic conflict*, cit., p. 554. Some anti-nationalist feminists in former Yugoslavia differentiated between victims and perpetrators. For example, Slavenka Drakulić

Surprisingly enough, what exactly made rapes "genocidal" received less attention. According to Karen Engle, the most recurrent arguments in feminist discussions considered rape as a form of genocide because it was organized and systematic, used as a policy of ethnic cleansing, and to socially ostracize or forcibly impregnate Bosnian Muslim women[58]. Particular attention was given to forced impregnation. Those who assumed that it amounts to a form of genocide insisted that the purpose of rapes in rape camps was to produce children to increase the Serbian population on the territory. Women were ganged raped for an extended period, and if a woman became pregnant she would be held in the rape camp until it was too late to procure an abortion safely. Frequently, Serb soldiers told women that by impregnating them they would create Chetnik babies who would kill Muslims when they grew up. According to this logic, the ethnicity of the father is decisive in determining the ethnicity of the child. Yet, as Beverly Allen observed, this is conceivable only if one completely rejects both science and culture:[59] in genetic terms, the fetus shares an equal amount of genetic material between the non-Serb mother and the Serbian father. Culturally, unless that child is raised by the father within a Serbian community, he or she will assimilate the cultural, ethnic, religious, and national identity of the mother. Todd A. Salzman further observed that even if biologically the child shares an equal amount of genetic material from the male and female, the idea that the male determines a child's ethnic identity, although misinformed, is cross-cultural as its acceptance is not limited to the Serbs but is supported by Muslim and Croat men and women as well. In other terms, a child born from rape by a Serb will always be considered Serbian because this belief is supported by both perpetrators and victims. Salzman also noted that no matter how much one argues against such a perspective, persons (mis)perceptions often dictate how they perceive reality regardless of the facts[60].

There were also some attempts aimed at identifying the causes of (genocidal) sexual violence in the Yugoslav Wars. MacKinnon, for example, adapted to the former Yugoslavia the theory of pornography she previously elaborated for the US. For MacKinnon, pornography «saturated the former Yugoslavia» and was one of the causes of sexual violence in the war of the 1990s. With this war, she argued, pornography emerged as a tool of genocide, thus suggesting that pornography can produce anywhere what it produced in the Yugoslav sphere because of an uncensored

wrote: «Of course, Croats and Muslims have raped Serbian women in Bosnia too, but the Serbs are the aggressors, bent on taking over two-thirds of the territory. This does not justify Croat and Muslim offenses, but they are in a defensive war and do not practice systematic and organized rape». See S. Drakulic, *Mass Rape in Bosnia: Women Hide Behind a Wall of Silence*, in *The Nation*, 1 March 1993, p. 253.

[58] K. Engle, *op. cit.*, p. 788 ff.

[59] See B. Allen, *Rape Warfare*, cit., p. 96 ff., observing that «Serb 'ethnic cleansing' by means of rape, enforced pregnancy, and childbirth is based on the uninformed, hallucinatory fantasy of ultranationalists whose most salient characteristic, after their violence, is their ignorance». See also T.A. Salzman, *op. cit.*, p. 364, who labeled the same mentality as an ignorant genetic and cultural patriarchal myth.

[60] *Ibidem*.

market[61]. This vision was criticized by Vesna Kesić – a well-known anti-nationalist feminist from former Yugoslavia. While Kesić agreed with MacKinnon that rape is a crime against gender and that it can be used as a genocidal war weapon, she also argued that pornography plays an important motivating factor in every war, but it cannot explain alone, as MacKinnon maintained, the origins, deep roots, and complexity of the brutality in this or any other war. Kesić further considered MacKinnon's theory inappropriate as it did not fit the cultural context of the region. Communist Yugoslavia, like other real-socialist countries, was an ascetic society where pornography was not openly permitted. Subsequently, according to Kesić, «if any 'theory' which associates war, rape, and pornography can be created, it is that repressed sexuality and hidden pornography contribute to sexual violence and war crimes»[62].

Finally, it can be noted that in 1994 the same sexual atrocities occurred in Rwanda. However, the debate about «genocidal rape» was not extended to the Rwandan civil war. Although stressing that it cannot be proven scientifically, Inger Skjelsbæk observed that it is highly likely that reports of rape were taken more seriously in relation to Bosnia because the conflict took place in Europe between white Europeans. In other words, the white Western world identified with the victims, as it was not possible just disregard the rape stories as being part of distant cultural traditions or unfamiliar gender relations[63]. Sherrie L. Russell-Brown also stressed that for unknown reasons, the debate about genocidal rape was centered only around the sexual violence that took place in Bosnia and did not include the acts of rape that had occurred in 1994 African genocide[64]. However, Russell-Brown also indicates that the Rwandan genocide had occurred by the time that legal scholars had already written much about the concept of genocidal rape. Similarly, Karen Egle observed that the debate about genocidal rape seemed to fade when the UN proceeded to establish the ICTY in 1993. Feminists often worked together, largely putting aside their disagreements, to play a formative role in the creation and operation of the ICTY and ensure that the crimes of rape and sexual violence will be subject to the jurisdiction of the tribunal[65].

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[61] C.A. MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, in A. Stiglmayer (ed.), *Mass Rape*, cit., p. 73.

[62] V. Kesic, *A Response to Catharine MacKinnon's Article "Turning Rape into Pornography: Postmodern Genocide*, in *Hastings Women's Law Journal*, 5, 2, 1994, p. 267 ff.

[63] I. Skjelsbæk, *The Elephant in the Room*, cit., p. 15.

[64] See S.L. Russell-Brown, *op. cit.*, p. 356, observing that «[h]ad what happened to African women during the Rwandan genocide been included in the analysis of the debate about genocidal rape[…], I suspect that there would not have been a debate or perhaps the debate would have been more inclusive and comprehensive».

[65] K. Engle, *op. cit.*, p. 779.

4. Sex Crimes as Genocide Under International Law

In the feminist debate about «genocidal rape» the term genocide was used in numerous ways, not always necessarily reflecting its legal definition. As a term, genocide was first coined by the Polish attorney Raphael Lemkin in 1944, who combined the ancient Greek word *genos* (race, tribe) with the Latin suffix *cide* (killing). Lemkin defined genocide as the «destruction of a nation or of an ethnic group»[66]. He further specified that «genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation». It is rather intended to signify a «coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves»[67].

The legal definition of genocide, as well as the lists of acts through which genocide is committed, are contained in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly in 1948 as a response to the Nazi atrocities committed in WWII. Article I of the Genocide Convention defines genocide as a crime under international law whether committed in time of peace or in time of war. Article II specifies that genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (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, and (e) forcibly transferring children of the group to another group. To prosecute the crime of genocide, two elements must be proven: the *actus reus* (the criminal act), and the *mens rea* (the mental intent to commit the act). In addition, the existence of the protected group should be proven, whilst the term «to destroy» means both the physical and biological destruction of a targeted group. While the acts comprising genocide (indicated through a-e) constitute the *actus reus* of genocide, the *mens rea* for genocide requires specific intent (*dolus specialis*) to destroy, in whole or in part, a protected group defined by national, ethnic, racial, or religious identity. The acts (a-e) covered by the Genocide Convention can be classified either as crimes against humanity or war crimes; however, if committed with the requisite specific intent, those acts will rise to the level of genocide.

William A. Schabas observes that the crime of genocide does not require a result, and courts do not need to determine whether the actual method was well chosen[68]. Sharon A. Healey further stresses that, depending on circumstances, genocide may

[66] R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation. Analysis of Government Proposals for Redress*, Washington, D.C., 1944, p. 79.

[67] *Ibidem*.

[68] W.A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, in *Fordham International Law Journal*, 25, 1, 2001, p. 47.

constitute an aggravated crime against humanity or a war crime although it is not identical to either offence. It is different from war crimes, as it may occur outside armed conflicts. It is also different from crimes against humanity (mass murder, racial and religious persecution, etc.) as it requires the specific intent (*dolus specialis*) to exterminate the group[69]. The genocidal intent must be present when the acts are committed, but it does not have to be formed prior to committing the acts[70]. The *mens rea* requirement makes proving genocidal intent particularly difficult because in most genocide cases the direct evidence of intent is unavailable. In the absence of an explicit confession by the defendant, the proof of genocidal intent may be inferred from several facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership to a particular group, or the repetition of destructive and discriminatory acts[71].

Rape is not explicitly enumerated as an act of genocide in the Genocide Convention. However, the existing literature, as well as international criminal tribunals recognize that, under certain circumstances, rape and other forms of sexual violence may constitute an act of genocide in violation of the 1948 Convention. For example, Sherrie L. Russell-Brown specifies that acts such as rape and sexual violence do not constitute «genocidal acts» simply because they occur at the same time or in the context of a genocide as the requisite intent must be proven[72]. In other words, rape and sexual violence will be genocidal acts when they are expressions of specific intent to destroy in whole or in part a protected group during and after the commission of the rapes. Kelly D. Askin further notes that sexual violence can fall under each of the sub-elements (a-e) of a crime of genocide listed in the Genocide Convention[73].

The 1998 *Akayesu case* decided by the ICTR represents the first case under an international tribunal to ever convict someone of genocide as defined under the 1948 Convention and the first case to hold that rape and sexual assault may constitute acts of genocide. The case concerned Jean-Paul Akayesu, the former Bourgmestre (mayor) of Taba Commune in the Kigali Prefecture in Rwanda, who stood trial, among others, for instigating, ordering, and otherwise aiding and abetting acts of rape and sexual violence committed against Tutsi women and girls in and around the bureau communal premises. The ICTR Trial Chamber found Akayesu guilty of several charges, including

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[69] S.A. Healey, *op. cit.*, p. 365.

[70] See, e.g., *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A (Appeal Judgement, November 27, 2007, para. 266), and *Prosecutor v. Clément Kayishema et al.*, Case No. ICTR-95-I-A (Appeal Judgement, June 1, 2001, p. 91).

[71] *Prosecutor v. Goran Jelišić*, Case No. ICTY-95-10-A (Trial Judgment, July 5, 2001), para. 47. See, e.g., *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11 (Appeal Judgement, November 28, 2007, para. 524), and *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-01-64 (Appeal Judgement, July 7, 2006, para. 40).

[72] S.L. Russell-Brown, *op. cit.*, p. 362.

[73] K.D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law*, cit., p. 315.

genocide (with rape recognized as an act of genocide) and crimes against humanity (with rape allegation) and sentenced him to life imprisonment. In 2001, the ICTR Appeals Chamber rejected Akayesu's appeal and affirmed his life sentence.

The *Akayesu judgment* represents a groundbreaking decision. As Russell-Brown stresses, it not only addresses but also clarifies some, if not all, of the concerns that emerged in the feminist debate about genocidal rape[74]. In other words, it contains the legacy of feminist fights over the meaning of rape as genocide, even though sexual violence that occurred in the Rwandan civil war was not included in the feminist discussions. Moreover, in connecting rape to genocide, the *Akayesu case* introduced three major contributions to international criminal law. First, the ICTR Trial Chamber clarified «how sex destroys people» under Article 2 of the ICTR Statute (which incorporated the 1948 Convention's definition of genocide) by expressly recognizing that rape and sexual violence may constitute an *actus reus* of genocide[75]. It then found that sub-element (a) (killing members of the group) and sub-element (b) (causing serious bodily or mental harm to members of the group) of the crime of genocide were perpetrated in Rwanda by means of sexual violence[76]. The Trial Chamber also discussed how sexual violence might rise to the level of sub-element (d) (measures intended to prevent births within the group) and held that such measures, which can be both mental and physical, include «sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages»[77].

Second, the ICTR Trial Chamber recognized the intersectionality of the crime of genocidal rape. It defined rape (in conjunction with the charge of a crime against humanity and not as an element of genocide) as «a physical invasion of a sexual nature, committed on a person under circumstances which are coercive»[78]. This was the first time that an international tribunal formulated the definition of rape. By introducing this broad definition of rape within international law, the ICTR indicated that it considers it a gender crime perpetrated against women because they are women, but it also found that rape and sexual violence can amount to a crime against a particular

[74] *Ivi*, p. 371.

[75] See *Akayesu*, Trial Judgment, cit., para. 731: «With regard, particularly, to [...] rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such».

[76] *Ivi* at para. 734: rape and sexual violence «certainly constitute infliction of serious bodily and mental harm on the victims and are even [...] one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm […]».

[77] *Ivi* at para. 507, also noting that «in patriarchal societies, where membership of a group is determined by the identity of the father, an example [...] is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group».

[78] *Ivi* at para. 688. The use of the word «invasion» instead of «penetration» to define rape allows more abuses to be prosecuted as rape, including raping women with objects, such as sticks or guns. See C. Powell, *op. cit.*, p. 36.

group[79]. In other terms, it recognized that Tutsi women were targeted on the basis of both their gender and their ethnicity.

Finally, the ICTR Trial Chamber recognized the subjectivity of the victims of the crime of genocidal rape[80]. In this sense, it specified that although the intent of genocidal rape was to destroy a particular group, the effect of the act is also the worst way of inflicting serious injury and harm upon individual Tutsi woman[81].

In sum, the *Akayesu case* set the terms for the future treatment of sexual violence as genocide in international law and sent a clear invitation to the ICTY to do the same[82].

5. Prosecuting Rape and Genocide in the International Criminal Tribunal for the former Yugoslavia (ICTY)

When the ICTY was established in 1993, it held the promise of being the first international court to prosecute the crime of genocide. However, it was not the ICTY but the ICTR, the first international criminal tribunal to pass a judgment of genocide. In doing this, it also established the link between genocide and sexual violence. The ICTY, on the other hand, was very successful in prosecuting sexual violence as a war crime and a crime against humanity by delivering several landmark cases[83]. Genocide

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[79] *Akayesu,* Trial Judgment, cit., para. 733: «The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects […] Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: 'don't ever ask against what a Tutsi woman tastes like'. This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the spirit, of the will to live, and of life itself».

[80] See S.L. Russell-Brown, *op. cit.*, p. 373.

[81] *Ibidem*. See also *Akayesu*, Trial Judgment, cit., para. 733: «In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its individual members in the process».

[82] Other ICTR contributions to the body of international law on sexual violence as genocide include: *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T (Trial Judgment, May 21, 1999); *Prosecutor v. Gacumbitsi*, Case No. ICTR 2001-64-I, (Indictment, June 20, 2001), and *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T (Trial Judgment April 28, 2005). In the *Kayishema* judgment, the ICTR extended the *Akayesu* ruling to the fourth sub-element of the crime of genocide (d) (deliberate infliction of conditions designed to bring about the slow destruction of a group). See S. Rogers, *Sexual violence, or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court*, in *George Washington International Law Review*, 48, 2, 2016, p. 281 ff.

[83] For example, in *Prosecutor v. Delalic*, Case No. IT-96-21-T (Trial Judgment, November 16, 1998), the ICTY found rape to constitute torture and thus a grave breach. The case concerned a Bosnian Muslim, accused of raping Serbian women. With respect to the feminist debate, it has been observed

convictions, however, have been slow in coming, and thus also the possibility to prosecute rape as genocide.

Yet some initial references to sex crimes as a form of genocide can be found in the ICTY case law before the adoption of the first genocide conviction. For example, in *Furundzija* – the first case entirely concentrated on charges of sexual violence – the ICTY Trial Chamber apparently prepared the terrain for the prosecution of genocidal rape[84]. The case focused on the multiple rapes of a Bosnian Muslim woman, which were committed during interrogations led by Anto Furundzija, who was at that time the commander of the Jokers, a special unit of the Croatian Defence Council (HVO) in Bosnia and Herzegovina. It was not Furundzija personally, but his subordinate who raped the woman in front of a laughing audience of other soldiers. The *Furundzija case* is relevant as the Trial Chamber made important remarks on the qualification of rape within the context of international crimes. In the ICTY Statute, the only explicit reference to rape was as a crime against humanity. The Trial Chamber widened that scope by stating that rape may also be prosecuted as a grave breach of the Geneva Conventions, and as a violation of the laws and customs of war. Moreover, by invoking the ICTR's *Akayesu case*, the ICTY confirmed that «rape may also amount to […] an act of genocide, if the requisite elements are met, and may be prosecuted accordingly»[85]. In the *Furundzija case*, the defendant was not, however, charged with sexual violence as a genocidal act.

Kunarac et al. represents the second ICTY case which dealt exclusively with charges of sexual violence and the first conviction of Serb men for raping Bosnian Muslim women[86]. The three accused Serb army officers, Kunarac, Vuković, and Kovač, had a prominent role in organizing and maintaining the system of rape camps in the eastern Bosnian town of Foča, where women were repeatedly raped, gang raped, and subject to other kinds of sexual assault in living conditions of enslavement. The Trial Chamber noted that in the context of a widespread and systematic attack on civilians, rape was used to implement a strategy of «expulsion through terror», the goal

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that through this prosecution, the ICTY signaled that it would prosecute the rapes committed on all sides for violation of international law. This was later confirmed in the *Furundzija case*. See K. Engle, *op. cit.*, p. 798.

[84] *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T (Trial Judgment, December 10, 1998).

[85] *Ivi*, at para. 17. In the *Karadžić and Mladić* Rule 61 decision, the ICTY Trial Chamber already made a connection between forced pregnancy and genocide by noting that forced impregnation may constitute evidence of genocidal intent through ethnic cleansing. In particular, it concluded that «the systematic rape of women, to which material submitted to the Trial Chamber attests, is in some cases intended to transmit a new ethnic identity to the child» and that «certain acts submitted for review could have been planned or ordered with genocidal intent». See *Prosecutor v. Karadžić and Mladić*, Review of the Indictment Pursuant to Rule 61, Nos. IT-94-95-R61, IT-95-18-R61 (July 11, 1996). See also K.D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, in *American Journal of International Law*, 93, 1, 1999, p. 115.

[86] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T (Trial Judgment, February 22, 2001).

of which was to drive the Muslims out of the region of Foča. Rapes became the way in which «the Serbs could assert their superiority and victory over the Muslims […]. While raping FWS-183, the accused Dragoljub Kunarac told her that she should enjoy being «fucked by a Serb. After he and another soldier had finished, Dragoljub Kunarac laughed at her and added that she would now carry a Serb baby»[87]. Although the ICTY recognized that the treatment of Kunarac for his victims was motivated by their being Muslims, he was not charged with genocide. This was criticized by Shayna Rogers, who observed that, despite the presence of that arguably genocidal *mens rea*, the ICTY refused to prosecute sexual violence as genocide. Kunarac was convicted of sexual violence as a crime against humanity and a war crime, but not as a genocidal act[88]. Karen Egle considered, however, that even without a finding of genocide, the ICTY indicated in the *Kunarac case* that the rapes of Bosnian Muslim women were different from the rapes of Serbian and Croat women as only in the first case were the rapes found to be a form of a systematic attack against an ethnic group[89].

The first concrete possibility to prosecute sexual violence as genocide arrived in 2001, with the *Krstić case* (referred to also as the *Srebrenica case*) – the first ICTY genocide conviction.

5.1 The Krstić case: Rape as Tool of Ethnic Cleansing

Radislav Krstić was indicted variously for genocide, crimes against humanity, and war crimes in relation to his role in the Srebrenica tragedy. Srebrenica – a small town situated in northeastern Bosnia – was formally declared in 1993 as an UN-safe area that was to be free of any armed attack or other hostile act[90]. Despite this, in mid-July 1995 the Bosnian Serb Army (VRS) captured the town. Following the take-over of Srebrenica, the VRS forces executed, within a few days, more than 8,000 Bosnian Muslim men and boys. In addition, approximately 25,000 Bosnian Muslim women, children, and the elderly were forcibly deported from the area, many of whom later reported rape and abuse at the hands of VRS soldiers. At the time of these events, Krstić was a General-Mayor in the VRS with command responsibility for the Drina Corps, a sub-unit of the VRS responsible for Srebrenica. Sexual violence formed a part of the basis of the conviction of Krstić for persecution as a crime against humanity. Despite the strong precedent from the ICTR, sexual violence was not charged as genocide.

On 2 August 2001, the ICTY Trial Chamber found that the actions of the VRS resulted in «the physical disappearance of the Bosnian Muslim population at

[87] *Ivi*, para. 654.
[88] S. Rogers, *op. cit.*, p. 290.
[89] K. Engle, *op. cit.*, p. 798.
[90] UN Security Council, Security Council resolution 819 (1993) [Bosnia and Herzegovina], 16 April 1993, S/RES/819 (1993).

Srebrenica» and concluded that Bosnian Serb forces committed genocide[91]. Krstić was found guilty on several counts including as a co-perpetrator of genocide based on his participation in a joint criminal enterprise to commit genocide and was sentenced to 46 years imprisonment. Following the Trial Chamber's judgment, both the Prosecution and Krstić filed an appeal. On 19 April 2004, the ICTY Appeal Chamber confirmed the Trial Chamber's finding that genocide occurred in Srebrenica but decreased Krstić's sentence to 35 years after determining that Krstić aided and abetted genocide rather than having functioned as a co-perpetrator as initially established by the Trial Chamber[92].

In defining Krstić's individual criminal responsibility, the ICTY first dealt with the broader question of whether genocide took place in Srebrenica. As in the case of ICTR, the definition of genocide was incorporated in the ICTY Statute (Article 4) by mirroring the provisions of the 1948 Convention. Therefore, to prove that the mass atrocities committed in Srebrenica fit into the legal definition of genocide, three elements had to be proven: a) the existence of the protected group; b) the *actus reus*, and c) the genocidal intent. In dealing with these elements, the ICTY Trial Chamber also focused on the nature of sexual violence that took place in and around Srebrenica following the Bosnian Serb takeover of the town. The most relevant findings can be summarized as follows.

The Trial Chamber identified the Bosnian Muslims as the protected group within the meaning of Article 4 of the Statute, largely by using historical analysis. A critical aspect concerned the requirement in the definition of genocide that the group should be destroyed «in whole or in part». The Trial Chamber concluded that to realize the destruction of the group «in whole or in part», the perpetrator must intend to destroy at least a substantial part of the protected group[93]. The determination of when the targeted part of the group is substantial enough to meet this requirement may involve several considerations, including (but not limited to): a) the numeric size of the group as necessary and important starting point to be evaluated not only in absolute terms, but also in relation to the overall size of the entire group; b) the prominence of the targeted part of the group within the overall group, and c) the current and potential area of the perpetrators' activity and control[94].

The Trial Chamber considered that the transfer of women and children, and the death of thousands of Bosnian Muslim civilian and military men in Srebrenica show that the Bosnian Serb forces took a purposeful decision to target the Bosnian Muslim population in Srebrenica because of their membership in the Bosnian Muslim group[95]. It then concluded that the Bosnian Muslim of Srebrenica – a group estimated to comprise about 40,000 people – constituted a part of the protected group under Article

[91] *Krstić*, Trial Judgment, cit., para. 595.
[92] *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A (Appeal Judgment, April 19, 2004).
[93] *Krstić*, Trial Judgment, cit., para. 586.
[94] *Krstić*, Appeal Judgement, cit., para. 12.
[95] *Krstić*, Trial Judgement, cit., para. 568.

4 of the ICTY Statute[96]. Despite the Bosnian Muslims of Srebrenica constituting a small percentage of the overall Muslim population of Bosnia and Herzegovina, they occupied a strategic location and were thus the key to the survival of the Bosnian Muslim nation. Srebrenica is located near the Serbian border, and its elimination as a Muslim enclave became an important objective in the consolidation of Serb territory[97].

While the *actus reus* of (a) killing members of the group and/or (b) causing serious bodily or mental harm to the few survivors of the Srebrenica enclave had been established «beyond all reasonable doubt» on the basis of eyewitness reports and extensive forensic evidence[98], the question remained as to whether there was a specific intent (*dolus specialis*) to destroy the protected group in whole or in part. As Mark Drumbl stresses, one of the difficult aspects of this case was that the Bosnian Serb forces did not kill all Bosnian Muslims of Srebrenica[99]. Killings were limited to Bosnian Muslim men and boys, largely of military age, while women, children, and the elderly were previously removed from the territory[100].

To prove the genocidal intent, in the absence of a direct evidence, the proof of intent was derived from the factual circumstances of the crime. The Trial Chamber first considered the long-term impact that the elimination of Bosnian Muslim men from Srebrenica would have on the physical survival of that community. In examining these consequences, it 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»[101]. Evidence introduced during the trial supported this finding by showing that, with most of the men killed, their spouses were unable to remarry and have new children. The Trial Chamber noted that the Bosnian Serb forces were aware of these catastrophic consequences when they decided to systematically eliminate two or three generations of Bosnian Muslim men[102]. The Appeal judgment further added that «the physical destruction of the men, therefore, had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction»[103].

The Trial Chamber then explained that the forcible transfer of women, children, and the elderly could be an additional means to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. It completed the removal of all Bosnian

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[96] *Ivi*, para. 593.

[97] *Ivi*, para. 597.

[98] *Ivi*, para. 543.

[99] See M. Drumbl, *Case Notes Prosecutor v. Radislav Krstic: ICTY Authenticates Genocide at Srebrenica and Convicts for Aiding and Abetting*, in *Melbourne Journal in International Law*, 5, 2, 2004, p. 5.

[100] In referring to the mass killing of men and boys in Srebrenica, the Trial Chamber used the term «men of military age». The Appeal Chamber found the term misnomer, as the group killed by the VRS also included boys and the elderly, normally considered to be outside that range. See *Krstić*, Appeal Judgment, cit., para. 27.

[101] *Krstić*, Trial Judgment, cit., para. 595.

[102] *Ibidem.*

[103] *Krstić*, Appeal Judgment, cit., para. 28.

Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself[104]. The Bosnian Serb forces knew, by the time they decided to kill all the military-aged men, that the combination of those killings with the forcible transfer of the women, children, and the elderly would inevitably result in the physical disappearance of the Bosnian Muslim population in Srebrenica[105]. The Trial Chamber thus concluded that the intent to kill all the Bosnian Muslim men of military age in Srebrenica constituted an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 of the ICTY Statute and, therefore, must be qualified as a genocide[106].

While critics of the *Krstić case* typically assume that calling Srebrenica genocide unreasonably distorted the term[107], an opposite argument to this statement may also be introduced: the limited recognition in the *Krstić case* of the acts that may constitute the *actus reus* of genocide. For example, the Trial Chamber did not consider that the forcible transfer may rise to a genocidal act. Although the forcible transfer (other than that of children from one group to another group) does not explicitly constitute a genocidal act for the purposes of the 1948 definition (set out without a significant change in Article 4(2) of the ICTY Statute), in the *Krstić case* the Trial Chamber expressly stated that the forced transfer constituted a tool of ethnic cleansing, while the Appeal judgment further found that this act constituted evidence from which genocidal intent can be inferred. Then, in *Blagojević et al.* the Trial Chamber concluded that the forcible transfer of women, children, and the elderly from Srebrenica amounted to genocide as it reached the level of causing serious mental harm under article 4(2)(b) of the ICTY Statute[108]. Furthermore, in the *Krstić* Appeal judgment, the ICTY acknowledged, on the basis of the evidence introduced in the trial judgement, that the physical destruction of men had severe procreative implications for the Srebrenica Muslim community. However, the sub-element (d) – the imposition of measures intended to prevent births within the group – was not considered as

[104] *Krstić*, Trial Judgement, cit., para. 595.

[105] *Ibidem.*

[106] *Ivi*, para. 598.

[107] See W.A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina?*, cit., p. 47, who argues that the atrocities committed in Srebrenica surely qualify as crimes against humanity but categorizing them as genocide expanded the concept beyond the definition adopted in 1948. Schabas further argues that the perpetrators' intent was not to physically destroy the protected group but rather to remove it from the territory. R.M. Hayden, *"Genocide Denial" Laws as Secular Heresy: A Critical Analysis with Reference to Bosnia*, in *Slavic Review*, 67, 2, 2008, p. 402, similarly claims that the Trial Chamber extended the definition of genocide to cover mass killings of purely local scope, including the acts made to remove an ethnic or religious community from a specific territory, especially one of strategic importance. K.G. Southwick, *Srebrenica as Genocide? The Krstic Decision and the Language of the Unspeakable*, in *Yale Human Rights & Development Law Journal*, 8, 2005, p. 206, notes that «[t]he chamber concluded that by killing the Bosnian Muslim men of military age, or part of the Muslim population at Srebrenica, the Bosnian Serb forces intended to destroy the Srebrenica Muslims, part of the Bosnian Muslim group. With this, the ICTY effectively stated that destroying part of a part of a group constitutes genocide».

[108] *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-T (Trial Judgment, January 17, 2005), para. 654.

genocidal act even if the ICTR held in the *Akayesu case* that it may include measures such as separation of sexes, prohibition of marriages, and rape.

More generally, it could be observed that rape was mentioned in a 255-page *Krstić* Trial judgment just seven times, while in the press release, it was mentioned only once.[109] Despite this, the *Krstić case* gave some important indications on the nature of sexual violence in the Bosnian genocide. For example, in reconstructing the events that led to the Srebrenica massacre, the Trial Chamber referred to several instances of rape. It observed that as Srebrenica fell under the Bosnian Serb army between 10 and 11 July, about 20-30,000 of its Muslim residents, mostly women, children, and the elderly, fled to the nearby village of Potočari. Several thousand sought protection inside the UN military camp. Serb soldiers, however, entered the compound and threatened, beat, and killed people. They also committed many acts of rape. The *Krstić* Trial judgment further referred to Bosnian Muslim refugees near Srebrenica being «subjected to a terror campaign comprised of threats, insults, looting and burning of nearby houses, beatings, rapes, and murders»[110]. These crimes were committed from 12 to 13 July, when also the separation of men and the forcible transfer of women, children, and the elderly began. The Trial Chamber found that the crimes committed from 11 to 13 July were part of the Serb policy of ethnic cleansing, largely realized through the forcible transfer. On 13 July, however, when the massacre of Bosnian men and boys started, the previous plan to ethnically cleanse the area of Srebrenica turned into genocide[111].

Rape was not considered by the Trial Chamber a genocidal act but limitedly as part of the policy of ethnic cleansing, which was largely performed through forcible transfer. Perhaps, if the ICTY had acknowledged that rape and forcible transfer amounted to genocide, it would have been less difficult to prove in the *Krstić case* the genocidal intent. As already observed, in *Blagojević et al.* the Trial Chamber found that the forcible transfer may lead to the destruction of the protected group. It also recognized that in Srebrenica the forcible transfer was directed against the protected group and that it was preceded by the separation of the community by gender. The Trial Chamber then found that the separation of the Bosnian Muslim men from the rest of the Bosnian Muslim group was a critical piece of evidence in establishing that the Bosnian Serbs, who organized and implemented the transfer, did not want the Bosnian Muslim group to ever reconstitute itself as a group in Srebrenica or elsewhere, and that, therefore, they intended to physically destroy the protected group[112]. Moreover, if the ICTY had argued in the *Krstić case* that the policy of rape and forcible transfer in the context of the campaign of ethnic cleansing represented a pattern of

[109] Press Release, *Radislav Krstić Becomes the First Person to be Convicted of Genocide at the ICTY and is Sentenced to 46 Years Imprisonment*, U.N. Press Release OF/P.I.S./609e (August 2, 2001).

[110] *Krstić*, Trial Judgment, cit., para. 150.

[111] *Ivi*, para. 622.

[112] *Blagojević*, Trial Judgement, cit., para. 650.

acts which taken together constituted the *dolus specialis* of genocide, critics would have had probably much harder time in questioning Srebrenica as genocide.

5.2. Genocide and Ethnic Cleansing: Is There Any Difference?

Although the *Krstić case* did not consider rape as genocide, it remains relevant as it established, for the first time, the link between rape and ethnic cleansing, which in the context of Srebrenica crimes was closely associated with genocide. The Trial Chamber, in fact, observed «obvious similarities between a genocidal policy and the policy [of] ethnic cleansing»[113] – an assumption that raises the need for exploring the relationship between ethnic cleansing and genocide.

Contrary to genocide which is a legal term with its legal definition, ethnic cleansing is a term without a legal status and does not constitute an independent crime under international law. The term started to be frequently used in the context of the Yugoslav wars of the 1990s and represents a literal translation of the Serbo-Croatian expression *etničko čišćenje*. From here, the term penetrated international documents, where especially in the 1990s was frequently used as a synonym for genocide. For example, the 1995 Final Report of the UN Commission of Experts suggested that ethnic cleansing can violate the 1948 Convention: «the expression 'ethnic cleansing' […] means rendering an area ethnically homogeneous by using techniques [that] include murder, torture, arbitrary arrest and detention, extrajudicial executions, sexual assault, confinement of civilian populations in ghetto areas, forcible removal, displacement and deportation of civilian populations […]».Those practices, as has been further added, may constitute crimes against humanity, specific war crimes, and could also fall within the meaning of the Genocide Convention[114].

The relationship between ethnic cleansing and genocide has been further discussed by academics. For instance, Andrew Bell-Fialkoff stressed that the term ethnic cleansing is not of easy definition: «[a]t one end it is virtually indistinguishable from forced emigration and population exchange while at the other it merges with deportation and genocide. At the most general level, however, ethnic cleansing can be understood as the expulsion of an 'undesirable' population from a given territory due to religious or ethnic discrimination, political, strategic, or ideological considerations, or a combination of these»[115]. For Catharine MacKinnon «ethnic cleansing» is a euphemism for genocide.[116] Similarly, Todd A. Salzman observed that in the former Yugoslavia «genocide and ethnic cleansing coincided, the goal being the establishment

[113] *Krstić*, Trial Judgement, cit., para. 562.

[114] United Nations, *Final report of the Commission of Experts*., cit., para. 129.

[115] A. Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, in *Foreign Affairs*, Summer 1993.

[116] See C.A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, cit., p. 8, noting that «[i]t is a policy of ethnic extermination of non-Serbs with the aim of 'all Serbs in one nation', a clearly announced goal of 'Greater Serbia', of territorial conquest and aggrandizement».

of a greater Serbia that is, a Serb-inhabited region purged of all non-Serbs throughout Serbia, Bosnia-Herzegovina, and Croatia»[117]. The same view has been accepted by more recent literature. For example, Jonathan M.H. Short argues that «[i]n recent conflicts, sexual violence has taken on a new purpose: ethnic cleansing or genocide»[118].

Most authors argue, however, that ethnic cleansing itself does not constitute genocide. For example, Douglas Singleterrym observes that genocide and ethnic cleansing are distinct concepts that share similar features[119]. For William A. Schabas ethnic cleansing is not genocide because the intent is to remove a population from the territory not to physically destroy it. He further specifies that ethnic cleansing is not even considered an *actus reus* of genocide[120]. However, Schabas also observes that «[e]thnic cleansing is a warning of genocide to come […]. Genocide is the last resort of the frustrated ethnic cleanser»[121]. Norman Naimark argues that the distinction between ethnic cleansing and genocide is complicated. For instance, forced deportation seldom takes place without violence, often murderous one. This is because people do not leave their homes on their own but resist, and the result is that forced deportation often becomes genocidal, as people are violently ripped from their native towns and villages and killed when they try to stay. Even when forced deportation is not genocidal in its intent, it is often genocidal in its effect[122]. Schabas also observes that genocide and ethnic cleansing may share the same goal, which is to eliminate the persecuted group from an area[123].

Another interesting issue is the nexus between ethnic cleansing and proof of genocidal intent. According to Martin Shaw, «[i]t is not just that 'cleansing' is sometimes genocidal, or that genocide is 'extreme' cleansing. Cleansing language invariably oozes genocidal intent, resonating with the idea of destroying, if not murdering, groups to which it is applied»[124]. The ICTY case law also recognized that ethnic cleansing may under certain circumstances ultimately reach the level of genocide and that the *dolus specialis* may be inferred from the gravity of ethnic cleansing[125]. In the

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[117] T.A. Salzman, *op. cit.*, p. 349.

[118] See J.M.H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, in *Michigan Journal of Race and Law*, 8, 2003, p. 503, noting that «[e]thnic cleansing is a term of modern adaptation; it is the zero-sum game of genocide. Ethnic cleansing is accomplished, for example, by removing individuals of a certain national, ethnical, racial, or religious group from a community or region. The gain of the perpetrating group is measured by the loss to the victimized group».

[119] D. Singleterry, *"Ethnic Cleansing" and Genocidal Intent: A Failure of Judicial Interpretation?*, in *Genocide Studies and Prevention: An International Journal*, 5, 1, 2010, p. 40.

[120] W.A. Schabas, *Genocide in International Law*, Cambridge, 2009, p. 233.

[121] *Ivi*, p. 234.

[122] N.M. Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe*, Cambridge (MA), 2001, p. 3.

[123] W.A. Schabas, *Genocide in International Law*, cit., p. 234.

[124] M. Shaw, *What Is Genocide?*, Cambridge, 2007, p. 58.

[125] See *Prosecutor v. Karadžić and Mladić*, Confirmation of Indictment, Case No. ICTY-95-18-I (November 16, 1995): «The policy of 'ethnic cleansing' […] presents, in its ultimate manifestation,

context of the *Krstić case*, however, although the rapes were identified as part of a campaign of ethnic cleansing, the ICTY showed the preference not to prosecute sex crimes as genocide; in fact, Krstić was found guilty of the rapes, but as a crime against humanity.

6. In the Aftermath

In the aftermath of the *Krstić case*, sexual violence has been included in some of the genocide indictments, notably against Slobodan Milošević, Radovan Karadžić, and Ratko Mladić[126]. However, no conviction has been entered on this basis. For example, the indictment of Milošević (issued in 2002) charged him with the «planning, preparation and execution of the destruction, in whole or in part, of the Bosnian Muslim national, ethnical, racial or religious groups, as such, in territories within Bosnia and Herzegovina» through «widespread killings of thousands of Bosnian Muslims» and «[t]he causing of serious bodily and mental harm to thousands of Bosnian Muslims during their confinement in detention facilities within Bosnia and Herzegovina [where they] were continuously subjected to, or forced to witness, inhumane acts, including murder, sexual violence, torture, and beatings»[127].

The issue of sexual violence as genocide was then included in the 2009 Prosecution's Marked-Up Indictment of Karadžić (President of the self-proclaimed *Republika Srpska* during the Bosnian War) and the 2011 Fourth Amended Indictment of Mladić (colonel-general who led the VRS during the Bosnian war). Both indictments charged them with two counts of genocide, the first related to the acts committed in Bosnia and Herzegovina and the second to the acts committed in Srebrenica. Only in the first case Karadžić and Mladić were charged with rape and other forms of sexual violence committed in detention centers as genocide based on serious bodily or mental harm and as a condition of life calculated to bring about the physical destruction of

genocidal characteristics. Furthermore, in this case, the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, which is specific to genocide, may be inferred from the gravity of the 'ethnic cleansing' practiced in Srebrenica and its surrounding areas, i.e., principally the mass killings of Muslims which occurred after the fall of Srebrenica in July 1995, which were committed in circumstances manifesting almost unparalleled cruelty». See also *Prosecutor v. Brđanin*, Case No. IT-99-36 (Trial Judgment, September 1, 2004): «ethnic cleansing may under certain circumstances ultimately reach the level of genocide […]».

[126] See C.A. MacKinnon, *Defining Rape Internationally: Comment on Akayesu*, in *Columbia Journal of Transnational Law*, 44, 3, 2006, p. 947, who argues that many perpetrators have been indicted for rape and sexual violence under other rubrics and for genocide for other acts. As of July 21, 2005, twenty-eight indictments by the ICTY charged rape or other sexual assault as something other than genocide in the ex-Yugoslav region. Twelve additional cases, most of them for the atrocities at Srebrenica, charged genocide on facts that did not mention sexual assault. Despite *Akayesu* showing the way, only ten ICTY cases have indicted rape as genocide.

[127] *Prosecutor v. Slobodan Milošević*, Amended Indictment "Bosnia and Herzegovina", Case No. IT-02-56-T (November 22, 2002).

the group[128]. Shayna Rogers observed that these prosecutions could yield the first genocide convictions for sexual violence[129], but neither Karadžić nor Mladić was found guilty of genocidal rape[130].

The reluctance to deal with rape as genocide in international courts can be further found in the long-awaited *Genocide case* decided by the International Court of Justice (ICJ) in the suit filed by Bosnia and Herzegovina against Serbia and Montenegro[131]. Bosnia asserted that the systematic rape carried out by Serb forces against Muslim women constituted an act of genocide under Article II(b) (d) (e) of the 1948 Convention (causing serious bodily or mental harm to members of the protected group; imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group), but the ICJ did not acknowledge that rape and sexual violence amounted to genocidal acts[132].

7. Concluding Remarks

Although the concept of «genocidal rape» has been theorized in the early 1990s in relation to the conflict that took place in the former Yugoslavia and especially in Bosnia and Herzegovina, sexual violence has not been included as genocide in the ICTY case law. On the one hand, the ICTY recognized that theoretically sex crimes can amount to genocide. It also indirectly linked rape to genocide by considering it a tool of ethnic cleansing. On the other hand, the Yugoslav Tribunal not only declined the invitation of the ICTR to prosecute rape and other forms of sexual atrocities as genocidal acts but refused also to consider sexual violence as evidence of the *mens rea* intent to destroy in whole or in part the protected group. As a result, despite the ethnically motivated, widespread, systematic, and organized sexual violence in the Bosnian war, rape was generally prosecuted as a crime against humanity.

Several reasons may explain this reluctance to prosecute sexual violence as genocide. First, rape and other forms of sexual atrocities were not expressly included as a crime of genocide in the ICTY Statute. The definition of genocide, contained in Article 6 of the Statute, mirrored the 1948 Convention, while the real novelty was introduced in Article 5, which categorized wartime rape as a crime against humanity.

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[128] *Prosecutor v. Karadžić*, Prosecution's Marked-Up Indictment, Trial Chamber III, Case No. IT-95-5/18-PT (October 19, 2009).

[129] S. Rogers, *op. cit.*, p. 290.

[130] *Prosecutor v. Mladić*, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, Trial Chamber I, Case No. IT-09-92-PT (December 16, 2011).

[131] ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)(February 26, 2007).

[132] See A. Marino, *Bosnia v. Serbia and The Status of Rape as Genocide Under International Law*, in *Boston University International Law Journal*, 27, 2009, p. 205 ff., noting that the ICJ treated the allegations relating to the rape and sexual violence incompletely, failing to consider relevant evidence, and reaching, as a result, questionable conclusions.

Cassie Powell noted that rape was not included as a crime of genocide because, contrary to crimes against humanity, genocide and war crimes had pre-existing definitions within international law[133]. Yet the ICTR Statute also contained the 1948 definition of genocide, but the Rwandan Tribunal went beyond the textual definition and recognized sexual violence as a constituent act of genocide. Despite this, the ICTY's refusal to follow the way the *Akayesu case* opened and prosecute rape as genocide may still be in part explained by the lack of an express provision authorizing it to prosecute genocidal rape. For example, under the 1998 Rome Statute, which governs the International Criminal Court (ICC), rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other forms of sexual violence of comparable gravity are recognized as crimes against humanity and war crimes. Similarly, to the ICTY, the ICC refused to prosecute sex crimes as genocide. For this reason, Shayna Rogers proposed to change the Rome Statute to expressly include sexual violence as a constituent act of genocide. This solution, according to Rogers, would offer the best means of ensuring the prosecution of genocidal sexual violence under international law[134].

Second, in *Karemera et al.* the ICTR took judicial notice of the genocide in Rwanda[135]. This meant that the prosecutor in this and future cases no longer needed to prove that genocide occurred; the fact of genocide in Rwanda became beyond argument[136]. No such notice was taken by the ICTY. Therefore, to prosecute rape and other forms of sexual violence as genocide, the prosecution needed first to prove on a case-by-case basis that genocide had occurred. Moreover, the only genocide convictions in the ICTY are those related to the 1995 Srebrenica massacre.

Third, prosecuting rape as genocide appeared probably more complex in the case of the Bosnian conflict than in the Rwandan civil war. To amount to an *actus reus* of genocide, it is not sufficient to prove that rape has been committed during genocide but also that it was committed with the intent to destroy the protected group. The ICTR found in *Akayesu* that the rape of Tutsi women was systematic and that it was perpetrated against all Tutsi women and solely against them. It further found that in most cases the rapes of Tutsi women were accompanied by the intent to kill those women. Although it has been sometimes argued that the rapes of Bosnian Muslim women by Serbs generally ended in death, this was much harder to prove than it was in Rwanda. In Bosnia and Herzegovina, the connection between genocide and rape did not ultimately rely on murder but on forced impregnation. Moreover, in the case

[133] C. Powell, *op. cit.*, p. 33.

[134] S. Rogers, *op. cit.*, p. 304 ff.

[135] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 35-38 (June 16, 2006) of the fact that «[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group as a fact of common knowledge».

[136] R. Faulkner, *Taking Judicial Notice of the Genocide in Rwanda: The Right Choice*, in *Penn State International Law Review*, 27, 3, 2009, p. 896.

of Bosnian rapes, it was very difficult to argue that the rapes were occurring only on one side, as sexual violence was used by all parts in the conflict.

Finally, it can be assumed that not only the ICTR but also the ICTY case law on sexual violence contains the legacy of feminist fights over genocidal rape. However, contrary to the ICTR, the ICTY chose a more mediating role between the two feminist positions. It successfully prosecuted the rapes committed on all sides of the conflict (*e.g.*, *Delalic*, 1998) but, at the same time, acknowledged that the rapes of Bosnian Muslim women by Serbs were different. Only in the latter case the rapes were found to be systematic (*e.g.*, *Kunarac*, 2001), linked to ethnic cleansing, and thus also indirectly to genocide (*e.g.*, *Krstić*, 2001).

Despite the ICTY's reluctance to directly prosecute rape as genocide, the concept of genocidal rape still appears relevant. When genocide – the most serious of international crimes – took place, it seems important to acknowledge that sexual violence may no longer be only a violation of individual women or a gender crime, but that it can amount to an act that is committed «with the specific intent to destroy, in whole or in a part, a particular group targeted as such». For example, Catharine MacKinnon observes that the survivors of rape in Bosnia and Herzegovina «typically understood that they had been raped precisely to destroy their ethnic and religious communities, in acts of sexual violence against women because they were not Serbian». However, the ICTY's seeming reluctance to prosecute sex crimes as genocide «made survivors unwilling to put themselves in its hands, damaging trust and opportunities for cooperation. The limited access to witness that ensued no doubt had a circular effect on [ICTY's] charging practices»[137]. For these reasons, linking rape to genocide may even be necessary for seeking the appropriate justice for the survivors. If so, then the above-mentioned reasons that led the ICTY to avoid genocide convictions for sexual violence may eventually be of some help for setting up specific guidelines for future prosecution of genocidal rape under international criminal law.

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Abstract: This article focuses on the nexus between wartime sexual violence and genocide in relation to the 1992-95 Bosnian war. It first discusses the nature of sexual violence in the Bosnian conflict through the lens of the feminist debate about «genocidal rape». It then explores how sex crimes may function as a constituent act of genocide under international law, as well as the extent to which the International Criminal Tribunal for the former Yugoslavia (ICTY) has prosecuted rape as a constituent act of the Bosnian genocide. The article argues, in particular, that although the ICTY has failed to prosecute sex crimes as genocide, the concept of «genocidal

[137] C.A. MacKinnon, *Defining Rape Internationally*, cit., p. 949.

rape» remains relevant under international law. It not only helps clarify the massive rape politics that systematically occurs in identity-driven conflicts, but linking rape to genocide may even be necessary for seeking the appropriate justice for the survivors of wartime sexual violence.

Abstract: L'articolo si focalizza sul nesso tra stupri di guerra e genocidio in relazione alla guerra bosniaca del 1992-95. Si analizza, in primo luogo, la natura della violenza sessuale nel conflitto bosniaco attraverso la lente del dibattito femminista sullo «stupro come strumento di genocidio». L'articolo esplora, quindi, i modi in cui i reati sessuali possano costituire uno strumento di genocidio ai sensi del diritto internazionale, nonché la misura in cui il Tribunale penale internazionale per l'ex Jugoslavia (TPIJ) abbia perseguito lo stupro come atto costitutivo del genocidio bosniaco. Si sostiene, in particolare, che sebbene il TPIJ abbia rifiutato di perseguire i reati sessuali come genocidio, il concetto di «stupro come strumento di genocidio» rimane rilevante ai sensi del diritto internazionale. Non solo tale concetto aiuta a chiarire la politica di stupro di massa che si verifica sistematicamente durante i conflitti identitari, ma collegare lo stupro al genocidio può risultare anche necessario nella ricerca di una giustizia appropriata per i sopravvissuti alla violenza sessuale in tempo di guerra.

Keywords: Wartime sexual violence – genocide – genocidal rape – Bosnia and Herzegovina – ICTY.

Parole Chiave: Stupri di guerra – genocidio – stupro come strumento di genocidio – Bosnia ed Erzegovina – TPIJ.

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