

2019

Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda

Bailey Fairbanks

Santa Clara University, bfairbanks@scu.edu

Follow this and additional works at: <https://scholarcommons.scu.edu/historical-perspectives>



Part of the [History Commons](#)

Recommended Citation

Fairbanks, Bailey (2019) "Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda," *Historical Perspectives: Santa Clara University Undergraduate Journal of History, Series II*: Vol. 23 , Article 13.

Available at: <https://scholarcommons.scu.edu/historical-perspectives/vol23/iss1/13>

This Article is brought to you for free and open access by the Journals at Scholar Commons. It has been accepted for inclusion in Historical Perspectives: Santa Clara University Undergraduate Journal of History, Series II by an authorized editor of Scholar Commons. For more information, please contact rscroggin@scu.edu.

Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda

Bailey Fairbanks

Rape and other acts of gender violence have been a contributing factor in all examples of modern genocide. However, it wasn't until the International Criminal Tribunal of Rwanda prosecuted Jean Paul Akayesu that rape was officially considered a genocidal act. During the 1990s as both the International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR) were being held there were a number of breakthrough charges and convictions. These tribunals redefined the way that acts of sexual violence during genocide were legally classified.

Despite huge changes in the conceptualized relationship between sexual violence and genocide, these changes have been less radical in their implication for prosecution. Since the trials in the 1990s, there have been fewer than fifty convictions of sexual violence in relation to genocide, crimes against humanity, or war crimes and fewer than one-hundred charges brought against people for these crimes. Although we have since seen examples of mass sexual violence during genocide in places like Darfur, it has not been prosecuted on the same scale as Bosnia or Rwanda. The ICTY and ICTR set precedents for the prosecution of crimes of sexual violence in times of genocide, creating new definitions that recognized the severity and interrelatedness of sexual violence and genocide. By exploring the historical setting, the demands of activist groups and intellectuals, and the events of the genocides in former Yugoslavia and Rwanda, the circumstances of the time lead to the establishment of these precedents. However, since these precedents were set, prosecutors have not used them to prosecute similar crimes in other times of genocide or ethnic cleansing. It is due to the rigid nature of these definitions, a general sense of skepticism about the classification of sexual violence as an act of genocide, and a disregard toward the unique experiences of sexual

Historical Perspectives, Series II, Volume XXIII, 2018

assault victims in genocide that the precedents set by the ICTR and ICTY have not been applied to more current examples of genocide.

As a foundation it is important to understand how sexual violence aligns with other forms of genocidal violence. While most modern scholars agree that rape is a form of genocidal violence and can be considered either a tool of genocide or weapon of war, there is some debate surrounding the place sexual violence has within genocide. Scholars like Martin Shaw and James E Waller argue that sexual violence is merely a tool used to perform a larger genocidal goal. Shaw writes, “Genocide seeks out all vulnerabilities’ and sexual violence may be a form of vulnerability in a specific context.”¹ Similarly Waller argues that sexual violence is merely one of the many processes through which the characteristic “othering” of genocide can take place.

In contrast to these views, scholars such as Joan Ringleheim and Dagmar Herzog argue that sexual violence is a reflective coordinate of genocide that is directly related to societal views of certain groups. Ringleheim examines female experiences of sexual violence during the Holocaust and concludes that the cases of sexual violence were directly related to “sexism and the division of social roles according to biological function,”² which put women at a disadvantage. Herzog made a similar connection between the treatment of homosexual men during the Holocaust and the Nazi’s “cultural attitudes and practices of sexuality”.³ However, she does take it a step further, considering sexual violence as soul murder. Soul murder equates the deliberate traumatization or deprivation by the perpetrator to the severity and finality of murder. In this way the victim is robbed of her identity and thus is damaged in a way Herzog argues in equivalent with other acts of genocide including murder.

¹ Robin May Schott, “‘What is the Sex Doing in the Genocide’: A Feminist Philosophical Response,” *European Journal of Women's Studies* 22, no. 4 (2015): 400, accessed Fall 2017, Women's Study International.

² *Ibid.*, 401.

³ *Ibid.*, 402.

The scholarly argument that most closely aligns with the views of the ICTY and ICTR are those of scholars such like Catharine MacKinnon and Kelly Dawn Askin, who emphasize sexual violence as an integral component of genocide. MacKinnon argues that not only is sexual violence a key genocidal function, but that it has a greater capacity than other forms of violence to damage the targeted groups. She writes that when rape occurs, “a specific tool of domination is selected...When men rape and do not kill, or rape and then kill, or kill and then rape, the same is true in genocide.”⁴ MacKinnon makes the argument that rape is as genocidal and often more impactful than other acts of genocide like murder. Dawn Askin supports this argument by positing that sexual assault satisfies all five components of the definition of genocide as described by the United Nations.

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- A. Killing members of the group;
- B. Causing serious bodily or mental harm to members of the group;
- C. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- D. Imposing measures intended to prevent births within the group;
- E. Forcibly transferring children of the group to another group.⁵

⁴ Catharine MacKinnon, “Genocide’s Sexuality,” in *Are Women Human? And Other International Dialogues* (Cambridge: Harvard University Press, 2006), 210.

⁵ “United Nations Office on Genocide Prevention and the Responsibility to Protect.” United Nations. <http://www.un.org/en/genocideprevention/genocide.html>.

Legally, this is the argument made by the ICTY and ICTR when the decision to prosecute acts of sexual violence as acts of genocide.

Although sexual and gender violence were important aspects of both the Armenian genocide and the Holocaust, Bosnia was the first case of widespread systematic rape as an organized part of genocide. Theorist Pascale R. Bos acknowledges that “the most significant incidents of large-scale rape were reported in Bosnia-Herzegovina in 1992-93.”⁶ Weitsman explains the relationship of sexual violence to genocidal killing as she states, “In the case of the wars in the former Yugoslavia, wholesale slaughter of identity groups went hand in hand with forced impregnation campaigns. These policies, undertaken for the purpose of actually eliminating, biologically, an ethnic or religious group.”⁷ Bos points out that it is difficult to know the exact number of cases of sexual violence, but the estimates range anywhere from 30,000 to 50,000. These number reflect the women who were raped during the forced impregnation campaigns as well as women who were raped to negate their perceived honor or societal position. Genocidal rape is as deeply tied to identity and societally constructed values as genocidal killings are to racial or religious identities. Weitsman continues, “Policies of sexual violence in wartime are predicated on these conceptions of gender roles within the larger context of ethnic identity.”⁸ Genocidal rape is unique in its intersectional consideration of ethnic identity and gender roles as many other genocidal acts are predicated much more singularly on religious or ethnic identities.

⁶ Pascale R. Bos, “Feminists Interpreting the Politics of Wartime Rape: Berlin, 1945; Yugoslavia, 1992-1993,” *Journal of Women in Culture and Society* 31, no. 4 (Summer 2006): 1012, accessed Fall 2017, Historical Abstracts with Full Text.

⁷ Patricia A. Weitsman, “Constructions of Identity and Sexual Violence in Wartime: The Case of Bosnia,” in *Genocide and Gender in the Twentieth Century*, ed. Amy E. Randall (New York: Bloomsbury, 2015), 121.

⁸ *Ibid.*, 123.

While Bosnia was the first case of mass rape as a function of perpetuating genocide, it the breakthrough case of The International Criminal Tribunal involved no charges related to genocide. Doris Buss describes the case saying, “The decision by the Yugoslav tribunal in Prosecutor v. Kunarac, Kovac, and Vukovic was the first case where the charges related solely to sexual violence crimes, though genocide charges were not pursued.”⁹ Although charges of genocide were not pursued, this landmark case, in conjunction with the similar cases in Rwanda, sanctioned that perpetrators can be charged with crimes that did not directly involve death or end of life. These men were charged with crimes such as rape and enslavement and these crimes were classified as crimes against humanity and war crimes. Previously crimes of this nature were viewed as honor crimes and were not prosecuted at the larger trials, if they were prosecuted at all.

It is important to note that the decisions to prosecute crimes of sexual violence did not stem directly from the ICTY or ICTR, but from feminist activists who pushed for these crimes to be taken seriously and prosecuted in a way that acknowledged the severity. The decision to prosecute crimes of sexual violence as crimes against humanity and war crimes during the ICTY did not come directly out of ICTY leader’s motivations. Feminist activists were not alone in this fight as many scholars were also pushing for a reform of the UN’s policies. Bos recalls their fight, “From 1992 on, when increasingly more reports on these rapes became public...feminists in the Balkans as well as in the rest of Europe and the United States started calling for intervention.”¹⁰ Feminist sociologist such as Floya Anthias and Nira Yuval-Davis argued that nationalism and its ideologies are deeply rooted in gender ideologies. This correlation between nationalism and gender ideologies was the foundation for the argument that genocide in

⁹ Doris Buss, “Making Sense of Genocide, Making Sense of Law: International Criminal Prosecutions of Large-Scale Sexual Violence,” in *Genocide and Gender in the Twentieth Century*, ed. Amy E. Randall (New York: Bloomsbury, 2015), 282.

¹⁰ Bos, “Feminists Interpreting the Politics of Wartime Rape,” 1012.

not solely motivated by nationalism or a desire for ethnic purity but also by gender ideologies.

The argument inextricably linking nationalism and gender ideologies made by Anthias and Yuval-Davis, was used as a platform for the argument that the rape campaigns in Yugoslavia were the effects of nationalism and gender working together toward a genocidal cause. In the early half of the 1990's as the violence in Yugoslavia and Rwanda was unfolding, many activists were appealing to the international community to take the crimes of sexual violence seriously and to prosecute them appropriately. Catharine MacKinnon wrote an article in Ms. Magazine arguing that the rape should be seen as genocide. A year later, in 1994 Alexandra Stiglmayer published *Mass Rape: The War Against Women in Bosnia*, focusing on the role rape plays as a function of genocide. It is largely through this activism and the attention that it garnered that rape was prosecuted as a legitimate crime and act of genocide during the ICTY and ICTR, shaping international humanitarian law.

Alongside Prosecutor v. Kunarac, Kovac, and Vukovic, the two cases from Rwanda that helped shape the precedent for prosecuting rape in genocide are Prosecutor v. Jean-Paul Akayesu and Prosecutor v. Pauline Nyiramasuhuko. Jennie E. Burnett describes the importance of the Akayesu case saying, "The International Criminal Tribunal for Rwanda (ICTR) established sexual violence as an explicit strategy of the genocide and yielded the first judgement of rape as a genocide crime in an international court."¹¹ The case against Akayesu was the first case in which rape was prosecuted as a crime of genocide and a crime against humanity. Originally, he was not indicted on any charges related to sexual violence. However, after hearing the testimonies of multiple women who spoke openly about rape, even when the questions did

¹¹Jennie E. Burnett, "Rape as a Weapon of Genocide: Gender, Patriarchy, and Sexual Violence in Rwanda," in *Genocide and Gender in the Twentieth Century*, ed. Amy E. Randall (New York: Bloomsbury, 2015), 147.

not pertain to rape or sexual violence, that the court decided to amend Akayesu's indictment. Usta Kaitesi writes,

In a hearing held on 17 June 1994, prosecution counsel submitted an oral motion to amend Akayesu's indictment. In justifying the amendment prosecution witnesses expressed that the testimonies of Witness J and H had helped the prosecution to link the evidence on rape and sexual violence to the actions of the accused.¹²

It is this ruling that is used to create the guidelines for prosecuting rape as crime against humanity and a crime of genocide.

The Trial Chamber outlined guiding definitions that state when rape and crimes of sexual violence can be considered acts of genocide or crimes against humanity. The Trial Chamber states that sexual violence and rape, "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."¹³ This meant that as long as the crimes of sexual violence were in accordance with the United Nations definition of genocide and any of the five components of genocide outlined in the definition the crimes can be prosecuted as crimes of genocide. Similarly, the Trial Chamber set out specific guidelines for the prosecution of sexual violence as crimes against humanity. The Chamber wrote, "Rape and sexual violence constitute crimes against humanity as long as they are: (a) part of a widespread or systematic attack; (b) on a civilian population; (c) on curtailed catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds."¹⁴ These definitions lay out

¹² Usta Kaitesi, *Genocidal Gender and Sexual Violence: The Legacy of the ICTR, Rwanda's Ordinary courts and Gacaca Courts* (Cambridge: Intersentia, 2014), 128.

¹³ Prosecutor v. Akayesu, Indictment Documents (International Criminal Tribunal Rwanda September 2, 1998).

¹⁴ Ibid.

the possibilities for determining acts of sexual violence as either genocidal or crimes against humanity.

These guidelines were applied directly to the case against Pauline Nyiramasuhuko. Much like Akayesu, Nyiramasuhuko was charged with acts of sexual violence as part of her participation in the genocide. The groundbreaking aspect of this case was Nyiramasuhuko's gender. Nicole Hogg and Mark Drumbl wrote about the case saying, "Nyiramasuhuko is the ICTR's only female accused. She is, moreover, the only woman tried and convicted by an international tribunal for the specific crime of genocide and the only woman tried and convicted by an international tribunal for rape as a crime against humanity."¹⁵ This ruling welcomed a whole new level of reform into international humanitarian law, as well as domestic law, as a woman was being charged with rape. Indicting a woman on these charges challenges the traditional perpetrator/victim narrative. However, it is important to note that the Chamber failed to prosecute or convict Nyiramasuhuko for genocidal acts of sexual violence.

This failure works to set a precedent of on some level, by prosecuting Akayesu's crimes as acts of genocide and Nyiramasuhuko's crimes as crimes against humanity this establishes a difference in severity between the acts carried out by these perpetrators, adhering to the societal narrative of perpetrator and victim along gender lines. Although prosecutors were able to hold Nyiramasuhuko accountable for genocide and sexual violence separately, the failure to prosecute her for the crimes in relation to each other, like they had done with Akayesu, speaks to an inability to view similar crimes carried out by men and women as equal in severity and implication. Nyiramasuhuko was involved in acts of sexual violence in very proximal ways to those Akayesu was tried for, but the charges brought against Nyiramasuhuko were

¹⁵ Nicole Hogg and Mark Drumbl, "Women as Perpetrators: Agency and Authority on Genocidal Rwanda," in *Genocide and Gender in the Twentieth Century*, ed. Amy E. Randall (New York: Bloomsbury, 2015), 199.

differentiated. At times, when reading the case notes and the Chamber's comments it seems as though they were unable to see Nyriamasuhuko's crimes as independent acts and focused heavily on the influence of male leaders around her rather than acknowledging her autonomy and her ability to make decisions independent of those around her.

By establishing the precedent of adhering to gender roles and set ideologies of perpetrator and victim in the Nyriamasuhuko ruling, that the breakthroughs in genocidal definitions made during the Akayesu and Nyriamasuhuko cases are ultimately stunted. The rigid nature of the definitions created by the ICTY and ICTR, a general sense of skepticism about the classification of sexual violence as acts genocide, and a disregard toward the unique experiences of sexual assault victims in genocide upholds the less nuanced accounts of victims and perpetrators as established in previous genocides. Joshua Kaiser and John Hagan examine the issues with these accounts stating, "Accounts of mass atrocities habitually focus on one kind of violence and its archetypal victim, inviting uncritical, ungendered misconceptions: for example, rape only impacts women; genocide is only about dead battle aged men."¹⁶ These misconceptions continue on even after the Trial Chambers in Rwanda and Yugoslavia created the possibility of prosecuting crimes of sexual violence in a legitimate way.

This issue is twofold. In the feminist attempt to urge the international community to prosecute rape appropriately the focus often centered on female only narratives of sexual violence and victim only narratives of female participation in the war, which in turn was mirrored at the ICTY and ICTR. Although the majority of people subject to sexual violence during both genocides were women, there were cases of male focused rape and sexual violence, but often these cases go unreported or untried. Bos discusses the

¹⁶ Joshua Kaiser and John Hagan, "Gendered Genocide: The Socially Destructive Process of Genocidal Rape, Killing, and Displacement in Darfur," *Law & Society Review* 49, no. 1 (2015): 69, accessed Fall 2017.

implications of neglecting these narratives writing, “In the end, by focusing exclusively on the victimization of women in this conflict, feminist analyses suggest all women were victims and only victims, and therefore by definition not participants in the war.”¹⁷ Left out of this critique by Bos is the compounding neglect of men as victims, by forcing women into a victim only narrative and men in a perpetrator only narrative there is a disregard for cases that oppose these narratives.

Working in tandem with simplification of victim and perpetrator narratives is the misunderstanding of the legal requirements for genocidal rape or rape as a crime against humanity. Kaiser and Hagan highlight this and tie it to the simplification of victim narratives, “Yet even experts who accept these arguments [rape as a form of genocide] in theory have trouble understanding how- and therefore when- such violence is genocidal. Absence of the genocide label reduces humanitarian and political aid, changes legal requirements, hinders public and scholarly understandings, and all but invalidates survivors’ experiences.”¹⁸ This lack of understanding and its consequent underuse of the classification have tangible effects on survivors of more contemporary genocides.

Turning to Darfur for evidence, we see that although there are high numbers of cases of sexual violence carried out during the genocide, none of these crimes are being classified as crimes of genocide. According to the International Criminal Court in Darfur (ICC), the current investigations that started in 2005 revealed crimes of genocide, war crimes, and crimes against humanity. However, rape was only classified under war crimes and crimes against humanity and the court documents only refer to the rape of women in the charges brought against perpetrators.¹⁹ However, in many people’s testimonies, including women’s, the rape that they recall is perpetrated against men and boys. In the article, “Gender-

¹⁷ Bos, “Feminists Interpreting the Politics of Wartime Rape,” 1020.

¹⁸ Kaiser and Hagan, “Gendered Genocide,” 70.

¹⁹ “Darfur, Sudan.” International Criminal Court. <https://www.icc-cpi.int/darfur>.

Based Violence Against Men and Boys in Darfur: The Gender-Genocide Nexus,” it is written that one, “21-year-old Masaleit woman recounted a key method of emasculation: rape. Rape preceded and followed murder, and groups of soldiers and Janjaweed typically used penile penetration or objects, such as sticks and gun barrels, against groups of Darfuri men.”²⁰

Throughout the article the authors provide countless testimonies that echo these experiences, men and boys raped by soldiers in order to emasculate and humiliate them.

Through not recognizing these acts of rape legally in the same way acts of rape and sexual violence against women are recognized, the ICC is only deepening the resistance to recognize the nuances of the roles of perpetrator and victim. Kaiser and Hagan comment on this saying, “Such arguments encourage dangerous assumptions that only women experience sexual assault, that only men perpetrate it, that only women interpret it and that women experience no other victimization.”²¹ It is through these rigid interpretations of victim and perpetrator roles and how those roles are in conversation with societally constructed gender roles that the prosecution of gender and sexual violence during genocide is being stunted.

Although there were major breakthroughs in international humanitarian law at the end of the 20th century, these breakthroughs continue to be inhibited by strict interpretations of gender roles and victim and perpetrator roles. These strict interpretations work together with the misunderstanding of the policy laid out by the ICTY and ICTR to restrict the use of sexual violence as a crime of genocide in more contemporary examples. It seems that unless it is as clear cut as the Akayesu case, meaning the man in power inflicts rape and sexual violence on women in the victim group, there is an international hesitation to prosecute

²⁰ Gabrielle Ferrales, Hollie Nyseth Brehm, and Suzy McElrath, “Gender-Based Violence Against Men and Boys in Darfur,” *Gender & Society* 30, no. 4 (August 2016): 573, accessed Fall 2017, Women's Study International.

²¹ Kaiser and Hagan, “Gendered Genocide,” 81.

crimes of sexual violence as acts of genocide. If the narrative strays even slightly, like in the case of Nyriamasuhuko, the international community is unable to reconcile the preconceived notions of gender roles and victim/perpetrator leaving them unable to hold perpetrators accountable for their crimes in the appropriate way. This hesitation is seen again in the ICC for Darfur's prosecution of sexual violence. Those that they are holding accountable are men who raped women, although there is evidence to support the systematic rape of men as a form of emasculation before and after their deaths. By viewing men as victims to male perpetrator the genocide in Darfur strays from the typical narrative and therefore forces the international community to recognize that their rigid definitions of genocidal crimes do not hold up to the realities of genocide.