Inconsistent Justice: The ICTR and ICTY's Divergent Jurisprudence on Sexual Violence as a Means of Genocide

Saahil Gill [a*]

[a] School of Political Studies, University of Ottawa

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ABSTRACT: This paper critically examines landmark precedents set by the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) in prosecuting sexual violence as a means of genocide. Under statutory international humanitarian law, sexual violence is not explicitly listed as a means of genocide, leaving the chambers of these aforementioned tribunals to interpret various legal instruments in order to prosecute perpetrators of sexual violence during armed conflicts. In this context, the ICTR set a groundbreaking precedent in the *Akayesu* case by recognizing sexual violence as a means of committing genocide, thereby elevating the status of these sexual crimes to one of the gravest violations under international law. By analyzing key cases such as *Akayesu* at the ICTR and *Kunarac et al*. and *Kristic* at the ICTY, this paper demonstrates the divergent approaches of the two tribunals, specifically the latter's reluctance to recognize sexual violence as a genocidal act. This reluctance is exhibited by the ICTY's repeated rulings of sexual crimes as crimes against humanity rather than genocide in cases where a genocidal intent comparable to that identified by the ICTR was apparent. This paper thus further argues that the ICTY's reluctance has influenced the International Criminal Court's limited application of genocide charges in contemporary cases involving sexual violence. This analysis highlights the need for a re-evaluation of both the existing statutory and judicial understanding of genocide under international law to reflect the ICTR's broader recognition of the relationship between gender-based sexual violence, armed conflict, and genocidal intent.

KEYWORDS: genocide, sexual violence, crimes against humanity, international humanitarian law, Rwandan Genocide, Bosnian Genocide

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* Corresponding Author - Email Address: saahilgill@gmail.com
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Since the Convention on the Prevention and Punishment of the Crime of Genocide came into force in 1951, only the events of the Rwandan Civil War in 1994 and the Srebrenica Massacre of 1995 have been legally deemed to be genocides by an authoritative international judicial body.[1] In each case, these judgements were respectively made by the International Criminal Tribunals for Rwanda (ICTR) and for the former Yugoslavia (ICTY), which were established by the UN Security Council to prosecute the catastrophic violations of international humanitarian law that occurred in their respective territorial and temporal jurisdictions. Therefore, as the first two international judicial bodies to have rendered guilty verdicts on charges of genocide, both tribunals left behind numerous interpretations and precedents that continue to shape the definitions within and scope of the Genocide Convention and the Rome Statute as they relate to prosecuting said crime.[i] Specifically, as it relates to the contemporary understanding of armed conflict, both tribunals are significantly cited because of their landmark rulings pertaining to sexual violence crimes as either crimes against humanity or as a genocidal act.

However, given the vastly different nature of both conflicts, it is pertinent to investigate how the judgements and precedents established by both the ICTY and ICTR compare in terms of their contributions to defining and prosecuting genocide, particularly as it relates to sexual violence. Through a comparative legal analysis, this paper examines the evidence and judgements of key cases from both chambers in order to assess how and why each tribunal differed in its interpretation of similar events and application of the statutory legal framework concerning sexual violence and genocide. Consequently,

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[i] The Extraordinary Chambers in the Courts of Cambodia (ECCC), established in 1997, rendered a genocide conviction in 2018; however, it lacked the same binding international legal authority as the ICTR and ICTY. Unlike the latter tribunals, the ECCC was a hybrid tribunal embedded within the Cambodian judicial system; therefore, it applied a combination of Cambodian domestic and international law. Consequently, its rulings only had an advisory effect outside of Cambodia and thus, does not provide the same weight and relevance as the ICTR and ICTY to this paper's analysis.

this paper posits that while both tribunals made significant jurisprudential contributions to the legal understanding of sexual violence during armed conflict, only the ICTR shifted the legal precedents of genocide by recognizing sexual violence as a genocidal act, whereas the ICTY solely prosecuted sexual violence as a crime against humanity. As a result of this disparity, the current genocide jurisprudence lacks consistent precedent outlining the conditions for the legal recognition of sexual violence as a tool of genocide under international law. Moreover, the disparity created by the ICTY's reluctance to concur with the ICTR reinforced the conventional interpretation of sexual violence as a crime against humanity or a war crime rather than a potential tool of genocide. Without a reinforcement of the ICTR's landmark ruling, current international courts, such as the International Criminal Court (ICC), have inclined away the ICTR's standalone classification of sexual violence as potential means of genocide. Specifically, the ICC and current international courts lack sufficient precedent to practically deviate from the conventional interpretation, thus contributing to the current outcome wherein sexual violence continues to largely be prosecuted as a crime against humanity or war crime rather than a genocidal act. Evidently, the divergence of jurisprudence from the ICTR and ICTY has shaped the contemporary jurisprudence and prosecution of genocide in a manner that limits the prosecution of sexual violence as the gravest of crimes under international law.

ICTR: Expanding the Scope of Genocidal Means to Include Sexual Violence

One of the ICTR's most notable and substantial contributions to the case law on genocide was its explicit recognition of sexual violence as a means of perpetrating genocide. By doing so, the Tribunal ultimately had the effect of elevating the gravity of sexual violence as a violation of international human rights law, thus emphasizing the need to uphold the dignity of victims of gender-based violence in later tribunals. As per Articles three and four of the ICTR statute, the Tribunal had explicit jurisdiction to prosecute acts of rape,

enforced prostitution, and forms of indecent assault; however, these would be limited as charges of crimes against humanity and violations of the Geneva Conventions.[2] Furthermore, the Tribunal also had the jurisdiction to prosecute acts of genocide as defined in Article two of the Genocide Convention; however, it is important to note that the Convention makes no explicit mention of any acts related to rape or sexual violence.[3]

Therefore, the written legal consensus regarding sexual violence was that, while it clearly constitutes a crime against humanity or a war crime, it did not explicitly fit under the definition of genocide. In this context, the ICTR disrupted this legal consensus by ruling that sexual violence can, in fact, constitute an act of genocide when it convicted Jean-Paul Akayesu on the charge of genocide for perpetrating a systemic campaign of sexual violence. The Tribunal specifically ruled that the acts of rape and sexual violence perpetrated by Akayesu and Hutu militants inflicted serious bodily and mental harm on the Tutsi victims, which is an element of genocide outlined in paragraph b of Article two of the Genocide Convention.[4] Crucially, the Tribunal set a novel precedent by recognizing that these acts of sexual violence were not random but carried out with genocidal intent, specifically as they targeted Tutsi women in order to destroy them physically and psychologically. As such, the ICTR Chamber concluded that this systematic sexual violence was an integral aspect of the Genocide itself as it aimed at inflicting acute suffering on Tutsi women and contributed directly to the broader attempt to eradicate the Tutsi group as a whole. This ruling marked a significant legal milestone by establishing that campaigns of systematic rape and sexual violence against a targeted group had, in fact, constituted a legally recognized means of perpetrating genocide.[5]

This was a significant change to the legal understanding of not only genocide but of sexual violence as a violation of international human rights law. As previously discussed, genocide was not explicitly understood to include acts of sexual violence; therefore, by interpreting the language of an existing clause of the Genocide Convention, the ICTR expanded the definition of

genocide to include for the first time systematic campaigns of sexual violence. Moreover, the precedent set with the *Akayesu* case expanded the categorization of sexual violence from only being considered a crime against humanity or a war crime to also constituting genocide. Given that the crime of genocide is widely considered, including by the Tribunal itself, as "the crime of crimes," the ICTR's ruling thus had the effect of elevating sexual violence to the status of one of the gravest possible violations of human rights and establishing it as foundational to the customary legal understanding of genocide.[6] Most importantly, the ICTR strengthened and reaffirmed the principle set by the ICTY that rape should not be regarded merely as a result of one's natural sexual inclinations but rather as a deliberate component of war used to destroy, in whole or in part, a specific group.[7]

However, this classification of genocide as the "crime of crimes" is itself a matter of debate amongst legal scholars as some hold the view that crimes against humanity should hold equal status to genocide as they can be just as brutal and atrocious in scale. Moreover, due to the relatively high evidentiary and legal burden of proof required for acquiring a genocide conviction, some scholars also maintain that pursuing charges of crimes against humanity over genocide constitutes a more pragmatic and beneficial approach to securing international justice for victims.[8] Nevertheless, the widely recognized unique status of the crime of genocide, stemming from its intent to destroy entire groups, means that the ICTR's ruling of sexual violence as a genocidal act substantially elevated its legal classification by recognizing its role in the intentional destruction of whole groups. Ultimately, the expansion of the definitions surrounding genocide to include sexual violence represents a recognition that genocide is in itself often intertwined with gender-based violence as women and gender-diverse individuals experience genocides and more broadly, armed conflicts in a decidedly unique manner. By acknowledging this, the ICTR's rulings signify a significant departure from what were then traditional understandings of armed conflict and genocides as exclusively to do with mass killings. Instead, these judgements demonstrate a novel

understanding of these crimes to include a wider array of harms, including mental and psychological harms, and experiences, including those of women and gender-diverse individuals, an understanding that has remained prevalent in contemporary international human rights law.

ICTY: Limiting the Scope of Genocidal Means to Exclude Sexual Violence

The transformative nature of the ICTR's jurisprudential contributions to the legal understanding of genocide becomes more evident when juxtaposed with the ICTY's approach to sexual violence in its judgements. In terms of prosecuting acts of sexual violence and rape, the ICTY convicted perpetrators of crimes against humanity and violations of the Geneva Conventions, notably not rendering any judgement to the same effect as the ICTR regarding sexual violence and genocide. While these judgements were certainly significant to shaping the case law of sexual violence and rape as grave violations of international human rights law, the Tribunal made minimal jurisprudential contributions to the case law on genocide. For example, in its judgement against Anto Furundžija, the Tribunal explicitly acknowledged that rape may amount to genocide under specific conditions; however, it did not convict the Accused of genocide for his acts of sexual violence, rather finding him guilty of crimes against humanity.[9] Therefore, without a relevant judgement, the jurisprudential contributions of the ICTY to the legal understanding of genocide are relatively minimal. On the other hand, by ruling that rape and acts of sexual violence can constitute a crime against humanity and a violation of the Geneva Conventions, the ICTY disrupted the notion that rape is simply the outcome of primal human nature. The ICTY firmly recognized that rape can be a systematic weapon of war used against civilians to cause traumatic harm to the wider population, an idea that the ICTR built upon in its ruling that rape may be considered a means of genocide. As such, through its landmark rulings on sexual violence as a grave violation of international human rights and

humanitarian law, the ICTY laid a foundational understanding that allowed the ICTR to use and further develop as it applied to genocide.

From a critical perspective, however, the ICTY's reluctance to rule any of the acts of sexual violence committed in the former Yugoslavia as acts of genocide has proved to limit the prosecution of the crime of genocide. A topical comparative analysis reveals a degree of inconsistency in the interpretation of the law by the two tribunals, despite the demonstrable similarity between respective acts of sexual violence in both jurisdictions. This notion is most evident in the ICTY's judgement against Dragoljub Kunarac, Zoran Vuković and Radomir Kovač, in which the Tribunal convicted the Accused for their crimes of sexual violence as crimes against humanity, rather than genocide.[10] In this context, it is important to note that in the ICTR's judgement against Akayesu three years earlier, the Tribunal explicitly noted that rape shall be considered a means to perpetrate genocide. More specifically, it acknowledged that when a woman from the target group is deliberately impregnated through rape by the Accused, the act is intended to prevent births within the group, which is outlined as a genocidal act in Article Two, Section (c) of the Genocide Convention. This is because the child would not be regarded as a member of that group in accordance with its patriarchal lineage.[11] As such, the Kunarac indictment seems to be inconsistent with the established jurisprudence on genocide considering utterances of the Accused suggesting that Bosniak victims of rape would "carry Serb babies," which exhibits a genocidal intent to prevent Bosniak women from reproducing their group.[12] Furthermore, in a separate judgement the same year against Radislav Kristic, the ICTY even established that Bosnian Muslims do in fact live in a patriarchal society with a "traditional patriarchal structure".[13] Therefore, it is apparent that the ICTY's preference to prosecute certain acts of sexual violence and mass rape as crimes against humanity rather than genocide demonstrates a degree of inconsistency with previously established jurisprudence from the ICTR.

It is to some degree likely that the reason behind the ICTY's reluctance to rule sexual violence as an underlying act of genocide was primarily a prosecutorial strategic decision due to the far higher evidentiary and legal burden of proof required to establish genocidal intent in comparison to crimes against humanity.[14] Nevertheless, the potential influence of concerns surrounding the probability of successful convictions does not change the outcome that the ICTY did not establish nor contribute to precedent recognizing sexual violence as a means of genocide, whereas the ICTR did. More importantly, the conflicting jurisprudence from both tribunals on this matter leaves the notion of continuing to recognize sexual violence as a genocidal act without reinforced legal precedent, aside from the ICTR decision.

Ultimately, the fact that ICTR stands alone as the only international criminal tribunal to have convicted individuals of genocide on the basis of sexual violence crimes has hindered the International Criminal Court in adequately addressing the crime of genocide. While it may also be that ICC prosecutors have elected to pursue a similarly pragmatic strategy to pursue charges of crimes against humanity rather than genocide, this approach, and its resulting consequences, are themselves are direct result of the ICTY's decision not to reinforce the ICTR's precedent on this matter. Given that the ICTY prevented a judicial consensus from forming on this aspect of genocide has likely influenced the successor ICC into applying a similarly narrow interpretation, of the Genocide Convention and the Rome Statute that rarely indicts perpetrators of sexual violence under charges of genocide, even in cases where the evidence suggests genocidal intent.[ii]

[ii] "An analysis of the rape crimes committed by those prosecuted indicates that some of these may constitute genocide, yet none were prosecuted as such. For example, despite the widespread and ethnically motivated acts of violence in the Democratic Republic of the Congo, none of the six individuals charged received indictments for genocide." See Cassie Powell, ""You Have No God": An Analysis of the Prosecution of Genocidal Rape in International Criminal Law," *Richmond Public Interest Law Review* 20, no. 1 (2017): 37.

Moreover, not only is this narrow understanding of genocide evident in the ICC's prosecutorial practices, but also in the fact that the statutory understanding of genocide in the Rome Statute has not been amended to include forced pregnancy in order to align with the jurisprudence of the ICTR.[15] As such, it is evident that the state parties to the Rome Statute are influenced by the lack of legal consensus on this matter as they have amended the Statute in regard to other crimes in recent years.[16] Therefore, considering the aforementioned impacts of expanding the scope of genocide to include these sexual violence crimes, the ICTY has evidently restricted the ICC's understanding of genocide and contemporary armed conflict. Moreover, the ability of victims of sexual violence to access proper justice through the ICC almost thirty years later is also demonstrably limited.

Conclusion

Overall, an analysis of the key cases pertinent to sexual violence from the ICTR and ICTY reveals a stark contrast in each tribunal's approach to sexual violence crimes and the application of the Genocide Convention. Firstly, the ICTR's recognition that sexual violence may be considered a genocidal act was a groundbreaking paradigm shift in the legal understanding of genocide and sexual violence crimes during armed conflict. By interpreting existing statutes such as the Genocide Convention in the *Akayesu* case, the ICTR established a precedent that underscored the vital role sexual violence plays in the destruction of targeted groups. By contrast, the ICTY's approach, while significant in its own right in recognizing sexual violence as a crime against humanity, did not render any judgement to the same effect as the ICTR regarding genocide. This is in spite of demonstrable key legal similarities to the acts of sexual violence committed in *Akayesu*; nevertheless, the ICTY exhibited a strong reluctance to rule these acts of sexual violence as genocidal, a reluctance which has remained within the contemporary ICC and the Rome Statute.

In essence, this analysis has revealed the need for judicial or statutory clarity to prevent the inconsistent application of the law in future prosecutions of sexual violence or genocide. Without such clarity, there remains a degree of ambiguity that hinders the pursuit of justice and accountability for victims of sexual violence in conflict settings. As demonstrated by the ICTR's landmark rulings, it is not only feasible but also important to recognize certain acts of sexual violence as constitutive acts of genocide as part of a contemporary understanding of genocide. This recognition aligns with evolving norms in international humanitarian law and human rights, acknowledging the inseparable link between gender-based violence and armed conflict. Therefore, judicial and statutory authorities should adopt and uphold the ICTR’s approach moving forward, ensuring that the legal framework reflects a nuanced understanding of the complexities of genocidal acts and sexual violence crimes.

Notes

[1] United Nations Office on Genocide Prevention and Responsibility to Protect, "When to Refer to a Situation as 'Genocide': A Brief Guidance Note," *United Nations*, December 9, 2022, https://www.un.org/en/genocideprevention/documents/publications-and-resources/GuidanceNote-When%20to%20refer%20to%20a%20situation%20as%20genocide.pdf

[2] United Nations Security Council, "Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994" (1994), https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-criminal-tribunal-prosecution-persons.

[3] United Nationals General Assembly, "Convention on the Prevention and Punishment of the Crime of Genocide" (1951), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

[4] UNGA, "Convention on the Prevention and Punishment of the Crime of Genocide" (1951).

[5] Laïty Kama, The Prosecutor versus Jean-Paul Akayesu (International Criminal Tribunal for Rwanda Chamber I September 2, 1998).

[6] Chloe Edmonds, "The Crime of All Crimes: Genocide's Primacy in International Criminal Law" (M.A. Thesis, 2016).

[7] United Nations International Criminal Tribunal for the former Yugoslavia, "Landmark Cases" (United Nations International Criminal Tribunal for the former Yugoslavia), accessed May 1, 2024, https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases.

[8] Alexander R. Murray, "Does International Criminal Law Still Require a 'Crime of Crimes'? A Comparative Review of Genocide and Crimes against Humanity," *Goettingen Journal of International Law* 3 (2011): 599.

[9] Catharine MacKinnon, “The Recognition of Rape as an Act of Genocide - Prosecutor v. Akayesu,” in Guest Lecture Series of the Office of the Prosecutor (International Criminal Court, 2008), 101–10.

[10] United Nations International Criminal Tribunal for the former Yugoslavia, “Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case,” www.icty.org (United Nations International Criminal Tribunal for the former Yugoslavia, February 22, 2001), https://www.icty.org/en/sid/8018.

[11] Kama, The Prosecutor versus Jean-Paul Akayesu.

[12] United Nations International Criminal Tribunal for the former Yugoslavia, “Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case.”

[13] Almiro Rodrigues, Prosecutor v. Radislav Kristic (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 August 2, 2001).

[14] Michelle Jarvis and Kate Vigneswaran, "Challenges to Successful Outcomes in Sexual Violence Cases," in Prosecuting Conflict-Related Sexual Violence at the ICTY, ed. Baron S. Brammertz (Oxford: Oxford University Press, 2016), 46.

[15] Shayna Rogers, “Sexual Violence or Rape as a Constituent Act of Genocide: Lessons from the Ad Hoc Tribunals a Prescription for the International Criminal Court,” *The Geo. Wash. Int’l L. Rev* 48 (2016): 265–314.

[16] Parliamentarians for Global Action, “Amendments to the Rome Statute,” Parliamentarians for Global Action, accessed May 3, 2024, https://www.pgaction.org/ilhr/rome-statute/amendments.html.

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