
**NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
RWANDA GENOCIDE PROSECUTION**

**MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR**

**ISSUE: IS EVIDENCE OF RAPE RELEVANT AND THEREFORE
ADMISSIBLE WHERE GENOCIDE, BUT NOT CRIMES AGAINST
HUMANITY (RAPE), HAS BEEN CHARGED IN AN INDICTMENT?**

**Prepared by Kathleen Cavanaugh
November 2001
UCWR**

TABLE OF CONTENTS

INDEX TO SUPPLEMENTAL DOCUMENTS.....	ii
I. Introduction and Summary of Conclusions.....	1
A. Issues.....	1
B. Summary of Conclusions.....	1
1. Rape as a Crime Against Humanity to be a Continuous Transaction of Genocide.....	1
2. Rape Considered and Charged as Genocide.....	2
II. Factual Background.....	2
III. Analysis.....	5
A. Systematic Mass Rapes as More than Simply Sexual Violence Towards Women.....	5
1. Systematic Mass Rapes as Genocide/Ethnic Cleansing.....	5
2. Recognition of Rape as a Means of Genocide.....	6
B. Analysis of Recent Cases Dealing with Sexual Violence of Women.....	8
C. Crimes Offered as Evidence Not Specified in the Indictment.....	15
1. Evidence of Crime Not in Indictment.....	15
2. Inextricably Intertwined.....	17
3. Federal Rules of Evidence, Rule 404(b).....	19
4. Akayesu Case.....	20

INDEX TO SUPPLEMENTAL DOCUMENTS

STATUTES, TREATIES & RULES

1. Convention on the Prevention and Punishment of the Crime of Genocide, reprinted in J. Oppenheim & W. van der Wolf, Global War Crimes Tribunal Collection, Volume I, The Rwanda Tribunal (December 9, 1948, entered into force January 12, 1951, in accordance with article XIII of the Convention).
2. Statute of International Tribunal for Rwanda, reprinted in 2 Virginia Morris and Michael P. Scharf, The International Criminal Tribunal for Rwanda 3-12.
3. Rome Statute of the International Criminal Court, 17 July 1999.
4. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, annexed to S.C. Res. 827, U.N. SCOR., reprinted in Michael P. Scharf, Balkan Justice, 241 (1977).
5. FED. R. EVID. Rule 404(b) (U.S.).
6. Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, entry into force December 7, 1978, in accordance with Article 23.

CASES

7. Prosecutor v. Farundzija, Case No., IT-95-17/I-T (10 November 1995).
8. Prosecutor v. Akayesu, Case No. IT-96-4-T (2 September 1998).
9. Prosecutor v. Tadic, Case No. IT-94-1 (25 June 1996).
10. Prosecutor v. Delalic, et al., Case No. IT-96-21 (16 November 1998), (the Celebici case).

11. Prosecutor v. Gagovic, et al., Case No. IT-96-23-PT (26 June 1996), (the Foca case).
12. United States v. Bass, 794 F.2d 1305 (8th cir. 1986), *cert. denied*, 107 S. Ct. 233 (1986).

BOOKS

13. J. OPPENHEIM & W. VAN DER WOLF, GLOBAL WAR CRIMES TRIBUNAL COLLECTION, VOLUME I, THE RWANDA TRIBUNAL
14. MICHAEL P. SCHARF, BALKAN JUSTICE (1997).
15. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW (2000).
16. MICHAEL P. SCHARF AND VIRGINIA MORRIS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998).

LAW REVIEWS AND JOURNALS

17. Siobhan K. Fisher, Note: *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91 (1996).
18. Milton Hirsch, *This New-Born Babe An Infant Hercules: The Doctrine of "Inextricably Intertwined" Evidence in Florida's Drug Wars*, 25 NOVA L. REV. 279 (2000).
19. Arden B. Levy, *Article: International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*, 4 UCLA Women's L. J. 101 (1999).
20. Jessica Neuwirth, *Towards a Gender Based Approach to Human Rights Violations*, 9 WHITTIER L. REV. 399 (1987).
21. Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U.J. INT'L & POL. 167 (1997-98).
22. Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947 (1988).

23. International Human Rights Law Group, *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HST. WOMEN'S L.J. 89 (1994).

MISCELLANEOUS

24. Helena Smith, *Revealed: The Cruel Fate of War's Rape Babies: Up to 20,000 Women Were Raped During the Kosovan Carnage. Now They Are Bearing Children Fathered by their Serb Tormentors*, *The Observer*, April 16, 2000, available in 2000 WL 7009845.
25. Kosovo Backgrounder: *Sexual Violence as International Crime*, *Human Rights Watch* (HWR World Report Chapter on the Federal Republic of Yugoslavia, Press Release), May 10, 1999, available in <<http://www.igc.org/hrw.backgrounder/eca/kos0510.htm>>.
26. The Hague: *Dragoljub Kunarak is the First Accused of Rape and Torture of Bosnian Muslim Women to Turn Himself in* Press Release, March 4, 1998, available in <<http://www.un.org/icty/pressreal/p298-e.htm>>.
27. Human Rights Watch, *Human Rights Watch Applauds Rwanda Rape Verdict Sets International Precedent for Punishing Sexual Violence as a War Crime*, Press Release, (New York), September 1998, available in <<http://www.igc.org/hrw/press98/sept/rrape902.htm>>.
28. Human Rights Watch, *Shattered Lives, Sexual Violence During the Rwandan Genocide and its Aftermath*, September 1996, available in <<http://www.hrw.org/summaries/s.rwanda969.html>>.
29. Women's Caucus for Gender Justice, *Recommendations and Commentary for the Elements of Crimes and Rules of Procedure and Evidence*, June 2000, available in <<http://iccwomen.org/icc/pc200006/elemenrules.htm>>.

I. Introduction and Summary of Conclusions

A. Issues

This memorandum addresses the issue of whether evidence of rape can be admitted to further prove the crime of genocide when the charge of rape expressly included within the Crimes Against Humanity has not been included in the indictment.¹ Further, this memorandum discusses the plausibility of rape as a means of genocide.

B. Summary of Conclusion

1. Rape as a Crime Against Humanity should be included and considered a continuous transaction of genocide.

Rape is expressly categorized under Article 5, Crimes Against Humanity of the Geneva Conventions of 1949, subsection (g). However, this particular crime against humanity could also be considered a continuous transaction of genocide. Throughout the Rwanda genocide of 1994, it has been well documented that rape was used to systematically destroy the Tutsi population. The sexual violence of rape may not immediately destroy all of those targeted but ultimately does achieve the goal of destroying a particular group; thus it is possible to argue that rape cannot be separated from genocidal acts.

¹ Actual Issue of Memorandum: Is evidence of rape relevant and therefore admissible where genocide, but not crimes against humanity (rape), has been charged in an indictment? (Further information provided to clarify this topic was given by Andra Mobberly, which indicated that the evidence of rape was to be used as a continuous transaction of the crime of genocide).

2. **Rape should be considered and charged as a means of Genocide**

“Sexual violence was a step in the process of destruction of the tutsi [sic] group – destruction of the spirit, of the will to live, and of life itself.”² The destruction of a particular group’s life itself is genocide irrespective of whether it is carried out by guns, machetes or through forms of torture and sexual violence in particular, rape. This rings especially true in cultures where rape is non-forgiving. The victim is the one who will suffer, her life can be destroyed by rape. In the end, rape is and should logically be included within genocide as it satisfies the requisite elements; the requisite result of destruction of a group.

II. **Factual Background**

Sexual assault, systematic mass rapes, gang rapes, public rapes, sexual mutilation, forced impregnation, enforced prostitution, forced abortions, forced sexual slavery, forced pregnancy and forced public nudity are some of the situations of violence that women had to endure in the 1994 Rwanda genocide. Rebels and degenerates were not performing this gender-based violence randomly; government forces and Hutu militia groups (known as

² Prosecutor v. Akayesu, ICTR-96-4-T, 2 September 1998. [Reproduced in the accompanying notebook at Tab 8.]

interwahamwe) with the knowledge and encouragement of officials in high positions of power and authority were carrying it out.³

All of those horrible acts were being used as a tool, a weapon of war. They were being used as an instrument of ethnic cleansing and genocide. The aim was to eliminate the Tutsi population.

Although this practice was going on Rwanda, it was not subject to criminal prosecution until very recently. Rapes were considered a part of “Grave Breaches” of the Geneva Convention. Rapes could also be found to constitute Crimes Against Humanity recognized through Article 3(g) of the International Criminal Tribunal for Rwanda.⁴

This memorandum explores the sexual violence that occurred in Rwanda and the relationship of this type of violence to its main objective. Next, it discusses the international recognition of these actions through recent cases addressing and successfully prosecuting these crimes. Each instance of crimes of war is categorized as both “grave breaches” and “crimes against humanity” and more recently, genocide.

The numerous accounts of systematic mass rapes and gang rapes of the young women and girls in Rwanda are terrifying. Not only are the acts

³ Human Rights Watch, *Shattered Lives, Sexual Violence During the Rwandan Genocide and its Aftermath*, September 1996, available in <<http://www.hrw.org/summaries/s.rwanda969.html>>. [Reproduced in the accompanying notebook at Tab 28.]

⁴ Statute for the International Tribunal for Rwanda, Article 3 (g) *reprinted in* 2 Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda 3-12*; also available in <www.ictt.org/ENGLISH/basicdocs/statute.html>. [Reproduced in the accompanying notebook at Tab 2.]

unspeakable but also the manner in which they were carried out is unconscionable. The rapes of Tutsi women and young girls occurred in their own homes and on government property. The interwahamwe would not only rape the women and girls but they would torture them as well. Some women were mutilated before, during and after the rapes.⁵ There are some reports of women being raped with machetes, sharpened sticks, pieces of wood, knives, gun barrels, scalding water and acid.⁶ Women and girls were threatened with death if they resisted.⁷ Others were held captive as sexual slaves or forced into “marriages” as they were called.⁸ These “marriages” could last days, weeks, or the entire time of the genocide and even others lasted longer.⁹

The physical and emotional trauma that these rape victims endured was and will continue to be immense; however, for those rape victims who survived, this was only the beginning. The emotional trauma they would have to suffer in the future would be far worse.

The emotional scars that the victims of rape have to bear are tremendous, although it would be nothing in comparison to facing their family, friends and community immediately after this traumatic event. Rape victims are treated

⁵ See Human Rights Watch, *supra* note 3. Even Hutu women were targeted for rapes if they were wives of Tutsis or were aiding Tutsis in any way. There are accounts of Hutu women having their wombs slashed for carrying a Tutsi’s child. [Reproduced in the accompanying notebook at Tab 28.]

⁶ See *id.* [Reproduced in the accompanying notebook at Tab 28.]

⁷ See *id.* [Reproduced in the accompanying notebook at Tab 28.]

⁸ See *id.* [Reproduced in the accompanying notebook at Tab 28.]

⁹ See *id.* [Reproduced in the accompanying notebook at Tab 28.]

very differently in this culture.¹⁰ The women are treated as though they allowed themselves to be raped, they are ashamed and feel they cannot re-integrate into society if anyone knew they were raped or even worse if they were impregnated by rape.¹¹ There is the possibility that they will be ex-communicated or that they will never be able to marry.

III. Analysis

A. Systematic Mass Rapes as More Than Simply Sexual Violence Towards Women

Systematic mass rapes and other kinds of sexual violence are generally seen as merely sexual violence. Sexual violence against women, of all kinds, has until recently, been viewed as a private matter, a family's shameful secret. The view is changing from this misconception of privacy and action is being taken to prevent it by seeking punishment against those who commit such acts of sexual violence towards women.

1. Systematic Mass Rapes as Genocide/Ethnic Cleansing

Systematic mass rapes of the Tutsi women was used as a method of genocide. The interwamahwe have also ensured, through the threat of the Tutsi women being raped, that the risk of humiliation and degradation was one so

¹⁰ See *id.* [Reproduced in the accompanying notebook at Tab 28.]

¹¹ See *id.* [Reproduced in the accompanying notebook at Tab 28.]

great that the harm to the victim as well as her family and community would be irreparable.

2. Recognition of Rape as a Means of Genocide

Sexual violence has never been categorized as a specific war crime. Instead, it has been considered or categorized under “grave breaches” and “willfully causing great suffering or serious injury to body or health.”¹² According to Article II of the Genocide 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 measure intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹³

Although systematic mass rapes are not explicitly included in the list of acts that constitute genocide, mass rapes can be deemed implicitly included under subsection (b) causing serious bodily or mental harm to members of the group.¹⁴

¹² Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, entry into force December 7, 1978, in accordance with Article 23. [Reproduced in the accompanying notebook at Tab 6.]

¹³ Convention on the Prevention and Punishment of the Crime of Genocide, Article 2, adopted December 9, 1948, G.A. Res. 260A(III), 78 U.N.T.S. 277 (entered into force January 12, 1951). [Reproduced in the accompanying notebook at Tab 1.]

¹⁴ Helena Smith, *Revealed: The Cruel Fate of War's Rape Babies: Up to 20,000 Women were Raped During the Kosovan Carnage. Now they are bearing children fathered by their Serb tormentors*, The Observer, April 16, 2000, available at 2000 WL 7009845 (giving detailed accounts of women who had

Also, there are the accounts of women who have suffered mental harm as a direct result of the act.¹⁵

Recently, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia have prosecuted individuals with the crimes of rape and sexual assault as “grave breaches of the Geneva Conventions” and “Crimes against humanity.”¹⁶ Specifically, the International Criminal Tribunal of Yugoslavia has prosecuted individuals for rape and torture.¹⁷ However, the Rwanda Tribunal has successfully prosecuted for rape as genocide and forced impregnation as a crime, this being the *Akayesu* case.¹⁸ “The loss of control infringes on the victim’s human dignity and is what makes rape and sexual assault such an effective means of ethnic cleansing.”¹⁹

been physically abused in the process of being raped, they had bites all over their bodies, in particular their genital areas and their breasts had been cut). [Reproduced in the accompanying notebook at Tab 24.]

¹⁵ See Human Rights Watch, *supra* note 3. [Reproduced in the accompanying notebook at Tab 28.]

¹⁶ Human Rights Watch, *Kosovo Backgrounder: Sexual Violence as International Crime*, (HRW World Report Chapter on the Federal Republic of Yugoslavia, Press Release), May 10, 1999, available in <<http://www.igc.org/hrw/backgrounder/eca/kos0510.htm>>. [Reproduced in the accompanying notebook at Tab 25.]

¹⁷ The Hague, *Dragoljub Kunarak is the First Accused of Rape and Torture of Bosnian Muslim Women to Turn Himself In*, March 4, 1998, available in <<http://www.un.org/icty/pressreal/p298-e.htm>>. [Reproduced in the accompanying notebook at Tab 26.]

¹⁸ See Smith, *supra* note 14 (discussing Human Rights Watch, *Human Rights Watch Applauds Rwanda Rape Verdict Sets International Precedent for Punishing Sexual Violence as a War Crime*, September 1998 available in <<http://www.igc.org/hrw/press98/sept/trape902.htm>>). [Reproduced in the accompanying notebook at Tab 27.]

¹⁹ *Prosecutor v. Delalic, Mucic, Delic and Landzo*, IT-96-21 (1996), (the *Celebici* Case), available in <<http://www.un.org/icty/Celebici/trialc2/jugement/part3.htm>>. [Reproduced in the accompanying notebook at Tab 10.]

B. Analysis of Recent Cases Dealing With Sexual Violence of Women (before the ICTR and ICTY)

“Rape has long been mischaracterized and dismissed by military and political leaders as a private crime, the ignoble act of the occasional soldier. Worse still, it has been accepted precisely because it is so commonplace. Longstanding discriminatory attitudes have viewed crimes against women as incidental or less serious violations.”²⁰

The International Tribunal for the Former Republic of Yugoslavia has indicted 97²¹ people pursuant to Article 18, Investigation and preparation of indictment and Article 19, Review of the indictment, of the Statute of the International Tribunal for Grave Breaches of the Geneva Conventions of 1949, for violations of the laws or customs of war, crimes against humanity and even genocide.²² Approximately 20 of these indictments include horrible accounts of sexual assault as rape, gang rapes, forced impregnation and torture.²³ These rapes and tortures and forced impregnations are found incorporated within provisions of the Statute of the International Tribunal. For example, under Article 2, Grave breaches of the Geneva Conventions of 1949, subsection (b) torture or inhuman treatment; subsection (c) willfully causing great suffering or

²⁰ Siobhan K. Fisher, *Note: Occupation of the Womb: Forced Impregnation as Genocide*, 46 Duke L.J. 91 (1996). [Reproduced in the accompanying notebook at Tab 17.]

²¹ United Nations website including the International Criminal Tribunal of the Former Yugoslavia *available in* <www.un.org/icty/ind-e.htm>

²² *See id.* (many indictments are listed and available on this website including judgments and appeals court information).

serious injury to body or health; and subsection (g) unlawful confinement of a civilian.²⁴ The stories of rape, torture, forced impregnation and sexual assault as described above can be included, impliedly, within these subsections of the statute. Additionally, rape is explicitly incorporated within subsection (g) of Article 5, Crimes against humanity committed against any civilian population.²⁵ It is also possible to include other forms of sexual assault, sexual torture and forced impregnation within section (i) of Article 5, Other inhumane acts.²⁶ However, rape and forced impregnation are not expressly included within any of the provisions set out for genocide.²⁷ As with Article 2, Grave breaches of the Geneva Conventions of 1949, and discussed above, they can be implied. Unlike the grave breaches of the Geneva Conventions of 1949, ICTY indictments are not recognizing systematic mass rapes and sexual violence as a means of genocide.²⁸

There have been several cases tried before the International Criminal Tribunal of the Former Yugoslavia. In the *Celebici* case, only one of the four men

²³ *See id.*

²⁴ Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808, Annex, art. 5(g), U.N. Doc. S/25704 (1993), *as amended* 13 May 1998 (hereinafter Statute of the International Tribunal). [Reproduced in the accompanying notebook at Tab 4.]

²⁵ *Id.* at Article 5 Crimes Against Humanity, subsection (g) rape. [Reproduced in the accompanying notebook at Tab 4.]

²⁶ *Id.* at Article 5 Crimes Against Humanity, subsection (i) other inhumane acts. [Reproduced in the accompanying notebook at Tab 4.]

²⁷ *Id.* at Article 4, Genocide (stating the drafters of the ICTY statute did not want to depart from the wording of the Genocide Convention so there would be no ex post facto claims, as have tainted the legacy of Nuremberg). [Reproduced in the accompanying notebook at Tab 4.]

²⁸ *See United Nations website including the International Criminal Tribunal of the Former Yugoslavia, supra* note 21.

indicted on charges of grave breaches of the Geneva Conventions and violations of the laws and customs of war and crimes against humanity including rape and torture was found guilty of rape and torture.²⁹ The *Celebici* case stemmed from events that occurred in Bosnia-Herzegovina and contained allegations of murder, torture, sexual assault including rape, and other forms of inhumane treatment.³⁰ It is referred to as the *Celebici* case because that is the name of the prison camp where all of the criminal activity took place against the civilians.³¹

This case is being singled out because it is the first case to recognize rape as torture by the international tribunal.³² Rape, albeit recognized as torture, is still within the grave breaches of the Geneva Conventions.³³ It is noted in the judgment that three elements need be met before rape can be considered elevated to the level of torture.³⁴ The three elements are that it must be first, a physical invasion, second, of a sexual nature, and third, committed on a person under circumstances that are coercive.³⁵ As these three crucial elements need to be met

²⁹ See *Delalic*, IT-96-21. [Reproduced in the accompanying notebook at Tab 10.]

³⁰ See *id.* [Reproduced in the accompanying notebook at Tab 10.]

³¹ See *id.* [Reproduced in the accompanying notebook at Tab 10.]

³² See *Delalic*, IT-96-21. [Reproduced in the accompanying notebook at Tab 10.]

³³ See *id.* [Reproduced in the accompanying notebook at Tab 10.]

³⁴ See *id.* [Reproduced in the accompanying notebook at Tab 10.]

³⁵ See *id.* [Reproduced in the accompanying notebook at Tab 10.]

in order to consider rape a form of torture, it would seem logical that almost all instances involving rape could be considered torture.

Rape is an extremely delicate subject for the international tribunals. In each instance, the tribunals deal with it differently, by creating its own definition and/or elements. For example, in the *Celebici* case, rape is defined as:

Rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of object and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. . . The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed under circumstances which are coercive.³⁶

The Court made a point to leave out the specific acts in the description, whereas in the case of *Prosecutor v. Anto Furundzija*³⁷ as well as the *Foca* case³⁸ it defines rape into elements, they are,

- (i) the sexual penetration, however slight:
 - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force

³⁶ *See id.* (relying on the definition of rape from *Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 September 1998). [Reproduced in the accompanying notebook at Tab 10.]

³⁷ *Prosecutor v. Farundzija*, Case no., IT-95-17/I-T (10 November 1995). [Reproduced in the accompanying notebook at Tab 7.]

³⁸ *Prosecutor v. Gagovic, Foca* IT-96-23-PT (1996). [Reproduced in the accompanying notebook at Tab 11.]

against the victim or a third person.³⁹

In this case, the accused *Furundzija*, on December 10, 1998, was found guilty of assisting in the outrages upon personal dignity, including rape.⁴⁰ *Furundzija* was found guilty because while he was interrogating two women, one of his soldiers physically abused the women and forced one to engage in oral and vaginal intercourse with him and *Furundzija* did nothing to stop it.⁴¹ In this particular instance, the accused did not physically participate in the sexual assaults and rape, but the crime for assisting in such activity was found serious enough that the accused was charged and proven guilty. In the *Foca* case, eight men were indicted and were charged with sexual assault and rape.⁴² The charges mainly consisted of gang rapes on women from *Foca*, the village the government forces had just overtaken.⁴³ The rapes occurred while the men were interrogating the women and if the women refused to cooperate or kept silent, the men would punish them by raping them.⁴⁴ The indictment indicated that as many as ten men would rape a single women at any given time.⁴⁵

³⁹ *See id.* (quoting *Farundzija*, IT-95-17/1-T, at 73, para. 185). [Reproduced in the accompanying notebook at Tab 11.]

⁴⁰ *See Farundzija*, IT-95-17/I-T. [Reproduced in the accompanying notebook at Tab 7.]

⁴¹ *See id.* [Reproduced in the accompanying notebook at Tab 7.]

⁴² *See Gagovic*, Foca IT-96-23-PT (1996). [Reproduced in the accompanying notebook at Tab 11.]

⁴³ *See id.* [Reproduced in the accompanying notebook at Tab 11.]

⁴⁴ *See id.* [Reproduced in the accompanying notebook at Tab 11.]

⁴⁵ *See id.* [Reproduced in the accompanying notebook at Tab 11.]

There have been 55 cases brought before the International Criminal Tribunal for Rwanda and only a fraction of which include charges of rape and or sexual violence.⁴⁶ One of which was brought against a woman, Pauline Nyiramacuhuko⁴⁷ and her son, Arsene Shalome Ntahobali.⁴⁸

In the *Akayesu* case, which was brought before the ICTR, the Court accepts that there is no one commonly recognized or accepted definition of rape in international law and defines it as, “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”⁴⁹ This is by far the simplest definition of the three; however, ironically the case in which it was used accomplished the most in recognizing the impact of rape as a means of genocide.⁵⁰

The International Criminal Court (ICC) in the Rome Statute of the International Criminal Court, 17 July 1998, has included a very extensive provision for rape that includes, under Article 7, “Crimes against humanity,” subsection g, “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable

⁴⁶ See <<http://www.icttr.org>> (finding there were only seven cases which included rape and or sexual violence within the indictment, however not all indictments, amended indictments and judgments were accessible).

⁴⁷ Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). This was the first indictment against a woman. Additionally, she was the Minister of Family Welfare and the Advancement of Women. [Reproduced in the accompanying notebook at Tab 16.]

⁴⁸ See *id.* [Reproduced in the accompanying notebook at Tab 16.]

⁴⁹ See <<http://www.icttr.org>>.

⁵⁰ See *id.*

gravity” and also includes this subsection within article 8, “War crimes,” subsection 2 (b)(xxii) as constituting a grave breach of the Geneva Conventions.”⁵¹ There have been recommendations put forth to the ICC by the Women’s Caucus for Gender Justice recently requesting that elements of crime should include a general statement of gender integration that sexual violence should be charged and prosecuted in crimes of genocide.⁵² Among other requests, the recommendations are to elevate rape to the level of other heinous war crimes.⁵³ This is being offered to broaden the scope of sexual violence to ensure that these acts are considered as grave and encompass the gravity of prosecution that all other war crimes and crimes against humanity receive. These crimes against a specific gender should not be restricted and should be open to incorporate other non-physical forms of sexual violence.⁵⁴ There should not be such a low ceiling put on sexual violence.

The *Akayesu* verdict that came out of the International Criminal Tribunal of Rwanda offers great hope to the advancement of properly punishing those who inflict rape and other sexual violence as a form of genocide.

⁵¹ Rome Statute of the International Criminal Court, 17 July 1999, *available in* <<http://www.icrc.org/IHL.nsf/52d68d...bf846412566900039e535>>. [Reproduced in the accompanying notebook at Tab 3.]

⁵² Women’s Caucus for Gender Justice, *Summary of Recommendations, Elements of Crime*, June 12-30, 2000, *available in* <<http://www.iccwomen.org/icc/pc200006>>. [Reproduced in the accompanying notebook at Tab 29.]

⁵³ *See id.* [Reproduced in the accompanying notebook at Tab 29.]

⁵⁴ *See id.* [Reproduced in the accompanying notebook at Tab 29.]

Because conventional law is currently interpreted through the inherent gender bias of customary law, it is of questionable value in the situation of the former Yugoslavia. The ambiguity conventional law reflects toward prevention of rape is evidenced by its virtual silence on the matter. Rape is not defined as a war crime, and does not fall squarely into the definition of genocide . . . Unlike victims of many other human rights crimes, rape victims do not always die. So long as legal scholar and military forces alike view rape as sexual conduct of soldiers, rather than purely violent conduct, a prosecuting tribunal will rest on a shaky foundation. Specific mechanisms must be developed that recognize rape as a crime against humanity and as a means of committing genocide.⁵⁵

The fight for recognizing rape and other forms of sexual violence will continue until it is sufficiently acknowledged as a major weapon used in the destruction of a people and prosecuted with the same intensity that it is employed.

C. Crimes offered as evidence not specified in the indictment

There have been instances where evidence of crimes have been presented even though these crimes are not included in the indictment. There are instances where evidence of a crime or series of crimes were admitted, not included in the indictment, and the defendant was found guilty of the crime(s). Conversely and more often there are cases where evidence of a crime or crimes is admitted to further prove the crime indicated in the indictment.

⁵⁵ Arden B. Levy, *Article: International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*, 4 UCLA W. L.J. 225 (1994). [Reproduced in the accompanying notebook at Tab 19.]

1. Evidence of crime not in the indictment

A case tried in the International Criminal Tribunal of the Former Yugoslavia (ICTY) illustrates just such a case. The case of Prosecutor v. Tadic exemplifies how a defendant can be charged with a host of crimes in an indictment yet be convicted on specific crimes not expressly stated in the indictment.⁵⁶ Tadic's indictment provided several counts of crimes but none included the murder of two non-Serb policemen, for which he was ultimately found guilty.⁵⁷

The conflict arose because the indictment did not specifically include these murders, yet Tadic was acquitted on all murders specific to the indictment.⁵⁸ The evidence used to prove the two murders was the eyewitness testimony of one man.⁵⁹ Due to the eyewitness' account of the defendant murdering the two policemen, he was subsequently found guilty of the murders.⁶⁰ The defense appealed the decision on the grounds that the indictment did not adequately

⁵⁶ Prosecutor v. Tadic, IT-94-I-T (June 25, 1996). The initial *Tadic* indictment included in counts 2 to 4, "Forcible sexual intercourse with 'F.'" However, prior to trial those counts were withdrawn at the request of the prosecutor because witness "F" decided not to testify at the trial. [Reproduced in the accompanying notebook at Tab 9.]

⁵⁷ *See id.* [Reproduced in the accompanying notebook at Tab 9.]

⁵⁸ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 NYU J Int'l L. & Pol. 167 (1998). [Reproduced in the accompanying notebook at Tab 21.]

⁵⁹ *See id.* [Reproduced in the accompanying notebook at Tab 21.]

⁶⁰ *See id.* [Reproduced in the accompanying notebook at Tab 21.]

describe the crime for which the defendant was found guilty.⁶¹ Ultimately the decision was upheld on the ground that the defense was given an additional three weeks to prepare after the conclusion of the prosecutor's case, and that the murders were part of a general persecution charge.⁶²

If the ICTY could find a defendant guilty of two crimes committed not explicitly stated in the indictment, why then would the International Criminal Tribunal of Rwanda (ICTR) not be able to introduce evidence of rape to further establish the crime of genocide simply because rape is usually categorized as a separate offense.⁶³

2. Inextricably Intertwined

Even though an indictment does not explicitly address a specific crime beside the one being tried, evidence of uncharged crimes can, in some instances, be admitted.⁶⁴ In the United States "until about the year 1980, no one thought that evidence of uncharged crimes could be rendered admissible by the simple expedient of describing it as 'inextricably intertwined' with evidence of the crime

⁶¹ *See id.* [Reproduced in the accompanying notebook at Tab 21.]

⁶² *See id.* (stating the amended indictment still did not specifically include the two murders of the policemen). [Reproduced in the accompanying notebook at Tab 21.]

⁶³ Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808, Annex, art. 5(g), U.N. Doc. S/25704 (1993), as amended 13 May 1998 (hereinafter Statute of the International Tribunal) at Article 5 Crimes Against Humanity, subsection (g) rape (Rape is included in the Crimes Against Humanity and is separate from that of Genocide which is in itself its own Article). [Reproduced in the accompanying notebook at Tab 4.]

⁶⁴ Milton Hirsch, *This New-Born Babe An Infant Hercules: The Doctrine of "Inextricably Intertwined" Evidence in Florida's Drug Wars*, 25 Nova L. Rev. 279 (2000). [Reproduced in the accompanying notebook at Tab 18.]

or crimes actually pleaded in the indictment.”⁶⁵ The theory of being inextricably intertwined is quite different from the previous section in that here, one is producing evidence of uncharged crimes or misconduct that is in some way part of the crime that is actually specified in the indictment.⁶⁶ This view takes on several relationships between the crime charged and the uncharged crime.⁶⁷ The relationships are as stated below:

First, uncharged misconduct may have been a necessary preliminary step toward completing the crime charged; second, uncharged misconduct may be directly probative of the crime charged; third, uncharged misconduct may arise from the same transaction or transactions as the crime charged; fourth, uncharged misconduct may form an integral part of a particular witness’ testimony concerning the crime charged; and fifth, uncharged misconduct evidence may complete the story of the crime charged.⁶⁸

For the purposes of this memorandum, the second and third relationships are the most pertinent. The second relationship, uncharged misconduct may be directly probative of the crime charged⁶⁹ may be applicable when dealing with the crime of attempted genocide. To use evidence of uncharged misconduct to prove the truth of the actual crime charged directly parallels using evidence of

⁶⁵ *See id.* [Reproduced in the accompanying notebook at Tab 18.]

⁶⁶ Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. Miami L. Rev. 947 (1988). [Reproduced in the accompanying notebook at Tab 22.]

⁶⁷ *See id.* [Reproduced in the accompanying notebook at Tab 22.]

⁶⁸ *See id.* [Reproduced in the accompanying notebook at Tab 22.]

⁶⁹ *See id.* [Reproduced in the accompanying notebook at Tab 22.]

rape to prove the truth of attempting genocide. Presenting evidence of interwahamwe raping Tutsi women would offer proof of the intent of destroying the Tutsi group as a whole thus proving the truth of the actual crime of genocide. Since the rapes are uncharged, they would only be offered to assist in proving attempt of genocide.

The third relationship is the offering of evidence of uncharged misconduct arising from the same transaction as the crime charged.⁷⁰ As in this case, offering evidence of rape as a continuous transaction of genocide would be substantial verification that the rapes were in direct correlation to the mass killings or genocide. Rapes and killings could be independent of each other, however in this circumstance the two crimes could foreseeably be offered as arising out of the same transaction. "If a defendant has participated in a scheme of criminal activity culminating in uncharged misconduct, evidence of that uncharged misconduct is admissible even though it occurred subsequent to the crime charged, because it arose from the same criminal activity."⁷¹ Rape could unquestionably be considered a part of a "scheme of criminal activity."⁷²

For example, in *United States v. Bass*, evidence of uncharged crimes was admitted to show a scheme of criminal activity that occurred over a period of

⁷⁰ See *id.* [Reproduced in the accompanying notebook at Tab 22.]

⁷¹ See *id.* [Reproduced in the accompanying notebook at Tab 22.]

⁷² See *id.* [Reproduced in the accompanying notebook at Tab 22.]

days.⁷³ The scheme of criminal activity led up to the actual crime that the defendants were indicted for.⁷⁴ The Supreme Court upheld the uncharged crimes as being admissible “because each of the events constituted an integral part of an extended criminal transaction.”⁷⁵

3. Federal Rules of Evidence, Rule 404(b)

Rule 404(b) allows the use of evidence of other criminal acts to be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.⁷⁶ Providing evidence of rape to assist in the prosecution of the crime of genocide, under this rule, could be admissible on the grounds of opportunity in that the defendant(s) had access to those they were trying to harm and murder. To prove motive, that the defendant(s) sought after this group to physically and emotionally harm and/or destroy them. The defendant(s) also would have had knowledge that by

⁷³ 794 F.2d 1305 (8th cir. 1986), *cert denied*, 107 S. Ct. 233 (1986). [Reproduced in the accompanying notebook at Tab 12.]

⁷⁴ *See id.* (holding the charge was stealing a car, however, the uncharged crimes were escaping from jail, stealing several other cars and robbing several people before stealing the actual car that was the actual charge). [Reproduced in the accompanying notebook at Tab 12.]

⁷⁵ *Bass*, 794 F.2d at 1305. [Reproduced in the accompanying notebook at Tab 12.]

⁷⁶ FED. R. EVID. 404(b). Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. [Reproduced in the accompanying notebook at Tab 5.]

perpetrating the rapes of the Tutsi women this would perpetuate a harm to them that, in their culture, there would be no reprieve.

4. The Akayesu Case

The most persuasive and compelling argument for including rape as genocide is the ICTR case of Jean-Paul Akayesu. The Akayesu case has done the most for accepting rape and sexual violence as a means of genocide. Not only was this the first case to convict a person of genocide, but this case was also the first case to conclude that rape and sexual violence could be included within Article II of the Genocide Convention, paragraph (b), causing serious bodily or mental harm to members of the group.⁷⁷ It has easily been the most significant case and judgment dealing with sexual violence and genocide.

The first international tribunal that acknowledged and prosecuted for the sexual crimes of rape and sexual violence as a means of genocide was in Rwanda, in the 1996 indictment of former mayor, Jean-Paul Akayesu.⁷⁸ In the *Akayesu* the Court acknowledged rape as a form of genocide by stating, “rape can be a measure intended to prevent births when a person raped refuses subsequently to procreate.”⁷⁹ The Court found that rape was used as an attack on a certain ethnic

⁷⁷ *Akayesu*, ICTR-96-4-T. [Reproduced in the accompanying notebook at Tab 8.]

⁷⁸ Human Rights Watch, *Human Rights Watch Applauds Rwanda Rape Verdict Sets International Precedent for Punishing Sexual Violence as a War Crime, Press Release*, (New York), September 1998, available in <<http://www.igc.org/hrw/press98/sept/rrape902.htm>>. [Reproduced in the accompanying notebook at Tab 27.]

⁷⁹ *See id.* [Reproduced in the accompanying notebook at Tab 27.]

population, thus a means of genocide.⁸⁰ “Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”⁸¹ This case was a landmark decision in the acknowledgement of the enormous detrimental impact and effect of rape and sexual assault on women. Furthermore, the Court found Akayesu criminally responsible for seven incidents of rape and genocide.⁸²

In the initial indictment, crimes against women were not even included but were added to the amended indictment mid-way through the trial.⁸³ Since the addition of these gender crimes, genocide has been exposed to recognizing and acknowledging more than just murder being within the elements for genocide. Appreciating of the gravity of sexual violence and in particular, rape is clearly expressed within the Chamber’s opinion:

With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment that is, rape and sexual violence, the Chamber wishes to

⁸⁰ See *Akayesu*, ICTR-96-4-T. [Reproduced in the accompanying notebook at Tab 8.]

⁸¹ See *id.* [Reproduced in the accompanying notebook at Tab 8.]

⁸² See *id.* [Reproduced in the accompanying notebook at Tab 8.]

⁸³ William A. Schabas, *Genocide in International Law*, 2000 (citing Kelly Dawn Askin, *War Crimes Against Women, Prosecution in International War Crimes Tribunals*, The Hague: Martinus Nijhoff, 1997, pp.342-4). The initial indictment against Akayesu was amended in part because of an amicus curiae brief submitted to the ICTR in May 1997 by the International Coalition on Women’s Human Rights in Conflict Situations and also in part due to pressure from other non-governmental organizations (NGOs). This brief pointed out the lack of recognition of sexual violence despite the overwhelming accounts of rape and sexual violence present during that time. This Coalition continued their struggle to seek sexual violence and rape charges are included in all indictments. [Reproduced in the accompanying notebook at Tab 15.]

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. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of [sic] inflict harm on the victim as he or she suffers both bodily and mental harm... These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction... and specifically contributing to their destruction and to the destruction of Tutsi group as a whole.⁸⁴

As the Court indicated in the above, rape was considered a form of genocide, if carried out with the requisite intent of destroying a group, could elevate the act of sexual violence to the level of genocide.⁸⁵

“In Akayesu, the Rwanda Tribunal ruled the term ‘serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.’”⁸⁶ Within the language of this decision finding the defendant, Akayesu guilty of genocide, the Tribunal has defined genocide as inhumane or degrading treatment of which rape would undeniably fall under.⁸⁷ Additionally rape could be included within acts of torture, mental or bodily. The tribunal further states, “that rape and

⁸⁴ *See id.* [Reproduced in the accompanying notebook at Tab 15.]

⁸⁵ *See id.* [Reproduced in the accompanying notebook at Tab 15.]

⁸⁶ *See id.* (citing *Akayesu*, ICTR-96-4-T). [Reproduced in the accompanying notebook at Tab 15.]

⁸⁷ *See id.* [Reproduced in the accompanying notebook at Tab 15.]

sexual violence may constitute genocide on both a physical and mental level.”⁸⁸
For the purposes of this memorandum, admitting evidence of rape to further
prove genocidal activity would be more than appropriate regardless of whether
the individual occurrences of rape are expressly included within the indictment.

This case is monumental to the furtherance of achieving genuine justice
for the crimes committed in Rwanda and for the Tribunal itself. No other
tribunal has ever reached such tremendous advancement in recognizing the
drastic effects that rape and sexual violence have not only on women but their
families and societies. The Akayesu case is a landmark for women’s rights and
the validation of tremendous insight and ability of the tribunal.

⁸⁸ See *id.* (citing *Akayesu*, ICTR-96-4-T). [Reproduced in the accompanying notebook at Tab 15.]