



**Global  
Justice Center**

Human Rights Through Rule of Law

DECEMBER 2018

# **BEYOND KILLING:**

***Gender, Genocide, & Obligations  
Under International Law***

## ABOUT GLOBAL JUSTICE CENTER

The Global Justice Center (GJC) is an international human rights organization dedicated to advancing gender equality through the rule of law. We combine advocacy with legal analysis, working to expose and root out the patriarchy inscribed in so many international laws. Our projects forge legal precedents in venues that have the greatest potential for global impact, such as the United Nations Security Council, and in places with the most potential for systemic change, like conflict and post-conflict situations and transitional democracies. We believe that enforcing treaties and international human rights laws can be a catalyst for radical change, moving these hard-won rights from paper to practice.

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## DEDICATION

This report is dedicated to Janet Benshoof, who devoted her life to fighting for the equal protection of the law for women.



## EXECUTIVE SUMMARY

Gender permeates the crime of genocide. It is woven into the perpetrators' planning and commission of coordinated acts that make up the continuum of genocidal violence. It is through these gendered annihilative acts that perpetrators maximize the crime's destructive impact on protected groups.

Female and male members of targeted groups, by the perpetrators' own design, experience genocide in distinct ways by reason of their gender. Men and older boys are targeted as a consequence of the gendered roles they are perceived to inhabit, including those as heads of households, leaders, religious authorities, protectors, guardians of the group's identity, and patriarchs. Assaults on women and girls pay heed to their roles as mothers, wives, daughters, bearers of future life, keepers of community's and family's honor, and sources of labor within the home. An understanding of what it means to be male and female in a particular society thus saturates perpetrators' conceptions of their victims, and of themselves. In particular, the violence directed at women and girls during genocide is fed by existing misogynistic attitudes in society, and the traumatic impacts are magnified by the financial, social, cultural inequalities to which women and girls are subjected.

Genocide is often understood as a crime committed predominantly through organized mass killings—the majority of victims of which, both historically and today, tend to be male. Consequently, non-killing acts of genocide—more likely to be directed against female members of a protected group—are often cast out of the continuum of genocidal violence. Equally, in privileging the act of killing, other acts of violence committed against men and boys—such as torture, rape, and enslavement—have also been obscured.

The continuing failure to acknowledge the complexity of genocidal violence—and the distinct ways in which genocide is planned and committed against men and women, boys and girls, by reason of their gender—has undercut the development of an effective framework to mobilize the Genocide Convention's legal obligations to prevent and punish genocide. It has limited political, diplomatic, and military authorities' capacity to recognize where there is a serious risk of genocide occurring, and to identify and suppress genocides that are in progress. This has particular consequences for female victims, who are often subjected to a wider range of violations that occur over a relatively longer span of time.

Prosecutors have been more likely to charge genocide in situations where mass killings have occurred, while non-lethal genocidal acts—perpetrated disproportionately against female victims—are more likely to be indicted as crimes against humanity or war crimes, or not at all. These prosecutorial decisions, and the judgments that follow, eclipse substantial parts of the community of genocide victims, mirroring the attempted erasure that the perpetrators of genocide intended, and distorting the historical record borne out of the trials.

In the decades that have elapsed since the signing of the 1948 Genocide Convention, the red thread of genocide has continued to course its way through human history, calling into question the international legal order. A failure to grapple with the intrinsic role that gender plays the crime of genocide has undercut the progressive framework for understanding and action offered by the Convention. One cannot prevent and punish what one does not recognize.

A gendered analysis is essential to illuminate the multi-dimensional nature of this crime, and the gamut of its victims. In this way we recognize, remember, and protect all those whose lives have been, or may still be, ripped asunder by the scourge of genocide.



Yazidi women mark the second anniversary of the Yazidi genocide at a refugee camp Diyarbakir, Turkey.  
REUTERS / Sertac Kayar

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# I. INTRODUCTION

Gender permeates the crime of genocide. It is woven into the perpetrators' planning and commission of coordinated acts that make up the continuum of genocidal violence. It is through these gendered annihilative acts that perpetrators maximize the crime's destructive impact on protected groups. However, it is the crimes that are committed disproportionately against men and boys, that have been most easily admitted into the canon of genocidal violence. The failure to recognize the totality of conduct that bears the hallmarks of putative and ongoing genocides has significantly undermined States' and international organizations' ability to meet their legal obligations under the Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention" or "the Convention"),<sup>1</sup> and customary international law.

Female and male members of targeted groups, by the perpetrators' own design, experience genocide in distinct ways by reason of their gender.

Men and older boys are targeted as a consequence of the gendered roles they are perceived to inhabit, including as heads of households, leaders, religious authorities, protectors, guardians of the group's identity, and patriarchs. Assaults on women and girls pay heed to their roles as mothers, wives, daughters, bearers of future life, keepers of community and family honor, and sources of labor within the home. An understanding of what it means to be male and female in a particular society thus saturates perpetrators' conceptions of their victims, and of themselves. In particular, the violence directed at women and girls during genocide is fed by existing misogynistic attitudes in society, and the traumatic impacts are magnified by the financial, social, and cultural inequalities of women and girls.

For those who intend to destroy a protected group, the crimes they commit in pursuance of this goal are saturated with, and vary according to, the cultural beliefs and prejudices of the perpetrators and the society in which genocide is taking place.

The inextricable role that gender plays in the crime of genocide has not always been evident. Arguably, the earliest conception of genocide implicitly recognized the differing experiences of female and male genocide victims. This was largely set aside in the drafting of the Genocide Convention, the preamble of which heralded the coming together of States to liberate "mankind" from the scourge of genocide. In the 1990s, gender became part of the academic, legal, and activist approaches to parsing genocide as a result of a confluence of events: the massive sexual violence perpetrated during the Bosnian and Rwandan genocides, the writing and advocacy of feminist jurists, and the increase in female and feminist judges and lawyers in international criminal tribunals. All of these factors culminated in key legal findings, notably the International Criminal Tribunal for Rwanda (ICTR)'s 1998 Judgment in *Prosecutor v. Akayesu*, which provided one of first clearly gendered analyses of the crime of genocide. In particular, *Akayesu* first determined that rape and other acts of sexual violence could be constitutive acts of genocide.

Still a gendered analysis of the crime of genocide has been limited at best. The understanding of genocide as a crime committed predominantly through organized mass killings—the majority of victims of which, both historically and today, tend to be male—continues to reassert itself. Often there is a refusal, both implicit and explicit, to recognize the multi-faceted female experience of genocide, as well as the experience of males not selected for execution. Instead, non-killing acts of genocide—more likely to be directed against female members of the protected group—are often removed from the span of genocidal violence.

The pull towards recognizing genocide when it is committed through acts that disproportionately affect male victims draws directly from the greater seriousness with which we view, investigate, and litigate crimes that affect men more than women. Patriarchal structures and attitudes inform not only the perpetrators' commission of genocide, but also the international community's response to it. The failure to recognize and act on the gender-based crimes of genocide infringes on the rights of female victims to be free from all forms of discrimination, and to equal protection before the law.<sup>2</sup>

The continuing failure to acknowledge the complexity of genocidal violence—and the distinct ways in which genocide is planned and committed against men and women, boys and girls, by reason of their gender—has undercut the development of an effective framework needed to mobilize the Convention's legal obligations to prevent and punish genocide. It has limited political, diplomatic, and military authorities' capacity to recognize where there is a serious risk of genocide occurring, and thus to take action to prevent it. Similarly, the focus on crimes that are most often committed against male members of targeted groups makes it more difficult to identify and suppress genocides that are in progress. This has particular consequences for female victims, who are often subjected to a wider range of violations that occur over a relatively longer span of time.

In the aftermath of genocide, when attention has firmly turned to the matter of accountability, prosecutors are more likely to charge genocide in situations where mass killings have occurred. In many of the cases where genocide has been tried before international tribunals, non-lethal genocidal acts—perpetrated disproportionately against female victims—have not been recognized or indicted as genocide, but rather as crimes against humanity or war crimes—or not at all. In privileging the act of killing, other acts of violence committed against men and boys—such as torture, rape, and enslavement—have also been obscured. These prosecutorial decisions, and the judgments that follow, eclipse substantial parts of the community of genocide victims, mirroring the attempted erasure that the perpetrators of genocide intended, and distorting the historical record borne out of the trials.

In the decades that have elapsed since the signing of the Convention, genocide has continued to inflict great losses on humanity. This has raised questions about the meaningfulness of the Convention's legal obligations. Yet, as this paper posits, the Genocide Convention and customary international law continue to offer a progressive framework for understanding genocide, and for preventing and punishing this crime. Failure to engage with the framework derives, in part, from the gender-blindness with which the international community has approached and interpreted the Convention. In failing to acknowledge the inextricable role that gender plays in genocide, limits have been placed on the ability to recognize genocide before and as it occurs, and consequently to prevent and punish the full spectrum of genocidal violence. Where States have been unwilling to act, gender-blindness affords space for equivocation, and for retreat from the legal obligations of the Convention.

To recognize genocide only in the mass grave or the shot to the back of the head is to arrive at a perspective so partial that it becomes a barrier to understanding and to action. Genocide cannot be seen in the gloaming. A gendered analysis of genocide casts a bright light on the multi-dimensional nature of this crime, and the gamut of its victims. In this way we recognize, remember, and protect all those whose lives have been, or may still be, ripped asunder by the scourge of genocide.

**“To recognize genocide only in the mass grave or the shot to the back of the head is to arrive at a perspective so partial that it becomes a barrier to understanding and to action.”**

1. Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, Dec. 9, 1948.

2. Global Justice Center, “When Terrorists Perpetrate Genocide: Legal Obligations to Respond to Daesh’s Genocide,” Apr. 7, 2016.



## II. THE CRIME OF GENOCIDE

The Convention, drafted in the aftermath of the Second World War, was a solemn recognition of a crime that was old in nature, and new in name. The letter and spirit of the final draft of the Convention, the result of often-contentious negotiation, was a powerful retrospective condemnation of the Holocaust.

The understanding of the crime of genocide, as enshrined in the Convention, owes much to Raphael Lemkin, whose work, reflections, and advocacy spurred the international community and the fledgling United Nations (UN) to action.<sup>3</sup> Lemkin’s broader conception of the crime as involving “a coordinated plan of different actions,” which included both lethal and non-lethal methods of destruction, implicitly recognized the gendered dimensions of genocide. In the drafting of the Convention, Lemkin’s conception of genocide was obscured, though not erased.

In illuminating the role gender plays in the crime of genocide, one first returns to the traces of the Lemkinian conception of genocide, from which the jurisprudence of the *Akayesu* case<sup>4</sup> and other progressive interpretations of the Convention implicitly draw.

### GENOCIDE, AS DEFINED BY LEMKIN

The 1921 assassination of Talaat Pasha, one of the architects of the Armenian genocide, first propelled Lemkin into researching the then-novel idea of crimes against groups. The Ottoman Turks’ systematic attacks on the Armenians between 1915 and 1917 comprised not only of mass executions (mainly of Armenian men and boys), but also: death marches of men, women and children across the Syrian desert to concentration camps; the sexual enslavement and torture of Armenian women and girls; and the taking of

3. The Convention, and Raphael Lemkin as the man behind it, benefitted from a “very brief window of historical opportunity, when utopian plans for global order and global justice could get a hearing and the wartime unity of the victorious allies had not yet collapsed into the acrimony of the Cold War.” Michael Ignatieff, “The Unsung Hero Who Coined the Term ‘Genocide,’” *New Republic*, Sept. 22, 2013.

4. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, Sept. 2, 1998.

young Armenian boys into Turkish households where they were forcibly converted and raised as Muslims.<sup>5</sup> Lemkin would also study the systematic targeting of the Assyrians by the Kingdom of Iraq in 1933.

In 1933, Lemkin appealed, unsuccessfully, to colleagues at the Fifth International Conference for the Unification of Criminal Law to criminalize two new international crimes: Acts of Barbarity and Acts of Vandalism. Acts of Barbarity included “brutalities and acts of extermination,” while Acts of Vandalism were concerned with the “destruction of works and culture” of targeted groups.<sup>6</sup> It was not, however, until the 1940s that Lemkin—a Jewish jurist who fled from Poland to Sweden and then to the United States (US) as the Nazis rose to power—finally formulated the substance and structure of the crime, which he named “genocide.”<sup>7</sup>

In his 1944 book *Axis Rule in Occupied Europe*, Lemkin first set to paper his conception of the crime of genocide, writing:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.<sup>8</sup>

Lemkin rejected genocide as being synonymous only with mass killing. In particular, Lemkin advanced the idea of genocide being committed through the physical, biological, and cultural destruction of a group.<sup>9</sup>

5. Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur*, [395 – 416], Yale University Press: New Haven, 2007.

6. Ana Vrdoljak, “Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law,” *EJIL*, Vol. 20, No. 4, 1163, at [1176], 2010.

7. Lemkin lost approximately 50 members of his family in the Holocaust: Kurt Mundorff, “Other Peoples’ Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e),” *HILJ*, Vol. 50 No. 1, 61, at [73], 2009.

8. Raphael Lemkin, *Axis Rule in Europe: Laws of Occupation, Analysis of Government – Proposals for Redress*, [79], New York, NY: Howard Fertig, 1973.

9. Lemkin, *Axis Rule*, at [80]: “The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.”

Rohingya women wait at an aid distribution point in Balukhali refugee camp in Cox’s Bazar.

PHOTO  
Allison Joyce/UN Women/CC BY 2.0

Lemkin's definition of genocide recognized the wide span of genocidal acts capable of being employed by those intending to destroy "the essential foundations of life" of a group, and arguably opened the door to a gendered analysis of the crime. However, Lemkin made no specific mention of gender, nor did he delineate gender-based violence, including sexual violence, as potentially constitutive acts of genocide. Nevertheless, as a more gendered understanding of the crime takes root in jurisprudence, aspects of Lemkin's conception of genocide continue to surface.

## GENOCIDE, AS DEFINED BY THE CONVENTION

In 1948, the Convention first codified the crime of genocide, and set out the legal obligations to prevent and punish it. Article II of the Convention establishes that genocide is committed when a person or persons carry out a prohibited act or acts with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. These are commonly referred to as the "protected groups." Prohibited acts are (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. The definition contained in Article II has proved

durable, and was replicated without amendment in Article 6 of the Rome Statute of the International Criminal Court (ICC).

When it comes to **genocidal acts**, the Convention's definition adheres to Lemkin's conception of the crime in its unambiguous assertion that genocide can be committed through lethal and non-lethal acts, killing being only one of five identified constitutive acts of genocide. The Convention imposes no hierarchy within

**"Genocide is committed when a person or persons carry out a prohibited act or acts with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such."**

the five prohibited acts in terms of how they may evidence genocide. And while none of the discussions from which the Convention sprung discussed how genocide was committed against women and men as gendered subjects, the non-lethal genocidal acts were drafted in sufficiently broad terms as to allow for a more gendered reading in later eras, when it became increasingly apparent that such a reading was both proper and necessary.

Conduct that was not within the contemplation of the Convention's drafters has been accepted as constitutive acts of genocide. As detailed in Section III below, this is particularly so as regards the second prohibited act, that of "causing serious bodily or mental harm," which has been recognized by the ICTR and International Criminal Tribunal for the former Yugoslavia (ICTY) as including physical or mental torture,<sup>10</sup> cruel, inhumane or degrading treatment or punishment,<sup>11</sup> persecution,<sup>12</sup> deportation

10. Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Trial Judgment and Sentence, para. [502] Apr. 28, 2005; Akayesu, ICTR-96-4-T, paras. [706-707], [711-712]; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Trial Judgment and Sentence, para. [108], Dec. 6, 1999; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgment and Sentence, para. [815], Dec. 1, 2003.

11. Prosecutor v. Karadžić, Case No. IT-95-5-R61, Review of Indictments pursuant to Rule 61, para. [93], Int'l Crim. Trib. for the Former Yugoslavia, July 11, 1996.

12. Akayesu, ICTR-96-4-T, para. [504]; Rutaganda, ICTR-96-3-T, para. [51]; Prosecutor v. Karemera, Case No. ICTR-98-44-T, Trial Judgment and Sentence, paras. [1665-1668], Feb. 2, 2012.

and forcible transfer,<sup>13</sup> and rape and other acts of sexual violence.<sup>14</sup> It is now accepted that such conduct falls within the second prohibited act, and consequently is part of the definitional scope of genocide. Furthermore, international criminal tribunals have stated that this list of conduct capable of causing serious bodily or mental harm is illustrative and non-exhaustive.<sup>15</sup>

When it came to **genocidal intent**, the drafters of the Convention indicated that the pivotal "intent to destroy" meant the intent to physically and biologically destroy the protected group. This view has largely been adhered to in the jurisprudence of the international criminal tribunals. As discussed in Section IV below, the interpretation of this genocidal intent has lent itself to more easily recognize genocides that are perpetrated mainly through killings. As this paper explores, a gender-sensitive analysis of the intent to physically and biologically destroy a protected group embraces a wider spectrum of genocidal violence.<sup>16</sup>

As detailed in Sections V and VI below, the Convention also places **binding legal obligations** on its States Parties. Article I of the Convention establishes that all Contracting Parties are not only under an obligation to refrain from committing genocide themselves, but are also positively obligated to prevent and punish genocide committed by others.

As this paper explores, where one recognizes genocide as present only in its most murderous articulations, and rejects from the genocidal continuum other criminal conduct such as rape, torture, forced pregnancy, and enslavement, the ability to uphold the legal obligations to prevent and punish is undermined. One cannot prevent and punish what one does not recognize.

## GENOCIDE, IN CUSTOMARY INTERNATIONAL LAW

The Convention's definition of genocide was swiftly recognized as an international crime for which individual and state responsibility would arise—even for a State that had not ratified the Convention. In 1951, shortly after the Convention came into effect, the International Court of Justice (ICJ) recognized that the "principles underlying the Convention are principles which are recognised by civilised nations as binding on states without any conventional obligation."<sup>17</sup> That the prohibition against genocide unambiguously forms part of customary international law is evidenced through the ratification of the Convention by 143 countries (at the time of writing), and the inclusion of the crime of genocide into the Statutes of the ICTY, the ICTR, and the ICC. The crime has also been incorporated into the national legislation of over 80 countries.<sup>18</sup>

13. Prosecutor v. Popović, Case No. IT-05-88-T, Trial Judgment, para. [846], Int'l Crim. Trib. for the Former Yugoslavia, June 10, 2010; Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Appeals Judgment, para. [209], Int'l Crim. Trib. for the Former Yugoslavia, Apr. 8, 2015; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Trial Judgment, para. [545], Int'l Crim. Trib. for the Former Yugoslavia, March 24, 2016.

14. Akayesu, ICTR-96-4-T, para. [731-734]; Prosecutor v. Musema, Case No. ICTR-96-13-A, Trial Judgment and Sentence, para. [933], Jan. 27, 2000 (the conviction for rape was quashed on appeal but the recognition of rape as constitutive act of genocide, falling under the second prohibited act, remained).

15. Akayesu, ICTR-96-4-T, para. [502]; Rutaganda, ICTR-96-3-T, para. [51]; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Trial Judgment, para. [110], May 21, 1999; Musema, ICTR-96-13-A, para. [156].

16. As detailed in Section IV, there is also a line of case law that asserts a broader reading of the intent to destroy, one more aligned with genocidal intent as Lemkin had conceived of it.

17. Int'l Court of Justice (ICJ), "Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide," Advisory Opinion, at [23], ICJ Reports, 1951; quoted in ICJ, "Legality of the Threat or Use of Nuclear Weapons," Advisory Opinion, at [226], para. [31], ICJ Reports, 1996. (While ICJ jurisprudence is not binding, except on the parties to a dispute, it is recognized as being highly persuasive in determining the content of customary international law.)

18. Prevent Genocide International, "The Crime of Genocide in Domestic Laws and Penal Codes," available at: <http://www.preventgenocide.org/law/domestic/>. Last updated May 6, 2004.

The prohibition against genocide is recognized as a binding legal obligation under customary international law. It is also an *erga omnes* obligation, meaning that it is owed by States to the international community as a whole, and necessary to protect and promote the basic values and common interests of all.<sup>19</sup>

Furthermore, the prohibition against genocide has reached *jus cogens* status. That is to say that it is one of the fundamental, overriding principles of international law, from which no derogation is ever permitted.<sup>20</sup> That it has *jus cogens* status has been recognized in two separate ICJ Judgments: DRC v. Rwanda,<sup>21</sup> and Bosnia and Herzegovina v. Yugoslavia.<sup>22</sup> The commentary to Article 26 on the Responsibility of States for Internationally Wrongful Acts expressly states that genocide was one of several peremptory norms that “are clearly accepted and recognized.”<sup>23</sup> Distinguished international legal scholars have also recognized its *jus cogens* status.<sup>24</sup>

### IMPORTANCE OF A GENDERED ANALYSIS

The crime of genocide hinges on the perpetrators’ perception of the world around them, and of their place and the place of the victims’ group in it. Before and during genocides, perpetrators agitate or draw from existing prejudices against groups and then hold those now-devalued groups up as the barrier impeding the perpetrators’ return to imagined or real former glory.<sup>25</sup> Perpetrators’ perceptions, and the prejudices that so often underpin them, are heavily informed by what it means—socially, culturally, politically, and economically—to be female and male in a particular society.

Gender, then, can never be ancillary to the crime of genocide. It is through understanding the interplay between gender and genocide that one can see clearly why genocides are planned and committed as they are, and how genocidal strategies wreak gender-specific traumas that have particular destructive impacts on the victim group.<sup>26</sup>

It is uncontroversial to say that for genocide to be prevented, suppressed, and punished, it must first be recognized. However, there has been little or no regard given to gender when assessing whether there is a serious risk of genocide, identifying the crime while it is ongoing, and punishing the full spectrum of genocidal violence.

For several decades after the crime was defined in the Genocide Convention, the role of gender was largely ignored. Early analyses of the Armenian genocide and the Holocaust by academics, jurists, activists, and Governments tended to describe the experiences of ‘victims’—a term that was gender-neutral in name only, as it was the crimes against male victims, specifically killings, that were identified as genocidal acts.<sup>27</sup>

The turn towards examining the role gender plays in genocide occurred in the mid-1990s, following the jarring reporting of the mass rape of women and girls in the former Yugoslavia and in Rwanda. The roots of a gendered analysis of genocide began with an understanding of sexual violence against women and girls as a potentially genocidal act.<sup>28</sup> Still today—as can be seen from the Yazidi genocide—the expansive female experience of genocide is often reduced to rape and other acts of sexual violence, just as the male experience is frequently and erroneously limited to killings.

**“The expansive female experience of genocide is often reduced to rape and other acts of sexual violence, just as the male experience is frequently and erroneously limited to killings.”**

Nevertheless, the gender-based distinctions in mass atrocities began to evolve into an understanding amongst many scholars that genocide was experienced—and designed by the perpetrators to be experienced—differently by its male and female victims.<sup>29</sup> Gender-sensitive analysis also provided valuable insights into how propaganda was used in pre-genocidal societies to ready them for a genocide that would be committed by and against women and men in distinct and gender-specific ways. Further, it expanded the understanding of the early warning signs of genocide, and created pressure to ensure the full range of genocidal acts was indicted in the smattering of criminal trials that resulted.

No case did more to bring an understanding of how genocide affects women and men, and girls and boys, in gender-specific ways than the 1998 ICTR Trial Judgment in *Prosecutor v. Akayesu*.<sup>30</sup> While, as detailed in Section V below, *Akayesu*’s gendered analysis of genocide is oft cited, it did not become immediately embedded in the jurisprudence surrounding genocide. Many of the subsequent prosecutorial strategies and judgments in both international and domestic trials in which genocide was charged, unfortunately, failed to follow the path *Akayesu* carved out.

The arguments for the importance of a gendered understanding of genocide must, therefore, still be made. When it comes to the prohibition against genocide—an *erga omnes* obligation with *jus cogens* status—the consequence is that female victims are denied equal protection of the law, and all victims, regardless of gender, suffer from a narrow conception of genocide that fails to engage the legal obligations first established by the Convention.

19. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), ICJ Judgment, para. [31], July 11, 1996: “[T]he rights and obligations enshrined by the Convention are rights and obligations erga omnes.”; Nulyarimma v. Thompson, Fed. Court of Australia 1192, para. [81], 1999; and see, Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain), ICJ Judgment, paras. [33-34], Feb. 5, 1970.

20. UN, “Vienna Convention on the Law of Treaties 1969,” Article 53, at [331], UN Treaty Series, Vol. 1155, May 23, 1969: “a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” For a discussion the relationship between the concepts of erga omnes and jus cogens, see M. Cherif Bassiouni, “International Crimes: Jus Cogens and Obligations Erga Omnes,” Law and Contemporary Problems, Vol. 58 No. 4, 63, at [63-68], [172-177], 1996.

21. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), ICJ Judgment, para. [64], Feb. 3, 2006.

22. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina), ICJ Judgment, para. [161], Feb. 26, 2007.

23. International Law Commission (ILC), “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” Yearbook of the ILC, Vol. II, Part Two, Article 26, para. [4], 2001. See also ILC, “Draft Articles on the Responsibility of International Organizations, with commentaries,” Yearbook of the ILC, Vol. II, Part Two, 2011.

24. Bassiouni, “International Crimes,” at [63-74]. See also, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), ICJ, Provisional Measures, Separate Opinion of Judge Lauterpacht, para. [100], Sept. 13, 1993.

25. See Kiernan, Blood and Soil, [21, 27-29], for discussion of idealist cults of ancient glory or pristine purity as one of the ideological common features of genocide.

26. This nuanced appreciation illuminates the gendered messaging inherent in genocidal ideologies and discourses and its presence in genocidal propaganda. See, Amy Randall, “Gendering Genocide Studies,” Genocide and Gender in the Twentieth Century: A Comparative Study, London, UK: Bloomsbury, 2015.

27. Even as late as 1993, the four-day opening conference of the United States Holocaust Memorial Museum had no panels on women or gender and the Holocaust. See, Joan Ringelheim, “The Split between Gender and the Holocaust,” Women in the Holocaust, [340-350], New Haven, CT: Yale University Press, 1998; Janet Jacobs, Memorializing the Holocaust: Gender, Genocide and Collective Memory, New York, NY: I.B. Tauris, 2010.

28. Sexual violence, if committed with the requisite intent, is a genocidal act regardless of the gender of the victim. However, it is the campaign of sexual violence against women and girls that led to an analysis of acts of sexual violence as constitutive acts of genocide.

29. See, for example, Roger Smith, “Women and Genocide: Notes on an Unwritten History,” Holocaust and Genocide Studies, Vol. 8, Issue 3, at [315-334], 1994.

30. Jean-Paul Akayesu, the mayor of the Rwandan town of Taba, was judged guilty of genocide and crimes against humanity for acts that he engaged in and oversaw and which were committed against Taba’s Tutsi residents. The underlying acts included murder, torture, rape and other inhumane acts.



### III. GENDER AND GENOCIDAL ACTS

In the public and political imagination, genocide is often understood as being committed through organized mass murder, which, as history has shown, is more likely to be committed against men and adolescent boys. The conflation of genocide with mass killing is incorrect for two reasons.

First, genocide is principally a crime of intent, not one of scale. What separates genocide from other crimes is the requirement that a perpetrator must intend, at the time of deliberately committing one or more prohibited acts, to destroy a protected group in whole or in part. Where this special intent is present, the killing of a thousand people is no less a genocide than the killing of a million people. The distinction between genocide and extermination is illustrated by the Khmer Rouge’s atrocities. Between 1975 and 1979, the Khmer Rouge killed nearly two million people. Although colloquially referred to as “the Cambodian genocide,” the Extraordinary Chambers in the Courts of Cambodia (ECCC) determined that ethnic Khmer were targeted because they belonged (or were perceived to belong) to a political group, or to a particular social class, which are not protected groups under the Genocide Convention.<sup>31</sup> Only the Khmer Rouge’s targeting of Cambodia’s Cham Muslim and Vietnamese populations were charged as genocide (by killing).<sup>32</sup> On 16 November 2018, the ECCC delivered its Trial Judgment, convicting both Nuon Chea and Khieu Samphan of genocide.<sup>33</sup> The majority of the crimes, including the extermination of over 1.3 million ethnic Khmer, could only be and were charged as crimes against humanity.

Second, while killings are a common facet of genocide, the crime may be—and often is—perpetrated through non-lethal acts, such as forced sterilization and sexual violence. Since these crimes are more

likely to be committed against female members of the targeted group,<sup>34</sup> narrowly defining genocide as mass killing incorrectly limits the scope of the crimes committed.<sup>35</sup>

A narrow construction obscures how lethal and non-lethal acts work together in a coordinated strategy aimed at destroying a protected group. Also lost is an understanding of why perpetrators choose to target members of a protected group in diverse ways beyond the act of killing, and why the resulting gender-specific harms continue to destroy the targeted community long after the killings are over.

As awareness grew that genocide could be perpetrated through the commission of killing and non-killing acts, it became increasingly apparent that using a gendered lens allowed for a more nuanced understanding of how and why genocides are planned and committed as they are. Consequently, much scholarship—and to a lesser extent, jurisprudence—began to explore how and why genocides “specifically affect men as men and women as women.”<sup>36</sup> Progress, as this paper discusses, has been halting as the view of “genocide as massacre” continues to assert itself, both in courtrooms and in the corridors of power.

This section considers the gender implications of the five acts of genocide, as delineated in Article II of the Convention: (a) killing; (b) causing serious bodily or mental harm; (c) deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended

Rwandan women in Rulindo District gather to commemorate the 20th anniversary of the genocide against the Tutsi.

PHOTO  
Kwibuka Rwanda

31. Stéphanie Giry, “The Genocide That Wasn’t,” *The New York Review of Books*, Aug. 25, 2014.

32. Prosecutor v. Nuon and Khieu – Trial 02/02 (ECCC), [Closing Order](#), 15 September 2010.

33. ECCC, Prosecutor v. Chea and Samphan, [Trial Judgment \(Summary\)](#), 16 November 2018. See also, *Guardian* (UK), [Khmer Rouge leaders found guilty of genocide in Cambodia’s ‘Nuremberg’ moment](#), 16 November 2018.

34. It must be emphasized, however, that sexual violence is not inherently non-lethal. Sexual violence against children, women, and men has resulted in mass deaths, including as a result of injuries sustained during sexual assaults, blood loss and septicemia, and deaths occurring years later as a result of sexually transmitted diseases, including HIV/AIDS, (arguably, deliberately) transmitted during rape. In several instances, female genocide survivors have been later killed in “honor killings” by members of their community as a result of their being victims of sexual violence.

35. See Elisa von Joeden-Forgey, “Gender and the Future of Genocide Studies and Prevention,” *Genocide Studies and Prevention: An International Journal*, Vol. 7, Issue 1, 89, 2012 and in particular, at [94]: “Bringing women back into scholarly representations of genocide favors those definitions of the crime that do not limit the genocidal element to physical killing.... Definitions which focus on massacres – mass bodies, mass graves, distinct moments of mass murder – erase almost completely the history and experience of women victims and therefore obstruct deeper and more penetrating understandings of the crime.”

36. Raul Hilberg, *Perpetrators Victims Bystanders: The Jewish Catastrophe, 1933-1945*, [126], London, UK: Secker and Warburg, 1993.

to prevent births within the group; (e) forcibly transferring children of the group to another group. As the analysis below will show, underlying conduct may constitute more than one prohibited act.

## KILLING MEMBERS OF THE GROUP

Genocide is most readily identified through its first prohibited act, killing members of the group. Killing, often primarily of men and adolescent boys, is *the* privileged genocidal act, and consequently examinations of the commission and risk of genocide largely and unhelpfully revolve around the numbers killed. Genocidal killing is in fact a highly gendered activity, with men and boys targeted for different reasons and killed in different ways than women and girls.

### *Men and boys*

Those who commit genocide disproportionately target men and adolescent boys for killing, particularly in the crime's early stages.<sup>37</sup> This has been a near-uniform pattern in genocides throughout history, documented in the Ottoman Turks' attack on the Armenians,<sup>38</sup> Nazi Germany's Holocaust of European Jewry,<sup>39</sup> Saddam Hussein's Anfal campaign against the Iraqi Kurds,<sup>40</sup> the Hutu Power regime's attempted annihilation of Tutsis in Rwanda,<sup>41</sup> the Bosnian Serb Forces' massacre of Bosnian Muslims in Srebrenica,<sup>42</sup>

the Sudanese government-backed *Janjaweed* militia assault on the Darfuris,<sup>43</sup> Daesh's ongoing genocide of the Yazidis,<sup>44</sup> and the Burmese security forces' attacks on Rohingya Muslims.<sup>45</sup>

The Srebrenica genocide is a particularly glaring example of the focus on men and boys for killing. To say that the killings were disproportionately directed against male members of the group barely suffices. At least 7,000 men and boys were executed; by July 2018, the remains of only 14 women and girls, including an infant who was days old at the time of the killings, have been recovered.<sup>46</sup>

Killings of male members of the protected groups have sometimes occurred in such large numbers that they contributed to significant demographic imbalances in the sex ratio of post-genocide populations. For example, it has been estimated that almost 70 percent of Rwanda's population was female following the 1994 genocide.<sup>47</sup>

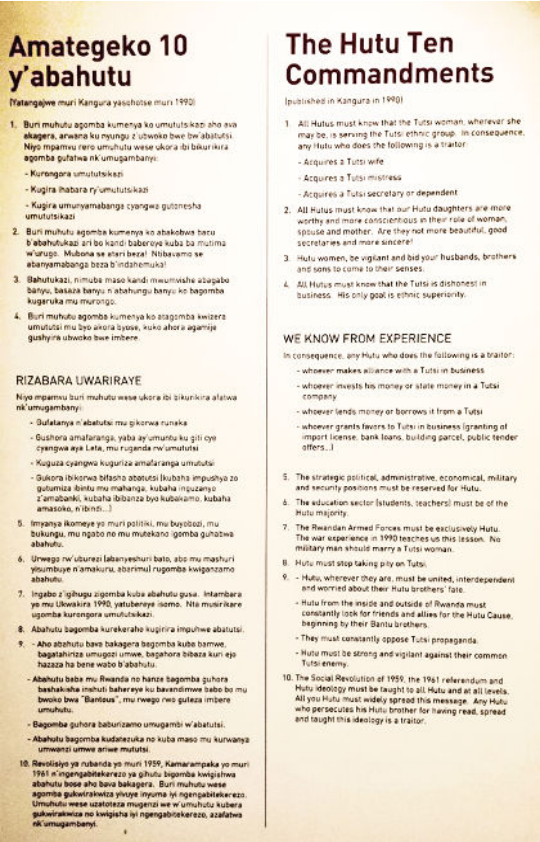
In genocides, men and boys are more likely to die "fast" (but not necessarily less horrific) deaths. They tend to be killed first and, usually, very shortly after being located or captured. These killings are usually presaged by the separation of men and older boys from the rest of the protected group. Prior to the Srebrenica genocide<sup>48</sup> men and boys were separated from the rest of their group.<sup>49</sup> Similar separations occurred immediately before Daesh's executions of Yazidi men and boys aged 12 and above in August 2014,<sup>50</sup> and the Burmese Security Forces' execution of male members of the Rohingya community during ground attacks in or after August 2017.<sup>51</sup>

The almost-immediate targeting of men and boys for execution is true even of genocides aimed at the total physical destruction of members of the targeted group, such as occurred during the Holocaust. The Nazi regime's genocidal attacks initially focused on Jewish men and then, progressively, on other members of the group. In the Rwandan genocide, also viewed as a genocide aimed at the total physical destruction of the Tutsi group, the early waves of killings focused on men and boys. It was documented that, "[t]he primary target of the hunt were Tutsi men [...] Within days, entire communities were without their men; tens of thousands of women were widowed, tens of thousands of children were orphaned."<sup>52</sup>

These killings are not gender blind. Males, particularly men and adolescent boys, are targeted for killing because they occupy gendered roles that genocide's perpetrators find particularly threatening:

37. Adam Jones, "Does Gender Make the World Go Round? Feminist Critiques of International Relations," *Rev. of Int'l Studies*, Vol. 22, Issue 4, 405, at [405], 1996. This paper distinguishes killing on the basis of gender from 'gendercide', a term drawn from Mary Ann Warren's work on sex-selective mass killings (of women). Jones co-opted the term 'gendercide' to describe sex-selective mass killings (which he posited as being gender-neutral, though observing correctly that mass killings occurring during unrest, armed conflict, and genocides mainly target men and boys). An excellent detailed critique of 'gendercide' being conceptually problematic was made by R. Charli Carpenter (Charli Carpenter, "Beyond 'Gendercide': Incorporating Gender into Comparative Genocide Studies," *The Int'l J. of Human Rights*, Vol. 6, Issue 4, 77, at [77-101], 2002). For the purposes of this paper, it is sufficient to emphasize that where men and boys or women and girls are targeted for genocidal killing (whether on a large scale or not), they are not targeted because of their biological sex, but rather because of their gender, which is to say, what it means to be male or female in a particular society. Beliefs about gender affect perpetrators' choices over how and why to kill victims in a particular manner.
38. In late 1914/ early 1915, the architects of the Armenian genocide drafted a 10-point document outlining the strategy to be pursued. The fifth point, referring to the Armenians, was, "Apply measures to exterminate all males under 50, priests and teachers, leave girls and children to be Islamised." See Vahakn Dadrian, "The Secret Young Turk Ittihadist Conference and the Decision for World War I Genocide of the Armenians," *Holocaust and Genocide Studies*, Vol. 7, Issue 2, 173, at [164], 1994. The ensuring massacres primarily, but not solely, targeted men and boys. See also Antonie Holslag, "Exposed Bodies: A Conceptual Approach to Sexual Violence during the Armenian Genocide," *Genocide and Gender in the Twentieth Century: A Comparative Study*, [96-97], London, UK: Bloomsbury, 2015; Kiernan, "The Armenian Genocide," *Blood and Soil*, [408-415].
39. Kiernan, "Blut und Boden," *Blood and Soil*, [440-454], in which Kiernan states that, following the invasion of Poland in September 1939, "Initial orders instructed German forces to kill Jewish men, Communists, and members of the Polish resistance, but as the soldiers and police became inured to murder of civilians, later orders included the killing of women and children." See also, Robert Gellately, *Backing Hitler: Consent and Coercion in Nazi Germany*, Oxford, UK: Oxford University Press, 2001.
40. The Hussein Government's attack on the Kurds, also known as the Anfal campaign, is perhaps most notoriously remembered for its use of chemical weapons, notably in Halabja in March 1988, which indiscriminately killed men, women, and children. However, Anfal included mass executions, primarily targeting Kurdish men and adolescent boys, killing tens of thousands. See, Human Rights Watch, "Genocide in Iraq: The Anfal Campaign Against the Kurds," 1993.
41. Human Rights Watch (HRW), "Leave None to Tell The Story: Genocide in Rwanda," 1999.
42. The Srebrenica cases form their own subset of ICTY jurisprudence. These cases include *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Trial Judgment, Int'l Crim. Trib. for the Former Yugoslavia, 29 Nov. 29, 1996; *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Appeals Judgment, Int'l Crim. Trib. for the Former Yugoslavia, Oct. 7, 1997; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgment, Int'l Crim. Trib. for the Foremer Yugoslavia, Aug. 2, 2001; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Judgment, Int'l Crim. Trib. for the Former Yugoslavia, Apr. 19, 2004; *Prosecutor v. Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgment, Int'l Crim. Trib. for the Former Yugoslavia, Dec. 10, 2003; *Prosecutor v. Nikolić*, Case No. IT-94-2-S, Sentencing Judgment, Int'l Crim. Trib. for the Former Yugoslavia, Dec. 18, 2003; *Prosecutor v. Nikolić*, Case No. IT-94-2-A, Appeals Judgment, Feb. 4, 2005; *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Trial Judgment, Int'l Crim. Trib. for the Former Yugoslavia, Jan. 17, 2005; *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Appeals Judgment, Int'l Crim. Trib. for the Former Yugoslavia, May 9, 2007; *Prosecutor v.*

- Popović, Case No. IT-05-88-T, Trial Judgment, Int'l Crim. Trib. for the Former Yugoslavia, June 10, 2010; *Prosecutor v. Popović*, Case No. IT-05-88-A, Appeals Judgment, Int'l Crim. Trib. for the Former Yugoslavia, Jan. 30, 2015; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Judgment, Int'l Crim. Trib. for the Former Yugoslavia, Dec. 12, 2012; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Appeals Judgment, Int'l Crim. Trib. for the Former Yugoslavia, Apr. 8, 2015; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Judgment, Int'l Crim. Trib. for the Former Yugoslavia, Mar. 24, 2016; and *Prosecutor v. Mladić*, Case No. IT-09-92-T, Trial Judgment, Int'l Crim. Trib. for the Former Yugoslavia, Nov. 22, 2017. The evidence adduced in the Srebrenica cases showed that Bosnian Serb Forces separated Bosnian Muslim men and adolescent from the general population of Bosnian Muslims and executed them shortly afterwards.
43. HRW, "Darfur in Flames: Atrocities in Western Sudan," at [26-29], 2004.
44. UN Office of the High Commissioner for Human Rights (OHCHR), "They Came to Destroy: ISIS Crimes Against the Yazidis," paras. [32-41], A/HRC/32/CRP.2, June 15, 2016.
45. Amnesty Int'l, "'We Will Destroy Everything:' Military Responsibility for Crimes Against Humanity in Rakhine State, Myanmar," June 2018; Fortify Rights & US Holocaust Memorial Museum, "'They Tried to Kill Us All' Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar," Nov. 2017.
46. Albina Sorguc, "Females Were the 'Youngest and Oldest Victims' of Srebrenica," *Balkan Insight*, July 5, 2018.
47. HRW, "Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath," 1996. See also Lisa Desai, "Why women are economic backbone of Rwanda," *CNN*, July 24, 2010.
48. Karadžić, IT-95-5/18-T, para. [5660].
49. Karadžić IT-95-5/18-T, para. [5662].
50. OHCHR, "They Came to Destroy," paras. [32-33].
51. Amnesty Int'l, "We Will Destroy Everything," at [11], [62-75]. See also, Fortify Rights & US Holocaust Memorial Museum, "They Tried To Kill Us All," at [9-10].
52. African Rights, *Rwanda: Death, Despair and Defiance*, [597-598], African Rights, 1995.



of Yazidi men and adolescent boys following capture. While the majority of Yazidi women and girls were abducted and sold into sexual slavery and/or forced to labor in the fighters’ homes, a number of instances of Daesh fighters executing women who were over childbearing age were recorded. Such was the fate of the older women of Kocho village who were killed at the primary holding site in Solagh Technical Institute on 16 August 2014,<sup>54</sup> the day after Daesh fighters executed hundreds of Yazidi men and boys inside Kocho. The killing of older women reflects Daesh’s view, keenly propagated within Daesh’s so-called caliphate but certainly not unknown in the wider world, that a woman’s worth is inextricably linked with her ability to bear children.

Second, examples of how gender informed the manner of killing can be seen in the Rwandan and Rohingya genocides. In the months and years preceding the 1994 Rwandan genocide, anti-Tutsi propaganda in Hutu supremacist publications, such as the magazine *Kangura*, leveraged existing prejudices towards Tutsi women. Tutsi women were cast as believing themselves to be superior to Hutu women in beauty, intelligence, and charm, and consequently displaying an attitude of arrogance that belittled the Hutus. Indeed, four of the infamous “Hutu Ten Commandments,” published in the December 1990 edition of *Kangura* fixated on the supposed duplicity of Tutsi women.<sup>55</sup> In the ICTR case against *Nahimana*,<sup>56</sup>

53. African Rights, *Death, Despair and Defiance*, [815].

54. OHCHR, “They Came to Destroy,” para. [48]. See also, Yazda, “Mass Graves of Yazidis Killed by the Islamic State Organization or Local Affiliates On or After August 3, 2014,” at [10], Jan. 28, 2016.

55. Kangura, “The Hutu 10 Commandments,” Genocide Archive of Rwanda, Dec. 10, 1990.

56. Ferdinand Nahimana was a co-founder of the radio station Radio Télévision Libre des Mille Collines (RTLM), which, during the genocide, broadcast information and propaganda that helped coordinate the killings and fuel the hatred against Tutsi and moderate Hutu victims. He was convicted and sentenced to life imprisonment by the Trial Chamber. This was reduced to 30 years’ imprisonment on appeal.

those of heads of households, community leaders, political figures, religious authorities, guardians of the group’s identity (particularly so in patrilineal cultures), fighters, and patriarchs. Steadfast in their intent to destroy the protected group, perpetrators seek to eliminate the male members of the group who hold (and are seen to hold) the preponderance of power in both public and private life. In doing so, the perpetrators also assert dominance over the women and children belonging to the same group. In some genocides, perpetrators have killed even young boys and infants. During the Rwandan genocide, members of the *Interahamwe*, the Hutu militia, tore clothes off children to ensure boys were not dressed in girls’ attire as a means of shielding them from execution.<sup>53</sup>

*Women and girls*

Where women and girls are targeted for genocidal killings, those killings—like the killing of men and boys—tend to reflect the gendered view of the role and uses of females in that society. This manifests primarily in two ways—in the reasons for killing and the means and/or methods by which it is carried out. For example, following Daesh’s initial attack on the Yazidis of Sinjar in August 2014, the group executed thousands

A copy of the Hutu Ten Commandments on display at the Kigali Genocide Memorial in Rwanda.

PHOTO Sareta Ashraph

*Barayagwiza*,<sup>57</sup> Ngeze<sup>58</sup>—usually referred to as “the media trial”—the Chamber reviewed the publications containing anti-Tutsi propaganda, and in convicting the accused, determined:

The presentation of Tutsi women as *femme fatales* focused particular attention on Tutsi women and the danger that they represented to the Hutu. This danger was explicitly associated with sexuality. By defining the Tutsi women as an enemy in this way, *Kangura* articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.<sup>59</sup>

Indeed, once the Rwandan genocide was underway, the massive scale and barbarity of the lethal violence meted out to Tutsi women and girls reflected the misogyny of the propaganda, itself built on deeply ingrained pre-existing bigotries. For the most part, Tutsi men and boys were summarily executed at their homes, at places of perceived refuge (such as churches), or at checkpoints, and were often killed by machetes or nail-studded clubs. In some cases Tutsi women and girls, particularly when they had taken refuge in schools and churches as part of a larger group, were killed in a similar fashion.

A large number of Tutsi women and girls, however, were murdered as a direct and intended consequence of brutal sexual violence and torture. The methods of their killing displayed the misogyny of the genocidaires, and their need to humiliate and diminish Tutsi women and girls. Perpetrators impaled them with objects, poured boiling water on their genitals, and cut off their breasts.<sup>60</sup> Many women died from blood loss following these mutilations.<sup>61</sup> Younger girls died as a result of the rapes themselves. Major Brent Beardsley, assistant to UN Force Commander Roméo Dallaire, testifying before the ICTR in the *Bagoasora* case, stated:

when they killed women it appeared that the blows that had killed them were aimed at sexual organs, either breasts or vagina; they had been deliberately swiped or slashed in those areas. And, secondly, there was a great deal of what we came to believe was rape, where the women’s bodies or clothes would be ripped off their bodies, they would be lying back in a back position, their legs spread, especially in the case of very young girls. I’m talking girls as young as six, seven years of age, their vaginas would be split and swollen from obviously multiple gang rape, and then they would have been killed in that position.<sup>62</sup>

Similarly, in Burma, as part of the security forces’ attack on the Rohingya, soldiers have raped women and girls, a currently unknown number of whom were killed afterwards. Soldiers also mutilated women’s and girls’ reproductive organs, prior to killing or as part of the act of killing. One witness recalled the 27 August 2017 attack on Chut Pyin village. Hiding, she saw four soldiers drag her neighbor from her house: “Two held her shoulders and they took turns to rape her...She was fighting back, they cut her breasts [with a knife]. After that, they stabbed her.”<sup>63</sup> The Global Justice Center, in its recent report, stated, “While

57. Jean-Bosco Barayagwiza was also the co-founder of RTLM. He was convicted and given a sentence of 35 years’ imprisonment, which was upheld on appeal.

58. Hassan Ngeze was the founder, owner, and editor-in-chief of *Kangura*. He was convicted and sentenced to life imprisonment by the Trial Chamber. This was reduced to 35 years’ imprisonment on appeal.

59. Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Trial Judgment, para. [188], Dec. 3, 2003.

60. HRW, “Leave None to Tell the Story,” at [215]; HRW, “Shattered Lives,” at [39].

61. Anne-Marie de Brouwer et al, *The Men Who Killed Me: Rwandan Survivors of Sexual Violence*, Vancouver, Canada: Douglas & McIntyre, 2009.

62. On 3 February 2004, Major Beardsley became the 38th Prosecution witness to testify in the Bagoasora case, often referred to the “Military 1” trial. Prosecutor v. Bagoasora, Case No. ICTR-98-41-T, Transcript of Proceedings, Feb. 3, 2004.

63. Amnesty Int’l, “We Will Destroy Everything,” at [90]. (Another female survivor interviewed by Amnesty International, described the body of one girl, last seen alive being taken away by a group soldiers, as having bite marks on her

Rohingya men were generally killed by gunshot, women and girls were stabbed/slashed and burned—means typically used when destroying objects and property. Choosing these means as fit for murdering women shows the perceived lower status of Rohingya women and girls in the eyes of their murderers, and evinces deeply gendered conceptions of dominance, power, and masculinity.”<sup>64</sup>

#### *Fast deaths, slow deaths, and gender*

In diplomatic discussions and in court, killings are most easily recognized as being genocidal when they are committed as part of, or immediately after, the initial attack. Put another way, the “fast” deaths of those killed soon after an attack are more likely to be acknowledged as genocidal acts. The majority of those killed in such circumstances are men and older boys.

As the jurisprudence of the ICTR has shown, the killing of women and girls has been positively determined to be an act of genocide where they were summarily executed (often alongside or shortly after the execution of men and boys), or where the killings followed very quickly after other acts of extreme violence, notably sexual violence and torture, being committed by the perpetrators.

What then of the “slow” deaths which are distant in time and space from the more immediate killings? Such deaths may result, for example, from the serious bodily or mental harm caused to the victims, or from the successful deliberate infliction of conditions of life calculated to bring about the destruction of the protected group, in whole or in part.<sup>65</sup> There is strong grounding to argue that these deaths, if it is determined they were brought about with the requisite intent, should be considered genocidal killings.

It is estimated that the majority of Tutsi women who survived the Rwandan genocide had been raped.<sup>66</sup> Survivors of the genocidal rapes were six times more likely to be HIV positive than the general population.<sup>67</sup> Survivors’ accounts suggest that some of the rapes were committed with intent to infect the victim with HIV and to cause a “slow, inexorable death.”<sup>68</sup> Consolee Makanyirigira, coordinator for the Rwandan widows organization AVEGA, stated that “the Hutu used two weapons to kill...one was to use guns and machetes; the other was to infect us with AIDS.”<sup>69</sup> Many of those infected subsequently died of AIDS and AIDS-related illnesses. No prosecutions have put forward a case theory that deaths from HIV, intentionally transmitted during genocidal rape, fall within the rubric of genocidal killing.

breasts, at [94]). See also, Fortify Rights & US Holocaust Memorial Museum “They Tried To Kill Us All,” at [9].

64. Global Justice Center, “Discrimination to Destruction, A Legal Analysis of Gender Crimes Against the Rohingya,” Sept. 18, 2018.

65. Attorney-General of Israel v. Eichmann, Crim. Case No. 40/61, Judgment, para. [196], District Court of Jerusalem, Dec. 11, 1961. As regards the third prohibited act, while the victims are still alive, existing under the conditions of life calculated to bring about the group’s physical destruction in whole or in part, it is evident that they are victims of the third prohibited act (as shall be discussed in detail below). But on their death, there is a strong argument to be made that these deaths should also be covered by the first prohibited act. The District Court of Jerusalem, during the trial of Eichmann, determined, “we do not think that conviction on the second Court [i.e. imposing living conditions calculated to bring about the destruction] should also include those Jews who were not saved, as if in their case there were two separate acts – first, subjection to living conditions calculated to bring about their physical destruction, and later the physical destruction itself.”

66. Catrien Bijleveld, et al, “Counting the Countless: Rape Victimization During the Rwandan Genocide,” Int’l Crim. Justice Rev., Vol. 19, Issue 2, 208, 2009. See also, Nancy Sai, “Rwanda,” Women Under Siege, Feb. 8, 2012, available at: <https://www.womensmediacenter.com/women-under-siege/conflicts/rwanda>

67. Bijleveld, “Counting the Countless;” Sai, “Rwanda.” Another study determined that, of a sample of Rwandan women who had been widowed as a result of the genocide, more than two thirds tested positive for HIV. The same study determined that HIV infection rates in rural area more than doubled after the genocide. See, Stefan Elbe, “HIV/AIDS and the Changing Landscape of War in Africa,” Int’l Security, Vol. 27, No. 2, 159, at [159–177], 2002.

68. Mark A. Drumbl, “She Makes Me Ashamed To Be A Woman: The Genocide Conviction of Pauline Nyiramasuhuko,” MJIL, Vol. 34, Issue 3, 559, 2011. See also, Obijiofor Aginam, “Rape and HIV as Weapons of War,” United Nations University, June 27, 2012.

69. Jennifer Hentz, “The Impact of HIV on the Rape Crisis in the African Great Lakes Region,” Human Rights Brief, Vol. 12, Issue 2, Article 4, 2005.

Daesh’s killing of older Yazidi women, occurring at the time of, or soon after, the killing of Yazidi men and boys, is likely to be unequivocally defined as genocidal killings. It is less clear, based on existing jurisprudence, whether the deaths of the women and girls that resulted from sustained sexual and physical abuse and/or poor living conditions (such as denial of adequate food) perpetrated against them over a prolonged period of time, would be included under the first prohibited act. Whether perpetrators of genocide would be criminally responsible for deaths that are a direct consequence of their abuse of members of the protected group has not yet been ruled upon. In its 2016 report, the Commission of Inquiry on Syria (“Syria COI”) documented the death by suicide of Yazidi women and girls held captive by Daesh and sexually enslaved (or about to be sold into sexual slavery).<sup>70</sup> Citing the ICTY Trial Judgment in *Krnjelac*, which found that these suicides may amount to killing where the accused’s acts or omissions “induced the victim to take actions which resulted in his death, and that his suicide was either intended, or was an action of a type which a reasonable person could have foreseen as a consequence,”<sup>71</sup> the Commission raised the possibility that future courts could charge deaths by suicide, in particular contexts, as genocidal killing.<sup>72</sup> To date no cases have asserted suicide as a form of genocidal killing and the matter remains open.<sup>73</sup>

Where slow deaths, the victims of which are more likely to be female, are not deemed to be constitutive acts of genocide, victims are denied the justice that comes with investigation and prosecution of the alleged perpetrators, and consequently are denied equal protection before the law. As the more immediate killings, largely of male members of the group, are more easily recognized as genocidal acts, the failure to recognize the slow deaths as genocide is discriminatory.

#### **CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE GROUP**

The second prohibited act, when committed with the requisite intent, can encompass a wide range of non-fatal genocidal acts. The ICTR and ICTY have held that rape and sexual violence; torture and other cruel, inhuman or degrading treatment or punishment; and deportation and forcible transfer are among the acts that may cause serious bodily or mental harm.<sup>74</sup> Additionally the Syria COI determined that enslavement also causes serious bodily or mental harm, and could be a constitutive act of genocide.<sup>75</sup>

70. OHCHR, “They Came to Destroy,” para. [53].

71. Prosecutor v. Krnjelac, Case No. IT-97-25-T, Trial Judgment, para. [329], Int’l Crim. Trib. for the Former Yugoslavia, Mar. 15, 2002.

72. OHCHR, “They Came to Destroy,” para. [110].

73. Witnesses in several cases, including Prosecutor v. Lelek (Prosecutor v. Lelek, Case No. X-KRŽ-06/202, Bosnia and Herzegovina, Jan. 12, 2009), before the State Court in Sarajevo referred to women jumping to their deaths from Vilina Vlas hotel to escape rape. Lelek was found guilty of rape and torture in relation to acts inside the hotel. He was not indicted for genocide, nor for the deaths of the women who jumped. In the ICTY, part of the case of Prosecutor v. Lukic (Prosecutor v. Lukic, Case No. IT-98-32/1, Int’l Crim. Trib. for the Former Yugoslavia), examined events occurring at Vilina Vlas hotel at the time. In that trial, there were no finding made in relation to rape, enslavement, or torture as the Prosecution failed to include them in the initial indictment. One month after the start of the trial, and more than two years after the Second Amended Indictment, the Prosecution sought to amend the indictment against to include these crimes (though not as genocidal acts). The Trial Chamber denied this motion on the ground that the Prosecution had not acted with the required diligence in submitting the motion in a timely manner so as to provide adequate notice to the Accused.

74. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Trial Judgment, para. [320], May 15, 2003; Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Trial Judgment, para. [664], Feb. 24, 2004.

75. OHCHR, “They Came to Destroy,” paras. [125-128].

**“Where women and girls are targeted for genocidal killings, those killings—like the killing of men and boys—tend to reflect the gendered view of the role and uses of females in that society.”**

As the drafting history shows, the current interpretation was not foreseen by the Sixth Committee of the UN General Assembly.<sup>76</sup> Consequently, acts that were not considered by the Convention’s drafters as genocidal are now included in the definitional scope of the crime of genocide.<sup>77</sup> This reasonable judicial interpretation of the second prohibited act helps provide an understanding—and a valuing—of the female experience of genocide.

### *Rape and Sexual Violence*

In September 1998, the ICTR in *Akayesu* handed down a landmark judgment determining that the targeting of members of a protected group for rape and other acts of sexual violence constituted “causing serious bodily or mental harm.” The Court ruled that:

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, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.<sup>78</sup>

It concluded, “Sexual violence was a step in the process of the destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself.”<sup>79</sup> By finding that sexual violence, by virtue of causing physical and mental harm, was a genocidal act, the *Akayesu* case forced the legal, political, and academic communities to grapple with a broader conception of genocide, one that included criminal conduct largely directed at female members of the targeted group.

That this judgment came out of the ICTR was fitting: the statistics—inherently approximate—of sexual violence committed during and as part of the Rwandan genocide remain shocking. Estimates range from 250,000 to 500,000 rape victims during the short period of the genocide, from April to June 1994—a statistic that does not account for the number of multiple rapes and gang rapes suffered.<sup>80</sup> The UN Special Rapporteur, in his 1996 report on human rights in Rwanda, determined that “rape was the rule and its absence, the exception.”<sup>81</sup>

Most genocidal campaigns have explicitly and implicitly sanctioned sexual violence. This includes, for example, the sexual enslavement of Armenian women and girls by the Ottoman Turks<sup>82</sup>—echoes of which reverberate in Daesh’s holding of Yazidi females in sexual slavery.<sup>83</sup> In Darfur, the *Janjaweed* conducted

a campaign of systematic rape of women and girls, with the frequent sexual mutilation of victims.<sup>84</sup> In Burma it has been found that “rape and other crimes of sexual violence were an integral part of the attack on the Rohingya.”<sup>85</sup>

Sexual violence, when employed as a genocidal strategy, aims to destroy the victim as an incremental step to annihilating the group. It is simultaneously an assault on the victim and on the existence, identity, and cohesiveness of the group. Sexual violence leaves survivors with profound physical and mental wounds.<sup>86</sup> As a means of destroying the victim group, it has been particularly effective when employed in more strongly patriarchal cultures where the protection of female members of the group is believed to be the ultimate responsibility of their male relatives. In this way, sexual violence against a group’s female members is also often perpetrated and understood as a means of deliberate attack on the group’s men, or more specifically on the gender roles that men are expected to play. Where men are expected to act as protectors of their female relatives and the female members of their particular group more generally, they may interpret the rape of “their” women as evidence of their own powerlessness, and thus as a cogent assault on their identity as men.<sup>87</sup> This is particularly apparent when perpetrators intentionally commit rapes of women and girls publicly, as occurred in Darfur<sup>88</sup>, Guatemala,<sup>89</sup> and Rwanda.<sup>90</sup> Often their husbands, fathers, family members, and/or neighbors are forced to watch these rapes and are prevented from intervening. Most recently, public mass and gang rapes of Rohingya women and girls by soldiers of the Burmese security forces have been documented.<sup>91</sup>

In much of the world, being a survivor of rape carries with it severe social stigma.<sup>92</sup> The physical and psychological injuries suffered by rape survivors are often aggravated by a sense of isolation and ostracization. In contexts where women and girls are held up as repositories of the family’s honor, female survivors of sexual violence are more likely to be cast out by their own community, unable to marry, abandoned by their husbands, or—in the extreme, as noted above—killed in order to remove the stain of the family’s “lost honor.” All of these consequences break down the bonds between members of the

76. For example, the reference to ‘mental harm’ in the second prohibited act was the result of the Chinese delegation’s demanding its inclusion based on its view that, during the Second World War, Japan had produced 50 tonnes of heroin with the intention of impairing the mental capacity of the group through narcotic drugs. Ad hoc UN, “Committee Draft Commentary,” at fn. [15], (UN Doc. E/794), cited in Berster et al, *Convention on the Prevention and Punishment of the Crime of Genocide*, at [89], München, Germany: Hart Publishing, 2014.

77. This fact was explicitly recognized in *Akayesu*, ICTR-96-4-T, para. [502].

78. *Akayesu* ICTR-96-4-T, para. [731]; *Karemera*, ICTR-98-44-T, paras. [1665-1668].

79. *Akayesu*, ICTR-96-4-T, para. [732]. See also Catharine A. McKinnon, “Rape, Genocide, and Women’s Human Rights,” *Harv. Women’s L.J.* Vol. 17, 5, at [11-12], 1994, which reads, in part, “It is a rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.”

80. Stephanie K. Wood, “A Woman Scorned for the “Least Condemned” War Crime: Precedent and Problems with Prosecuting Rape as a Serious Crime in the International Criminal Tribunal for Rwanda,” *Columbia J. of Gender and Law*, Vol. 13, 274, at [299-301], 2004. See also, UN Econ. & Soc. Council [ECOSOC], Commission on Human Rights, “Report on the Situation of Human Rights in Rwanda,” para [16], U.N. Doc. E/CN.4/1996/68, Jan. 29, 1996 (discussing the methodology and difficulties in estimating the number of rapes during hostilities).

81. ECOSOC, “Report on the Situation of Human Rights in Rwanda,” para. [16].

82. Holslag, “Exposed Bodies,” at [97-99].

83. OHCHR, “They Came to Destroy,” paras. [42-80]. For an examination of some of the similarities between the Armenian genocide and the Yazidi genocide, see Nikki Marczak, “A Century Apart: The Genocidal Enslavement of Armenian and Yazidi Women,” *A Gendered Lens for Genocide Prevention, Rethinking Political Violence*, [133-162], UK: Palgrave, 2016.

84. HRW, “Darfur in Flames,” at [29].

85. Amnesty Int’l, “We Will Destroy Everything,” at [89].

86. With regards to the Yazidi women and girls who survived the genocidal sexual enslavement (among other genocidal acts, and crimes against humanity that they suffered), the International Independent Commission of Inquiry on the Syrian Arab Republic found that “female survivors of sexual slavery have been shattered, with many experiencing suicidal thoughts, and intense feelings of rage interspersed with periods of deep depression and listlessness”: OHCHR, “They Came to Destroy,” para. [177]. With regard to survivors of genocidal rape in Rwanda, see Jennie E. Burnet, “Rape as a Weapon of Genocide: Gender, Patriarchy, and Sexual Violence in Rwanda,” *Genocide and Gender in the Twentieth Century: A Comparative Study*, [149-152], London, UK: Bloomsbury, 2015.

87. Sareta Ashraph, “Acts of Annihilation: Understanding the Role of Gender in the Crime of Genocide,” at [65], *The Cairo Review of Global Affairs*, Issue 24, Winter, 2017.

88. US Agency for Int’l Development, Office of Transition Initiatives, “The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan,” at [15], 2004. Page 15 reads, in part, “during the attacks on villages, the rapes were often committed in front of others, including husbands, fathers, mothers, and children of the victims, who were forced to watch and prevented from intervening. These rapes are reported as having been inflicted upon a wide age range, from girls under 10 to women of 70 years or older.”

89. Anastasia Moloney, “Guatemalan war rape victims break silence in genocide trial,” *Reuters*, May 10, 2013.

90. *Karemera*, ICTR-98-44-T, para. [1666], in which the Trial Chamber held, “Considering the nature of the crimes and the brutal and often public manner in which they were carried out, often repeatedly and by more than one assailant, the Chamber concludes that the sexual assaults, mutilations and rapes that Tutsi women were forced to endure from April to June 1994 certainly constituted acts of serious bodily and mental harm.” See also, for example, the emphasis of the Trial Chamber in the *Bagosora* case, on the public nature of the genocidal rapes of Tutsi women and girls, many of which took place at road blocks. *Prosecutor v. Bagosora*, ICTR-98-41-T, Trial Judgment, para. [1728], Dec. 18, 2008.

91. Fortify Rights & US Holocaust Memorial Museum, “They Tried To Kill Us All,” at [10].

92. For example, “Rwandan women who have been raped or who suffered sexual abuse generally do not dare reveal their experiences publicly, fearing that they will be rejected by their family and wider community and that they will never be able to reintegrate or to marry”, HRW, “Shattered Lives,” at [3].

## “Rape and other forms of sexual violence serve not only to inflict pain but also to humiliate and disempower the male members of the protected group.”

targeted community, reducing social cohesion and diminishing the ability of the protected group to replenish itself through sexual reproduction.<sup>93</sup>

Male victims of sexual violence are often not acknowledged—whether within the framework of genocide or at all.<sup>94</sup> Discourses of masculinities

have historically prevented men from speaking out about or being recognized as being victims of crimes of sexual violence, and have limited inquiries made by those charged with investigating and documenting.<sup>95</sup> As a result, prosecutors have been less likely to posit sexual violence against men and boys as a genocidal act. This in turn has adversely affected within jurisprudence an exploration of the physical and psychological trauma suffered by men and boys.

Rape and other forms of sexual violence serve not only to inflict pain but also to humiliate and disempower the male members of the protected group, to challenge both their masculinity and heterosexuality, and to assert the supremacy of those directing the sexual violence.<sup>96</sup> As is the case for female victims, the psychological damage resulting from the sexual violence can be so profound that men have difficulty building relationships and/or refuse to procreate even years after the crimes have taken place.

It is notable that the ICTR did not prosecute any sexual violence cases in which men were victims, though there was evidence to suggest that acts of sexual violence had been committed against Tutsi men and boys as part of the genocide.<sup>97</sup> Similarly the perpetration of sexual violence by Serbian forces against non-Serb, and particularly Bosnian Muslim, men was charged before the ICTY as war crimes and crimes against humanity, but not as genocide.<sup>98</sup>

Within the academic sphere, much is made of the *Akayesu* Judgment. It is impossible to read any article about gender and genocide, including this one, without the importance of the Judgment being emphasized. Yet the legal avenues opened by *Akayesu* were, for a long time, not seized upon by international prosecutors.<sup>99</sup> The failure to indict rape as genocide was, in part, due to the failure to properly investigate and prosecute sexual violence as a whole. In many subsequent ICTR cases, sexual violence was not charged on the initial indictment (as, indeed, had been the case in *Akayesu*); in some

93. Jonathan Gottschall, “Explaining Wartime Rape,” *J. of Sex Research*, Vol. 41, Issue 2, 129, at [131], 2004.

94. Chris Dolan, “Into the mainstream: Addressing sexual violence against men and boys in conflict,” Overseas Development Institute, London, 2014.

95. Chris Dolan, “Addressing sexual violence against men and boys in conflict”; See also, UNCHR, “‘We Keep It In Our Heart’: Sexual Violence against Men and Boys in the Syria Crisis,” 2017.

96. Kristine Chapleau et al, “Male Rape Myths: The Role of Gender, Violence, and Sexism,” *J. of Interpersonal Violence*, Vol. 23, Issue 5, 600, 2008.

97. Testifying in the ICTR Bagosora case, Lieutenant-General Roméo Dallaire, Force Commander of the UN Peace-Keeping Mission in Rwanda at the time of the Rwandan genocide, described seeing public displays of mutilated male genitalia. Prosecutor v. Bagosora, ICTR-98-41-T, Transcript of Proceedings, Jan. 20, 2004. See also, Doris Buss, “Making Sense of Genocide, Making Sense of Law: International Criminal Prosecutions of Large-Scale Sexual Violence,” *Genocide and Gender in the Twentieth Century: A Comparative Study*, at [288], London, UK: Bloomsbury, 2015.

98. Cases in which evidence of sexual violence against men and boys was added include Prosecutor v. Tadic, Case No. IT-94-1, Int’l Crim. Trib. for the Former Yugoslavia, May 7, 1997; Prosecutor v. Češić, Case No. IT-95-10/1, Int’l Crim. Trib. for the Former Yugoslavia, Mar. 11, 2004; Prosecutor v. Mucić, Case No. IT-96-21, Int’l Crim. Trib. for the Former Yugoslavia; Prosecutor v. Todorović, Case No. IT-95-9/1, Int’l Crim. Trib. for the Former Yugoslavia, July 31, 2001; and Prosecutor v. Simić, Case No. IT-95-9, Int’l Crim. Trib. for the Former Yugoslavia, Oct. 17, 2003.

99. For a detailed critique of the legacy of the *Akayesu* Trial Judgment, see Beth Van Schaack, “Engendering Genocide: The *Akayesu* Case Before the International Criminal Tribunal for Rwanda,” *Human Rights Advocacy Stories*, Santa Clara Univ. Legal Studies Research Paper No. 08-55, 2008.

cases the Prosecution withdrew the counts involving sexual violence.<sup>100</sup> There were also a significant number of acquittals for rape before the ICTR.<sup>101</sup> In several instances, the Prosecution did not appeal the acquittals on this count. Furthermore, as detailed in Section V below, the ICTR and ICTY Prosecutions’ practice of charging rape occurring during the genocide as crimes against humanity and/or war crimes, rather than genocide continued after and despite *Akayesu*.<sup>102</sup>

### *Torture and other cruel, inhuman or degrading treatment or punishment*

Torture and other cruel, inhuman or degrading treatment or punishment has also been found to cause serious bodily and mental harm. Such conduct can amount to a genocidal act both directly—such as acts of sexual violence—and indirectly. Indirect acts of torture and other cruel, inhuman or degrading treatment or punishment tend also to be directed more often towards female victims, by virtue of the simple fact that women and girls are more likely to survive the initial wave of genocidal killings.

The Syria COI documented Daesh fighters severely beating captured, and later enslaved, Yazidi women and girls if they resisted rapes, attempted to escape, refused orders to carry out tasks for the fighters and their families, or tried to prevent Daesh fighters from removing their children or siblings from their care. The Syria COI further found that severe mental anguish was caused to Yazidi mothers as a consequence of Daesh fighters taking their daughters to sell into sexual slavery, and their sons to be indoctrinated and forcibly recruited into Daesh forces. For many Yazidi women who still do not know where their children are and under what conditions they are living, the mental trauma is all-consuming. Consequently, the Syria COI held that the “sexual and physical violence, together with the severe mental trauma, which Yazidi women and girls over the age of nine experience at the hands of ISIS rises to the level of torture, causing them serious physical and psychological harm.”<sup>103</sup>

Those who were separated from their families with the realization that they would be executed, and those who managed to survive the intended execution were determined to have suffered seriously bodily or mental harm.<sup>104</sup> The victims of this particular type of harm tend to be male. Within the *Srebrenica* cases before the ICTY, each of the Bosnian Muslim men targeted for killing was subjected to two of three genocidal acts: “the pre-anguish of death; death itself; and for the males who survived, the anguish of a botched execution.”<sup>105</sup> The mental anguish of the women and girls whose fathers, husbands, sons, and other male relatives were taken away and executed was ultimately recognized in the 2016 *Karadžić* Trial Judgment.<sup>106</sup>

Female members of the targeted group are often forced to watch the murder of their fathers, husbands, sons, and other male relatives. Not uncommon was the scene described by a Yazidi girl to the Syria COI: “After we were captured, ISIS forced us to watch them beheading some of our Yazidi men. They made the men kneel in a line in the street, with their hands tied behind their backs. The ISIS fighters took knives

100. See Binaifer Nowrojee, “‘Your Justice is Too Slow’ Will the ICTR Fail Rwanda’s Rape Victims?” UN Research Institute for Social Development, 2005, for a critique of the ICTR’s investigation and prosecution of sexual violence.

101. Van Schaack, “Engendering Genocide,” at [24].

102. Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42, Trial Judgment, paras. [5835, 5864], June 24, 2011; Musema, ICTR-96-13-T, para. [933]. Musema’s conviction for rape was quashed on appeal: Musema, ICTR-96-13-A, paras. [172-194].

103. OHCHR, “They Came to Destroy,” para. [130].

104. Blagojević, IT-02-60-T, paras. [647-649]; Popović, IT-05-88-T, para. [866]; and Karadžić, IT-95-5/18-T, paras. [5660-5663].

105. Patricia Viseur Sellers, “Genocide Gendered: The Srebrenica Cases,” *The Fifth Annual Katherine B. Fite Lecture, Proceedings of the Ninth International Humanitarian Law Dialogs*, Aug. 30– Sept. 1, 2015.

106. Karadžić, IT-95-5/18-T, para. [5664].



and cut their throats.”<sup>107</sup> Similarly, accounts were received from Rohingya women made to watch the execution of their male relatives and neighbors.<sup>108</sup> In Rwanda, the Interahamwe forced some Tutsi women to kill their sons in order to spare other members of their family.<sup>109</sup> While female survivors are often regarded as witnesses to genocide—by virtue of the fact they are alive, there has been lesser regard to the violations they have suffered, including the serious mental harm that results from being forced to kill one’s family, and being forced to witness the killings of one’s family.

#### Enslavement

Enslavement<sup>110</sup> also constitutes causing serious bodily or mental harm,<sup>111</sup> and is carried out in a gendered manner.

For example, the Syria COI documented how enslaved Yazidi men and women, girls and boys, were forced to work for Daesh fighters, albeit in differing environments depending on their sex. Daesh fighters forced Yazidi women and girls to cook, clean, and wash clothes for them, and sometimes for their

Loutfie Bilemdjian, a 17 year old Armenian woman, was rescued from Muslim captivity in 1926.

PHOTO  
Sareta Ashraph

families. Yazidi men and boys who survived the initial executions (usually by feigning conversion to Islam, as interpreted by Daesh) were similarly made to labor on Daesh projects in Tel Afar and Mosul. These tasks included construction and cleaning work, digging trenches, and looking after cattle. Any Yazidi, male or female, who refused to undertake tasks as Daesh ordered, was beaten severely. As is evident, the tasks that the Yazidi victims were forced to undertake adhered strongly to gendered stereotypes.

Drawing on this documentation, the Syria COI found enslavement, as distinct and in addition to sexual slavery, caused captured Yazidis serious bodily and mental harm as a result, stating “the acts underpinning their enslavement are incremental steps in the destruction of the individual, and ultimately the group.”<sup>112</sup>

107. OHCHR, “They Came to Destroy,” at [8].

108. Amnesty Int’l, “We Will Destroy Everything,” at [11], [70-71], [86].

109. HRW, “Leave None to Tell The Story.”

110. By which a perpetrator has “exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”, Footnote 11 attached to this material element reads, “It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”

111. OHCHR, “They Came to Destroy,” paras. [125-128]. In the Adolf Eichmann case, where the accused was convicted of crimes against the Jewish people, genocide under another legal definition, the District Court of Jerusalem stated in its judgment of 12 December 1961, that serious bodily or mental harm of members of the group can be caused “by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture.” Attorney-General of the Government of Israel vs. Adolph Eichmann, Crim. Case No. 40/61, District Court of Jerusalem, Dec. 11, 1961, quoted in the The Int’l Law Reports, Vol. 36, at [340], 1968, and quoted in Akayesu, ICTR-96-4-T, para.[ 50].

112. OHCHR, “They Came to Destroy,” para. [128].

#### Forcible transfer

Despite some initial debate within the jurisprudence,<sup>113</sup> the ICTY has determined that, depending on the circumstances of a given case, forcible transfer may cause serious mental harm so as to constitute a prohibited act under Article II of the Genocide Convention.<sup>114</sup> The Syria COI drew upon this jurisprudence in finding that Daesh’s forcible transfer of Yazidis who survived the initial attack, who were predominantly women and children, from the point of capture to various primary and then to secondary holding sites in Syria and Iraq, caused serious mental harm to members of the protected group.<sup>115</sup>

#### DELIBERATELY INFLECTING CONDITIONS OF LIFE CALCULATED TO BRING ABOUT THE GROUP’S PHYSICAL DESTRUCTION IN WHOLE OR IN PART

The third prohibited act, that of “deliberately inflicting conditions of life calculated to bring about the group’s physical destruction in whole or in part,” has not been heavily relied upon in cases where genocide has been charged. Akayesu helped to define the contours of the third prohibited act in holding that “the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.”<sup>116</sup>

This prohibited act was, in large part, the Convention’s drafters’ acknowledgement of the horrors of the Nazi concentration camps. But it could equally be applied to a variety of measures taken in genocidal campaigns over the years. For example, the “death marches” where Ottoman Turks forced the Armenians who survived the initial massacres—many of them women and children—into the Syrian desert, with many dying along the way of exhaustion, exposure and starvation,<sup>117</sup> or when Daesh besieged the Yazidis who fled to the arid upper slopes of Mount Sinjar in August 2014, and trapped them there with little to no food, water, or shade.<sup>118</sup> Similar examples of the destruction of property, deprivation of necessary food and water sources and forced displacement abound in genocidal campaigns including: the Anfal campaign by the Iraqi government under Saddam Hussein against the Kurds; Sudan’s genocidal campaign in Darfur against the Fur, Masalit, and Zaghawa; the Guatemalan army’s campaign against the Mayan people; and the Burmese security forces’ campaign against the Rohingya.

During the Anfal campaign waged by the Iraqi government under Saddam Hussein against the Kurds, at least 2,000 villages, as well as a dozen larger towns and administrative centers, were destroyed by burning

113. For example, in one of the earliest of the Srebrenica cases, the Trial Chamber in Krstić determined that the forcible transfer, mainly of women and children, from Srebrenica constituted credible evidence of the perpetrators’ specific intent to commit genocide against the executed males and against those males who survived executions, but was not an act of genocide in and of itself; Krstić, IT-98-33-T, para. [595]; this determination was upheld on appeal; Krstić, IT-98-33-A, para. [33].

114. Popović, Case No. IT-05-88-T, para. [846]; Tolimir, IT-05-88/2-A, para. [209]; Karadžić, IT-95-5/18-T, para. [545];

115. OHCHR, “They Came to Destroy,” paras. [134-136].

116. Akayesu, ICTR-96-4-T, para. [506]. This definition has been affirmed in Rutaganda, ICTR-96-3-T, para. [52]; Musema, ICTR-96-13-T, para. [157]; Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment, para. [517], July 31, 2003. The ICC Elements of Crimes defines “conditions of life” as including, but not necessarily restricted to, “deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes”; ICC, Elements of Crimes, at [114], ICC-ASP/1/3. In many contexts, the border between the third prohibited act of inflicting conditions of life calculated to bring about the group’s physical destruction, and the act of killing is seamless. Once the infliction of a condition of life brings about death, as calculated, the first prohibited act has been committed. Moreover, the infliction of such conditions of life is likely to also constitute causing serious bodily or mental harm. This act, in particular, emphasizes the importance of not regarding the five prohibited acts as mutually exclusive.

117. US Holocaust Memorial Museum, “The Armenian Genocide (1915-1916): In Depth.” Available at: <https://encyclopedia.ushmm.org/content/en/article/the-armenian-genocide-1915-16-in-depth>.

118. OHCHR, “They Came to Destroy,” para. [138].

and/or bulldozing; army engineers destroyed all schools, mosques, non-residential structures, and electricity substructures; and soldiers and militia systematically looted civilian property and livestock.<sup>119</sup> The result was the forcible displacement of Kurdish civilians. Kurds who were forcibly displaced, or released from prison “were then trucked into areas of Kurdistan far from their homes and dumped there by the army with only minimal governmental compensation or none at all for their destroyed property, or any provision for relief, housing, clothing or food, and forbidden to return to their villages of origin on pain of death. In these conditions, many died within a year of their forced displacement.”<sup>120</sup>

This third prohibited act was charged in the ICC case of *Prosecutor v. Al-Bashir*. There, the Pre-Trial Chamber held that “the acts of contamination of the wells and water pumps and the forcible transfer of hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups coupled with the resettlement in those villages and lands they had left by members of other tribes allied with the Government of Sudan.... were committed in furtherance of the genocidal policy, and that the conditions of life inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the physical destruction of a part of those ethnic groups.”<sup>121</sup> As Sudanese President Omar Al-Bashir has not yet been arrested, the case has not moved forward to trial.

The Guatemalan Commission for Historical Clarification, in concluding that genocide had been committed by the Guatemalan army against the Mayan people, relied upon evidence of the army’s razing of villages, destruction of property including farmland, and the burning of harvests—all of which left the Mayan community bereft of food sources. The Commission opined that this conduct constituted the infliction of conditions of life “that could bring about, and in several cases did bring about, its physical destruction in whole or in part.”<sup>122</sup>

In Burma, the security forces have deliberately destroyed dozens of mosques, homes of tens of thousands of civilians, and food stocks, with the consequence that entire villages have been razed. The United States Holocaust Memorial Museum found that “the level of collective destruction demonstrates that the military created conditions that make it impossible or extremely difficult for people to survive in their places of origin.”<sup>123</sup> The razing of Rohingya villages has led to mass forced displacement, with many of those who are able crossing the border to become refugees in Bangladesh. Whether this forced displacement would constitute an act of genocide under the third prohibited act depends on whether it was intended to lead to the physical destruction of the Rohingya.<sup>124</sup> Forced displacement alone, on the basis of current

jurisprudence, would be unlikely to fall within the third prohibited act.<sup>125</sup> It would, as discussed above, likely fall within the second prohibited act of causing serious bodily or mental harm.

Sexual violence has not been historically included as a condition of life calculated to bring about the physical destruction of the group. For example, in the case of Rwandan Tutsi women who were deliberately infected with HIV as a result of genocidal rapes, there appeared to be little attempt by the ICTR Prosecution to investigate allegations of the *Interahamwe*’s deliberate infliction of HIV. In Rwanda at the time, this was very much akin to a death sentence, as the perpetrators knew, and there is an argument to be made that deliberate transmission of HIV in that context was a relevant “condition of life” under the third prohibited act.

However, future prosecutions could seek to broaden the scope of this third prohibited act. For example, the ICTR Trial Chamber in the *Kayishema* case determined that the infliction of rape was also a method of destruction that does not “lead immediately to the death of members of the group.”<sup>126</sup> In the ICJ’s 2015 Judgment in *Croatia v. Serbia*, the Court indicated that rape could fall within Article II(c) of the Genocide Convention but noted that in the particular case before the Court, “it has not been shown that these occurrences [of rape] were on such a scale to have amounted also to inflicting conditions of life on the group that were capable of bringing about its physical destruction in whole or in part.”<sup>127</sup> This should embolden national and international prosecutors to explore how rape and other forms of sexual violence can form the third prohibited act.

For example, the conditions where Yazidi women and girls were held captive constitutes not only the second prohibited act (causing serious bodily or mental harm), but also the third prohibited act (deliberately inflicting conditions of life calculated to bring about the group’s physical destruction in whole or in part). As part of the Yazidi genocide, Yazidi women and children held by Daesh on its bases and in the homes of its fighters have been kept locked in rooms, with inadequate food, water, light, heating, or medical care. Considered as possessions rather than persons, Yazidi women and children have been subjected to conditions of life that do not support prolonged life. The Syria COI noted, “most interviewees reported regularly having little food while held in captivity regardless of whether they were being punished or not. Many lost significant amounts of weight while held captive by ISIS. In photographs circulated by fighters in online ISIS slave auctions, some captured Yazidi women and girls appear emaciated.”<sup>128</sup> In finding that



Srebrenica survivor Zineta Mujic (R) meets Dutch Prime Minister Wim Kok (L) in Sarajevo.

PHOTO REUTERS / Reuters Photographer

119. HRW, “Genocide in Iraq,” at [21], [24], [42], [112], [121], [130], [132], [147-149], [151], [161], [166-168], [206], [211].

120. HRW, “Genocide in Iraq,” at [21]. On page [42], HRW writes, “the relocated Kurds were simply driven south in convoys of trucks, dumped in the middle of nowhere and left to their own resources. “This is to prevent you from going to Mustafa [Barzani] or Iran,” one villager remembers being told by a soldier. Many people died of heat and starvation.”

121. *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09-94, Second Decision on the Prosecution’s Application for a Warrant of Arrest, paras. [32-40], July 12, 2010. See also, HRW, “Darfur in Flames,” which describes the Janjaweed militia systematically looting houses, burning houses, stealing livestock, destroying granaries, cutting down fruit trees, destroying wells and water sources, and contaminating wells by throwing corpses in them.

122. Commission for Historical Clarification, “Guatemala: Memory of Silence’ Report of the Commission for Historical Clarification Conclusions and Recommendations,” paras. [116-118]. This conclusion was cited with approval by Judge A.A. Cançado-Trinidad in the case of *Plan de Sanchez Massacre v. Guatemala* before the Inter-American Court of Human Rights: *Plan de Sanchez Massacre v. Guatemala*, Merits, Judgment, Separate Opinion by Judge A.A. Cançado-Trinidad, para. [5], Inter-Am. Ct. H.R., series C, No. 105, Apr. 29, 2004.

123. OHCHR, “They Tried To Kill Us All,” at [12]. See Amnesty Int’l, “We Will Destroy Everything,” at [67], [74], [112-134].

124. See for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Judgment, para. [163], Feb. 3, 2015, in which the ICJ states, “In order to determine whether the forced displacements alleged by the Parties constitute genocide in the sense of Article II of the [Genocide] Convention (subparagraph (c), in particular, it will seek to ascertain whether, in the present case, those forced displacements took place in such circumstances that they were calculated to bring about the physical destruction of the group.”

125. The Tolimir Appeals Chamber emphasized that the forcible transfer of Bosnian women and children out of Srebrenica did not constitute conditions of life calculated to destroy the group physically, since it was not intended to lead to the physical destruction of the displaced Bosnian Muslims; Tolimir, IT-05-88/2-A, paras. [231-234].

126. *Kayishema*, ICTR-95-1-T, para. [116].

127. *Croatia v. Serbia*, ICJ Judgment, paras. [362-364].

128. OHCHR, “They Came to Destroy,” para. [73].

Daesh committed the third prohibited act, the Syria COI found “ISIS and its fighters deliberately impose[d] these conditions in a calculated awareness that such conditions, particularly when inflicted continuously over a long period of time, would cause the deaths of Yazidi women and children.”<sup>129</sup>

There is also strong grounding on which to plead forced sterilization of members of a protected group as a condition of life calculated to bring about the group’s physical destruction in whole or in part, in addition to it being a measure intended to prevent births within the group, as is currently recognized (as discussed below). Forced sterilization of female and male members of the protected group prevents, definitively, the regeneration of the group through procreation and consequently works to destroy the group—arguably both as a “condition of life” under the third prohibited act, and as a “measure” under the fourth.

A similar question with regard to conditions of life is raised in instances where genocidaires commit rapes of women and girls in contexts where, if they survive, they are at high risk of being killed by their families or other members of their own communities. In this way, gendered strategies of genocide, which play on patriarchal conceptions of women as symbols of purity and honor, can lead communities to engage with the process of their own destruction. With regard to these so-called “honor” killings, the question of *novus actus interveniens* looms—but in many patriarchal cultures, the rape and release of women and girls will be foreseen, and potentially intended, to bring about their deaths. It may be argued that, in certain contexts, rape and sexual assault are deliberately used to create conditions of life calculated to bring about the destruction of the group. For example, it has been noted that Islamic law provides that women who have sexual relations outside of marriage are not marriageable: “targeting Muslim women for rape and assault in order to effectively separate Bosnian Muslim women from Bosnian Muslim men may create a condition of life calculated to bring about the group’s destruction.”<sup>130</sup>

It remains to be seen in any future cases related to either Daesh’s genocide of the Yazidis of Sinjar, or the Burmese security forces’ attacks on the Rohingya, whether prosecutors will illuminate the experience of women and girls from these groups by positing such a case theory.

### IMPOSING MEASURES INTENDED TO PREVENT BIRTHS WITHIN THE GROUP

Preventing the targeted group from regenerating through reproduction is a fixation of genocidaires which is acknowledged in the fourth prohibited act of genocide—imposing measures intended to prevent births within the group. It has never, however, been the basis for criminal prosecution of genocide in international tribunals, underscoring yet another impunity gap for female victims of genocide.

This act has from the outset been presumed, in practice, to be mainly concerned with women and girls. This stems from a deeply held view of women as wombs, and as the primary holders of reproductive power and responsibility. In the Hutu Power magazine *Kangura*, one article referring to Tutsis stated, “[A] cockroach cannot give birth to a butterfly. This is true. A cockroach gives birth to another cockroach.”<sup>131</sup>

*Akayesu*, a judgment in which the Trial Judges deliberately surfaced gender in their consideration of women’s specific experiences, listed the measures intended to prevent births within the group as including rape; sexual mutilation; the practice of sterilization; forced birth control; separation of the sexes; prohibition of marriages; impregnation of a woman to deprive group identity (forced impregnation);

129. OHCHR, “They Came to Destroy,” para. [140].

130. Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* [587], Irvington-on-Hudson, New York: Transnational Publishers Inc., 1996.

131. Nahimana, ICTR-99-52-T, para. [179]. Tutsis were commonly referred to as “inyenzi”, the literal translation of which is “cockroaches”.

and mental trauma resulting in a reluctance to procreate.<sup>132</sup> In theory, none of these (save for forced impregnation) assume the victim is female but, in practice, that assumption has been made. The result of this gendered assumption is that male victims of forced sterilization, including by sexual mutilation, are less likely to be included in allegations of the commission of the fourth prohibited act.

Sexual violence may act as a measure preventing births where the women and girls are so traumatized that they develop anxieties around any contact with men, and/or an unwillingness to procreate.<sup>133</sup> In *Akayesu*, the Chamber noted that “rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”<sup>134</sup> A trauma expert, interviewed by the Syria COI about his work treating Yazidi female genocide survivors who had suffered sexual enslavement and rape, stated that “[the Yazidi females being treated] do not trust those around them, particularly men. There is a real anxiety around any contact with men. This in turn has resulted in sexual dysfunction which is to say, a disinterest in sexual relationships, in any contact with men.”<sup>135</sup> The expert further stated that the Yazidi women and girls under treatment did not want to marry, or to contemplate relationships with men now or in the future, and that this was compounded by a sense that they had lost their honor.<sup>136</sup> This formed the partial basis for the Syria COI’s determination that the rapes perpetrated by the Daesh fighters on Yazidi women and girls constituted a measure to prevent births within the group.<sup>137</sup>

In instances where genocidaires commit acts of sexual violence against women, men, and children in the knowledge and with the intent that survivors are likely to be ostracized from the community, it is an open question as to whether this would be considered to be a measure imposed to prevent births within the group. Depending on the context, there may be strong arguments to support such a finding where survivors would not be permitted to form relationships through which the protected group could regenerate. In Rwanda, for example, female survivors of genocidal rapes found themselves stigmatized, and were cast out of their families and communities. Consequently, they were often deemed unmarriageable, and denied their rights to property and inheritance, as well as opportunities for employment.<sup>138</sup> This made it difficult for them to survive, and also meant they were excluded from procreative relationships with other members of the Tutsi community. The consequences were amplified where the women and girls were impregnated during, or gave birth to children resulting from, genocidal rapes.<sup>139</sup>

132. Akayesu, ICTR-96-4-T, paras. [507-8]. See also Rutaganda, ICTR-96-3-T, para. [53]; Musema, ICTR-96-13-T, para. [159]. Akhavan takes issue with forced pregnancy as a measure under the fourth prohibited act, writing “preventing births as a form of genocide is conceptually different from forced impregnation intended to affect the ethnic composition of a group”: Payam Akhavan, “The Crime of Genocide in ICTR Jurisprudence,” *J. of Int’l Crim. Justice*, Vol. 3, Issue 4, 989, at [989], 2005.

133. African Rights, “Rwanda – Broken Bodies, Torn Spirits: Living with Genocide, Rape and HIV/AIDS,” at [75], Apr. 2004; OHCHR, “They Came to Destroy,” para. [145].

134. Akayesu, ICTR-96-4-T, para. [508].

135. OHCHR, “They Came to Destroy,” para. [145].

136. OHCHR, “They Came to Destroy,” para. [145].

137. OHCHR, “They Came to Destroy,” para. [146].

138. Anne-Marie De Brouwer, “Introduction,” *The Men Who Killed Me*, British Columbia, Canada: Douglas & McIntyre, 2010.

139. This also has profound consequences for children born of genocidal rapes who are often not accepted into the community to which their mothers belong. In Rwanda, children born from the genocidal rapes of their mothers by Hutu genocidaires, are often referred to as *les enfants mauvais souvenir* (children of bad memories) or *enfants indésirés* (unwanted children). Reports have noted that these children were at immediate risk of infanticide, abandonment, and lack of birth registration. As they grew, they were at risk of familial neglect and social ostracization, including by not being permitted to marry within the community or to inherit land or other property. See Marie Consolee Mukangendo, “Caring for Children Born of Rape in Rwanda,” *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, [40-52], Bloomfield, CT: Kumarian Press, 2007; HRW, “Shattered Lives,” at [4]; and Joanne Neenan, “Closing the Protection Gap for Children Born of War: Addressing Stigmatisation and

Campaigns of rape directed towards conceiving mass forced pregnancies can, if the pregnancies are carried to term, result in demographic changes to the protected group. This constitutes a measure imposed to prevent birth for the straightforward reason that a woman impregnated by a genocidaire is unavailable for impregnation by a male member from her own group. This is sometimes referred to as an “occupation of the womb,”<sup>140</sup> and forms part of the underlying strategy of those who seek to perpetrate genocide. As detailed above, campaigns of forced impregnation of non-Serbian (and particularly Bosnian Muslim) women and adolescent girls by Serbian forces during the Balkans conflict are one example of this tactic. In October 2014, Daesh discussed the impregnation of Yazidi women and girls, presenting its adherence to a theory of patrilineage with the phrase “the slave girl gives birth to her master.”<sup>141</sup> Like sexual violence, forced impregnation has been prosecuted as a war crime and/or crime against humanity, but not as a constitutive act of genocide.

In patrilineal cultures where ethnic and religious identity of the child is passed down from the father, the very act of separating men from women—a separation made permanent by killing—constitutes a measure to prevent births within the group. For much of the jurisprudential history of genocide, the killing of male members of the protected groups has rarely been analyzed in this way, underscoring the fact that men and boys are not considered as reproductive agents in the same way that women and girls are; rather, they are, as discussed earlier, bearers of identity. As gendered analyses become more ingrained in prosecutorial strategies and judicial deliberations, the killing of men and boys is increasingly understood with greater nuance. In the April 2004 Appeals Judgment in the ICTY case of *Prosecutor v. Krstić*, the Court affirmed that:

[t]he Trial Chamber was entitled to consider the long-term impact that the elimination of seven to eight thousand men would have on the survival of that community... With the majority of men missing, their spouses are unable to remarry and consequently to have children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica community, potentially consigning the community to extinction.<sup>142</sup>

While observing the long-term procreative consequences of the killings of the men of Srebrenica, neither the Trial nor Appeals Chamber in *Krstić* made explicit findings that such killings, in addition to being the prohibited act of killing, were also a measure imposed to prevent births within the group. Similarly, in the 2016 *Karadžić* Trial Judgment, the Court held:

viewing the evidence in its totality, the Chamber considers that the Bosnian Serb forces must have been aware of the detrimental impact that the eradication of multiple generations of men would have on the Bosnian Muslims of Srebrenica in that the killing of all able-bodied men while forcibly removing the remainder of the population would have severe procreative implications for the Bosnian Muslims in Srebrenica and thus result in their physical extermination.<sup>143</sup>

As in *Krstić*, the Court narrowly viewed the long-term procreative implications of the executions of men as evidence of the intent to destroy the Muslim community of Srebrenica, not as underlying genocidal acts.

the Intergenerational Impact of Sexual Violence in Conflict,” London School of Economics for Women, Peace and Security, June 2018.

140. Siobhan K. Fisher, “Occupation of the Womb: Forced Impregnation as Genocide,” *DLJ*, Vol. 46, Issue 1, 91, at [91-133], 1996.

141. Dabiq, “The Revival of Slavery, Before the Hour,” at [15-16]. Available at: <http://www.danielpipes.org/rr/2014-10-dabiq.228.pdf>.

142. *Krstić*, IT-98-33-A, para. [28] (affirming *Krstić* Trial Judgment). See also, Popović, IT-05-88-T, para. [866].

143. *Karadžić*, IT-95-5/18-T, para. [5671].



### FORCIBLY TRANSFERRING CHILDREN OF THE GROUP TO ANOTHER GROUP

The fifth and final prohibited act is that of forcibly transferring children of a protected group to another group. In *Akayesu*, the Trial Chamber held that in respect of the forcible transfer of children of the protected group, “the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.”<sup>144</sup> It is the only prohibited act which does not lead to physical or biological destruction, and is viewed as a vestige of Lemkin’s conception of genocide enshrined in the Convention.

The removal of children belonging to the targeted group from their families and their communities occurs in all genocides. In some, such as the Holocaust, children are killed quickly, sometimes with their mothers.<sup>145</sup> In others, such as the Armenian and Yazidi genocides, children of the protected group are transferred into the perpetrator group. Whether killed or forcibly transferred, children become the focus of the attack because they constitute “physical proof of the community’s future, parental love and protectiveness as the bond that promotes family and communal unity.”<sup>146</sup>

An Armenian widow and her three children flee genocide. They walked 90 miles from Geghi to Harput.

PHOTO  
Everett Collection  
Historical

144. *Akayesu*, ICTR-96-4-T, para. [509]. See also Rutaganda, ICTR-96-3-T, para. [54]; Musema, ICTR-96-13-T, para. [159].

145. Having arrived at Nazi concentration camps (as distinct from ghettos), Jewish children were sent with their mothers or grandparents to the gas chambers. Babies born in the camps were immediately killed, along with their mothers. See, Helena Kubica, “Children,” *Anatomy of the Auschwitz Death Camp*, [412-427], Bloomington, Ind: Indiana University Press, 1994.

146. Elisa von Joeden-Forgey, “The Devil in the Details: “Life Force Atrocities” and the Assault on the Family in Times of Conflict,” *Genocide Studies and Prevention: An Int’l J.*, Vol. 5, Issue 1, at [5], 2010.



Protestors gather in Istanbul's Taksim Square to commemorate the Armenian genocide.

PHOTO  
Lars Kjølhed  
Christensen

In the documentation of genocides, children are often referred to collectively, without regard to their gender. Yet it plays a significant role: girls and boys, like women and men, experience genocide differently as a result of their gender. The problematic de-gendering of children, which has often led to the subsuming of the female experience, can be seen in the ICC's *Lubanga* prosecution. While genocide was not charged in this case, it stands as a cautionary note on the importance of a gendered analysis as part of the pursuit of justice for all victims.

The Prosecution indicted Lubanga for war crimes relating to the enlistment and conscription of children under the age of 15 years, and using children to participate actively in hostilities.<sup>147</sup> Having already received strong criticism of its failure to investigate and charge crimes of sexual violence in a region that has been referred to as “the rape capital of the world,”<sup>148</sup> the Prosecution then failed to engage with the gendered dimensions of the “child soldiers” charges. While all child soldiers—boys and girls—were trained to fight and to engage in activities such as portering and reconnaissance missions, sexual violence (which was primarily but not solely committed against girls) was an inherent feature of conscription practices. Female recruits were also subjected to sexual enslavement.<sup>149</sup> However, since the Prosecution failed to include rape and sexual enslavement in the Indictment, and because the facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, the Trial Chamber held that it could not consider evidence of sexual violence introduced during the trial.<sup>150</sup> As a result, the outcome of *Lubanga* was based primarily on the experiences of boys and left girls without complete justice.

147. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, Int'l Crim. Court, Jan. 29, 2007. Thomas Lubanga Dyilo founded and led the Union of Congolese Patriots and was a key player in the Ituri conflict (1999–2007) in the east of the Democratic Republic of the Congo.

148. BBC News, “UN official calls DR Congo ‘rape capital of the world,’” Apr. 28, 2010.

149. This evidence was entered into the record by the then-UN Under-Secretary General for Children and Armed Conflict, Radhika Coomaraswamy, who was recognized with amicus curiae status and who appeared as an expert witness. Notably, such evidence did not arise organically from prosecution investigations but rather from pressure from the United Nations and non-governmental organizations. See, Brigid Inder, “Reflection: Gender Issues and Child Soldiers – The Case of Prosecutor v Thomas Lubanga Dyilo,” Women's Initiatives for Gender Justice, Aug. 31, 2011.

150. Lubanga, ICC-01/04-01/06, Trial Judgment, paras. [629–630]. In the Separate and Dissenting Opinion of Judge Odio Benito, Judge Benito stated, “Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of

In both the Armenian and Yazidi genocides, children were taken from their families and forced into gendered roles defined by their aggressors. Boys were often taken into the fold of the perpetrator group. Between 1915 and 1917, Ottoman Turks forcibly removed young Armenian boys from their families and gave them to Turkish families.<sup>151</sup> There they were given Muslim names, forcibly converted to Islam, and used for labor. Almost one hundred years later, Yazidi boys aged seven and above were forced into Daesh training camps where they were given Muslim names, instructed on how to follow Islam as interpreted by Daesh, and trained to fight.<sup>152</sup> Later, these “converted” boys were used to fight in battles as part of Daesh forces. One female survivor recounted to the Syria COI the words of an Iraqi Daesh fighter who took a Yazidi boy: “We are taking him so he can go and kill your people.”<sup>153</sup>

For Yazidi boys who were rescued, the question of their identity may be an open and traumatic one. For some, the indoctrination process, combined with their suffering intense trauma, has led to a continued identification with Daesh. This has included a revulsion directed at their own family and community, including referring to Yazidis as “devil-worshippers” and “infidels.”<sup>154</sup> For the Yazidi community, itself heavily traumatized, there has been no one consolidated response to the still-indoctrinated boys. Some view them with compassion and see their recovery as a long-term process; others view them as a security threat, as Daesh living within their midst.

Girls who have been forcibly removed from their families as part of a genocide have been treated much differently, in a manner that displays the misogyny of the perpetrators—a misogyny that feeds into, but arguably exists independently of, their genocidal intent. Girls have not been taken into the perpetrator group and in both the Armenian and Yazidi genocides there was no attempt to indoctrinate or otherwise purge their identities from them; rather, in both genocides, Armenian and Yazidi girls were treated as chattel for use by those who captured them.

During the Armenian genocide, girls were taken from their mothers and sold into sexual slavery.<sup>155</sup> After the Daesh attack on Sinjar in August 2014, captured Yazidi girls, aged nine and above, were ripped from their mothers' arms and sold as chattel for the use of Daesh fighters. While in captivity they were sexually enslaved, and also forced to undertake domestic work—cooking and cleaning in the living quarters of their fighter-owners—which is to say, work compatible with their perceived gender roles.<sup>156</sup>

There were no prosecutions of the crimes committed by the Ottoman Turks against the Armenians. In the case of the Yazidis, while accountability is being pursued at the international and domestic levels, no court has yet been seized with a genocide case. If women and girls are to see any measure of justice for the crimes committed against them, prosecutions need to be pressed to pursue gender-sensitive investigations, including with specific regard to violations committed against children.

the involvement with the armed group. I thus consider it necessary and a duty of the Chamber to include sexual violence within the legal concept of “use to participate actively in the hostilities”, regardless of the impediment of the Chamber to base its decision pursuant to Article 74(2) of the Statute.” See, Lubanga, ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito, paras. [16–17].

151. Holslag, “Exposed Bodies,” at [97–99].

152. OHCHR, “They Came to Destroy,” paras. [90–97].

153. OHCHR, “They Came to Destroy,” para. [93].

154. Interview with Jan Kizilhan, Dean, Institute for Psychotherapy and Psychotraumatology at the University of Dohuk, June 19, 2018.

155. Holslag, “Exposed Bodies,” at [98]; OHCHR, “They Came to Destroy,” paras. [42–82].

156. OHCHR, “They Came to Destroy,” paras. [72], [119], [126].



## IV. GENDER AND GENOCIDAL INTENT

What distinguishes genocide from other crimes is the requirement that a perpetrator must intend, at the time of deliberately committing one or more prohibited acts, to destroy a protected group, in whole or in part.

The ICTR’s *Rutaganda* Judgment deconstructed this special intent:

For any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group.<sup>157</sup>

The special intent to destroy has historically often been inferred from conduct, including statements. Genocidal intent can also be inferred from the perpetrators’ “deeds and utterances considered together, as well as from the general context of the perpetration of other culpable acts systematically directed against the same group.”<sup>158</sup> Relevant conduct includes the physical targeting of the group and/or their property, the use of derogatory language towards members of the targeted group, and the methodological way of planning.<sup>159</sup> The scale of atrocities committed, their general nature, and the fact of deliberately and systematically targeting victims on account of their membership in a particular group, while excluding members of other groups, are other factors from which one can infer genocidal intent.<sup>160</sup> These factors are often not considered through a gender lens.

In the Convention’s negotiations, the drafters defined this intent as intent to cause the physical and biological destruction of the protected group. In its 1996 Draft, the International Law Commission (ILC) considered destruction to be only the “material destruction of a group either by physical or by biological

157. *Rutaganda*, ICTR-96-3-T, para. [60].

158. *Prosecutor v. Gacumbitsi*, ICTR-01-61, Trial Judgment, para. [252], June 17, 2004.

159. *Kayishema*, ICTR-95-1-T, para. [93].

160. *Akayesu*, ICTR-96-4-T, para. [523]; *Kajelijeli*, ICTR-98-44A-T, paras. [804-805].

means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.”<sup>161</sup> Much of the later international criminal jurisprudence has adhered to this limited view of genocidal intent.<sup>162</sup> In *Krstić*, for example, the Trial Chamber held that:

Customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.<sup>163</sup>

The ICJ, in its 2015 Judgment in *Croatia v. Serbia*, endorsed the view taken in *Krstić*, noting that:

the travaux préparatoires of the Convention show that the drafters originally envisaged two types of genocide, physical or biological genocide, and cultural genocide, but that this latter concept was eventually dropped... It was accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group.<sup>164</sup>

Even so, an unmistakable emphasis has been placed on physical destruction as perpetrated through killings as evidence of genocidal intent, leaving out biological destruction and the non-killing acts of genocide. *Akayesu* notwithstanding, the majority of genocide convictions in both the ICTR and ICTY have

Displaced Yazidis who fled Daesh’s genocidal attacks take part in a demonstration at the Iraqi-Syrian border crossing in Fishkhabour, Iraq.

PHOTO  
REUTERS / Youssef Boudlal

161. ILC, “Report of the Commission to the General Assembly on the work of its forty-eighth session,” Yearbook of the International Law Commission, Vol. II, Part 2, at [46], para. [12], 1996.

162. *Prosecutor v. Brdanin*, IT-99-36-T, Trial Judgment, para. [694], Int’l Crim. Trib. for the Former Yugoslavia, Sept. 1, 2004; *Tolimir*, IT-05-88/2-T, para. [741]; *Prosecutor v. Seromba*, Case No. ICTR-2001-66-I, Trial Judgment, para. [319], Dec. 13, 2006. See also William A. Schabas, *Genocide in International Law: The Crime of Crimes*, [271-272], Cambridge, UK: Cambridge University Press, 2nd Ed., 2009; Larissa van den Herik, “The Meaning of the Word “Destroy” and its implications for the Wider Understanding of the Concept of Genocide,” *The Genocide Convention: The Legacy of 60 Years*, [51-58], Martinus Nijhoff Publishers, 2012.

163. *Krstić*, IT-98-33-T, para. [580], (affirmed in *Krstić*, IT-98-33-A, Appeals Judgment, para. [25]).

164. See *Croatia v. Serbia*, ICJ Judgment, para. [136].

been based on instances of mass executions, founded upon strategies geared towards achieving the immediate physical destruction of (predominantly male members of) the group. The Trial Chamber in the ICTY's *Kupreškić* case held that, "in genocide the persecutory intent is pushed to its uttermost limits though the pursuit of the physical annihilation of the group or of members of the group."<sup>165</sup>

Whereas physical destruction focuses on the annihilation of the existing group, biological destruction is aimed at the regenerative power of the group. The inclusion of biological destruction—while in some cases perpetuating a stereotype that reduces women and girls to their reproductive systems—does provide some space for a more gendered approach to analyzing the specific intent of genocide. That space has, however, been under-utilized. For example, when faced with accounts of forced pregnancies or sexual mutilation, prosecutors have generally not viewed these testimonies as potential evidence of the *intent* to cause the biological destruction of the protected group.<sup>166</sup> By contrast, a gendered approach could utilize acts such as forced pregnancy, sexual mutilation, and other acts of sexual violence to infer intent.

**“Pregnancies from rape deliberately project the dominance of the perpetrator group. This is amplified in patrilineal cultures where the ethnicity and religion of the infant are derived from the biological father, even in cases of rape.”**

Forced pregnancies evince intent to biologically destroy a protected group in several ways. First, pregnancies from rape deliberately project the dominance of the perpetrator group. This is amplified in patrilineal cultures where the ethnicity and religion of the infant are derived from the biological father, even in cases of rape. Female victims, in this understanding of

biological destruction, are regarded as wombs, drawing upon the ingrained stereotypes of women as carriers of life, vessels for paternal identity, and also the beings more responsible for their community's regeneration. Second, in more strongly patriarchal cultures in which women and girls are perceived to be the symbols of the family's and community's honor, the pregnancies—notwithstanding the fact they are a result of rape—risk ostracizing the women and girls from their community, or at an extreme, endangering their lives.

For example, during the Bosnian War, campaigns of forced impregnation of non-Serbian (and particularly Bosnian Muslim) women and adolescent girls were perpetrated by Serb forces<sup>167</sup> and it was found that those women and girls who became pregnant as a result were forced to carry the pregnancies to term.<sup>168</sup> The forced pregnancies had a number of overlapping aims, which included destroying the Bosnian Muslim community's capacity to regenerate.

165. Prosecutor v. Kupreškić, IT-95-16-T, Trial Judgment, para. [751], Jan. 14, 2000.

166. Nor, as discussed in Section III above, have prosecutors always identified forced pregnancies or forced sterilization as potentially constitutive acts of genocide.

167. Survivor accounts demonstrate that forced impregnation was one of the goals of the Serbian authorities. One survivor, held at came and raped on multiple occasions, recalled her rapists telling her "you re going to have our children, you are going to have our little Chetniks"; Robert Fisk, "Rape Victims Say Serb Troops 'Wanted Babies,'" *Toronto Star*, Feb. 8, 1993. See also, Alexandra Stiglmayer, "The Rapes in Bosnia-Hertzeogovina," *Mass Rape: The War Against Women in Bosnia-Hertzeogovina*, [412], Lincoln, NE: The University of Nebraska Press, 1994, for similar accounts.

168. UN Security Council, "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)," S/1994/674, May 27, 1994.



Similar to the treatment of forced impregnation, accounts of sexual mutilation of men held in Serbian and Bosnian detention were not asserted or analyzed as potential evidence of genocidal intent,<sup>169</sup> providing insights into the impact of unacknowledged gender prejudices on male victims. While female victims of genocide are frequently reduced to their reproductive capacities, men and boys are often not viewed as reproductive agents, their role in regenerating their group often dismissed without consideration. One notable exception where men's role in reproduction was considered in finding the intent to destroy was in the *Karadžić* judgment. There, the Trial Chamber examined the killing of men and boys in Srebrenica as an attack on the group's regenerative capacity, evincing an intent to destroy it biologically.<sup>170</sup> However it must be noted that the approach in *Karadžić* adheres to the view that an examination of genocide—whether of acts or intent—concentrates on killings.

Biological destruction naturally encompasses instances where members of the targeted group—either male or female, but more likely to be female—are deliberately subjected to sexual violence of such intensity and/or duration that they are so traumatized that they can no longer contemplate a procreative relationship, even after their return to their own group. The Syria COI nodded to this, in finding that some Yazidi women were so traumatized by sexual violence that they "did not want to marry, or to contemplate relationships with men now or in the future. This was compounded by a sense that they had lost their

Rohingya women take part in a protest at Kutupalong refugee camp to demand justice and mark the one year anniversary of the genocide.

PHOTO  
REUTERS /  
Mohammad Ponir  
Hossain

169. Incidents of sexual violence against men committed during the conflict in the Balkans were examined in the following cases before the International Criminal Tribunal for the former Yugoslavia: Tadić, IT-94-1; Češić, IT-95-10/1; Mucić, IT-96-21; Todorović, IT-95-9/1; and Simić, IT-95-9. As discussed in Section III, sexual mutilation of men, resulting in de facto forced sterilization, has not been indicted as a genocidal act under either the second (causing serious bodily or mental harm) or fourth (imposing measures intended to prevent births within the group) prohibited acts in either the ICTY or ICTR.

170. *Karadžić*, IT-95-5/18-T, para. [5671]. See also, Krstić, IT-98-33-A, para. [28].



Survivors of the Rwandan genocide, sisters Henriette Mutewaraba (R) and Chantal Rutayasire (L), hug in front of the Gisozi memorial site

PHOTO  
Reuters / Finbarr O'Reilly

honor.”<sup>171</sup> No prosecutor has yet sought to evidence perpetrators’ intent to biologically destroy on this basis.

Lemkin, it should be noted, imbued genocidal intent’s destructive components with his understanding of the multiple ways in which the Ottoman Turks targeted the Armenian community, each part of a coordinated strategy aimed at the group’s annihilation.<sup>172</sup> There is a strand of case law that cleaves more closely to Lemkin’s expansive view of the intent to destroy. In December 2000, the Federal Constitutional Court of Germany determined that “the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the social existence of the group [...] the intent to destroy the group [...] extends beyond physical and biological extermination.”<sup>173</sup>

Judge Shahabudeen, in his Dissenting Opinion on the *Krstić* Appeals Judgment, expressed similar doubts and proposed a clearer distinction between acts of genocide and the special intent. Whereas genocidal acts had to be of a physical nature, “it is not apparent why an intent to destroy a group in a non-physical or non-biological way should be outside the ordinary reach of the Convention.”<sup>174</sup> In the *Blagojević* case before the ICTY, the Trial Chamber—while not rejecting the limitation to “physical or biological destruction”—held that such destruction did not necessarily mean “the death of the group members,” and referred to various elements which it saw as characteristics of the protected group, including its “history, traditions, the relationship between its members, the relationships with other groups, the relationship with the land.”<sup>175</sup> In the *Krajišnik* case, the ICTY Trial Chamber followed Judge Shahabudeen’s line of reasoning, holding that the word “destroy,” as used in the mental element of the crime of genocide,

171. OHCHR, “They Came to Destroy,” para. [145].

172. This included the killing of men and older boys; the death marches of Armenians into the Syrian desert; the rape and sexual enslavement of Armenian women and girls; torture by crucifixion; forced conversion; forcible transfer of Armenian boys into Turkish households; and the burning and razing of churches.

173. German Constitutional Court, para. (III)(4)(a)(aa), NJW, 1848, 1850, Dec. 12, 2000; *Krstić*, IT-98-33-T, para. [579].

174. *Krstić*, IT-98-33-A, Partially Dissenting Opinion of Judge Shahabudeen, para. [49].

175. *Blagojević*, IT-02-60-T, para. [666].

“is not limited to physical or biological destruction of the group’s members, since the group (or a part of it) can be destroyed in other ways, such as by transferring children out of the group (or the part) or by severing the bonds among its members.”<sup>176</sup>

A broader understanding of intent to destroy could also be read into the wording of the 1998 *Akayesu* Judgment, where the Trial Chamber held that “sexual violence was a step in the process of the destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself.”<sup>177</sup> This view has not been fully explored, in part because the Rwandan genocide was replete with mass killings and utterances by leaders and followers of Hutu Power of their intent to physically annihilate the Tutsi population.

Undoubtedly a broader definition of the destructive element of genocidal intent would more easily encompass conduct that targets the social bonds that bind individuals into a group. Acts that target men as protectors and leaders, and that attack women as symbols of purity and honor, deliberately use the cultural scaffolding upon which gendered stereotypes rest to destroy social bonds among community members, unraveling individuals’ ties to each other.

Novel approaches to evidencing physical and, notably, biological intent to destroy, particularly when imbued with gendered insights, widen the potential evidence base for genocide’s special intent. For prosecutors, the difficulty (both actual and perceived) of evidencing genocidal intent has often resulted in a barrier to analyzing and charging genocide. A broader gendered understanding of the intent to physically and biologically destroy may help overcome that perception. The de-privileging of killings, not only within the analysis of genocidal acts but also of genocidal intent, will allow the international community, jurists, and courts to better construe and find genocide.

176. *Prosecutor v. Krajišnik*, IT-00-39-T, Trial Judgment, para. [854], Int’l Crim. Trib. for the Former Yugoslavia, Sept. 27, 2006. In footnote 1701 of the Trial Judgment, which corresponds to the sentence quoted above, the Trial Chamber noted, “It is not accurate to speak of “the group” as being amenable to physical or biological destruction. Its members are, of course, physical or biological beings, but the bonds among its members, as well as such aspects of the group as its members’ culture and beliefs, are neither physical nor biological. Hence the Genocide Convention’s “intent to destroy” the group cannot sensibly be regarded as reducible to an intent to destroy the group physically or biologically, as has occasionally been said.”

177. *Akayesu*, ICTR-96-4-T, para. [732]. Other scholars who advocate a more expansive definition of ‘destroy’ include Alexander Zahar and Goran Sluiter, *International Criminal Law*, [179], Oxford, UK: Oxford University Press, 2008; Gerhard, Werle, *Principles of International Criminal Law*, [703], T.M.C. Asser Press, 2nd Ed., 2009; A. Ahmed and I. Tralmaks, “Prosecuting Genocide at the Khmer Rouge Tribunal,” 1 *City University of Hong Kong Law Review*, at [111], 2009; and Micol Sirkin, “Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations,” *Seattle U. L. Rev.* Vol. 33, Issue 2, 489, at [525-526], 2010.



## V. INTERNATIONAL LEGAL OBLIGATIONS

The prevention and punishment of genocide was at the forefront of the deliberations over the drafting of the Genocide Convention. Article I of the Convention reads: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” It is this Article that forms the basis for States Parties’ and international organizations’ legal obligations to prevent and punish genocide.

The Convention, however, provides no direction as to what measures should be taken to comply with these legal obligations, and even the casual observer will have noted that the existence of these binding legal obligations has not resulted in the universal prevention or punishment of genocide. The political responses to genocide have never matched the legal obligations of States.

### GENDER AND THE DUTY TO PREVENT

The failure to acknowledge the role of gender in the planning, commission and impact of the crime of genocide has limited States’ and international organizations’ ability to recognize the warning signs of a nascent genocide, to properly construe a genocide while it is occurring, and to punish genocide. This myopia allows States and international organizations to obfuscate whether genocide may occur, is occurring, or has occurred, and so to sidestep compliance with their binding legal obligations.

This limited understanding of warning signs is founded upon a disproportionate focus on the first constitutive act of genocide, that of killing members of the protected group, the victims of which are more likely to be men and adolescent boys. The killing of male members of the group accords with the perception that perpetrators of genocide kill men and older boys because they represent (and often are) the holders of political, social, and economic power in their community.

However, the corollary of this is that there is less chance of genocidal or pre-genocidal acts, which have as their primary victims women and girls, being logged as warning signs, evidence of serious risk, or even as genocide. The same is true where men and boys are subjected to non-lethal crimes—such as rape—which require perceiving of males as victims in entirely new ways. Furthermore, as the erroneous perception of genocide as a crime involving *mass* killing persists, genocidal killings of small groups over longer periods of time, rather than mass executions, are less likely to be recognized as indicia of nascent genocide, or as genocide.

### Duty to Prevent

The legal obligation to prevent genocide is binding on every State, and recognized as an obligation under customary international law. In the landmark 2007 *Bosnia v. Serbia* judgment, the ICJ ruled that the obligation to prevent genocide was “normative and compelling ... [and] is not merged with the duty to punish, nor can it be regarded as simply a component of that duty.”<sup>178</sup> A referral to the Security Council, or any other competent organ of the UN, does not relieve States of the obligation to prevent genocide.<sup>179</sup>

The ICJ went on to clarify that the obligation to prevent was:

one of conduct and not of result... the obligation of the States parties is... to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.<sup>180</sup>

The ICJ specified that the obligation varied according to the capacity of States to “influence effectively the action of persons likely to commit, or already committing, genocide.”<sup>181</sup> The Court referenced three factors that could provide a measure of a State’s capacity: the geographic distance between the State and the scene of the events; the strength of the political and other links to the main actors in the events; and the legal position vis-à-vis the situations and the persons facing the danger.<sup>182</sup>

Importantly, the ICJ settled an ambiguity contained in the Convention, which provided no indication of what triggered the obligations contained therein. This allowed the self-serving view to flourish that to invoke the obligations under the Convention, there first needed to be a legal determination of genocide. The ICJ, in its 2007 Judgment, held that to suggest:

178. *Bosnia v. Serbia*, ICJ Judgment, para [427], 2007.

179. *Bosnia v. Serbia*, ICJ Judgment, para [427], 2007.

180. *Bosnia v. Serbia*, ICJ Judgment, para [430], 2007.

181. *Bosnia v. Serbia*, ICJ Judgment, para [430], 2007.

182. *Bosnia v. Serbia*, ICJ Judgment, para [430], 2007.

Women lie in the barracks of the newly liberated Auschwitz concentration camp.

PHOTO  
United States Holocaust Memorial Museum, courtesy of National Archives and Records Administration

The obligation to prevent genocide only comes into being when perpetration of genocide commences.... would be absurd since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally learn of, the existence of a serious risk that genocide will be committed.<sup>183</sup>

#### *Early warnings signs and the existence of serious risk*

Chronologically, early warning signs and risk assessment are the first phase of preventing genocide. Whereas "existence of serious risk" triggers the legal obligation to prevent genocide, the identifying and monitoring of early warning signs takes place at a time before any legal obligations arise. Nevertheless, both early warning signs and identifiers of serious risk share indicia in common.

There have been a number of attempts, both at policy and academic levels, to establish a reliable process for assessing risk and generating early warnings as a means of getting critical information to policymakers in time for them to take effective preventive action. Driving this effort is the fact that where signs of genocide are only detected once violence has begun to escalate, States and international organizations are left with only costly and risky options in order to prevent genocide. When conduct constituting warning signs can be recognized and accurately described in advance of, or at the early stages of, a crisis, a full spectrum of policy options becomes available. Additionally, an accurate assessment of the risk of genocide at an early stage would allow for efficient allocation of limited resources and policy attention. Implicit in this is the belief that the combination of more policy options, including many that are less onerous on States and organizations, will fortify the political will to fulfill their legal obligations under the Convention.

The Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide ("OSAPG") was created in 2004, on the tenth anniversary of the Rwandan genocide.<sup>184</sup> The mandate of the Special Adviser, in summary, is to act as a catalyst to raise awareness of the causes and dynamics of genocide, to alert relevant actors where there is a risk of genocide, and to advocate and mobilize for appropriate action.<sup>185</sup> A 2005 report recommended that the OSAPG "should develop a systematic early warning capability including, in particular, the establishment of an analytical database for global monitoring of situations that may lead to genocide or similar crimes."<sup>186</sup> The database was to be designed to take into account indicators of potential genocide such as "the rise of extremist political movements, incitement

to ethnic hatred and violence.... and a ranking of situations based on a hierarchical assessment of risk ranging from situations of general concern to those of imminent threat."<sup>187</sup>

A 2006 report prepared for the Office titled "Developing a Strategy, Methods and Tools for Genocide Early Warning"<sup>188</sup> sought to advise the OSAPG further. While the report mapped various indicia that had been identified by international organizations, NGOs, and academics, it stopped short of recommending a set of indicia for use by the OSAPG. The report contains no contemplation of a gendered analysis in determining indicia.

In 2014, the UN published a Framework of Analysis for Atrocity Crimes<sup>189</sup> that set out common risk factors, as well as specific risk factors for "intergroup tensions or patterns of discrimination against protected groups" and "signs of an intent to destroy in whole or in part a protected group," which is to say signs of genocidal intent. Despite a detailed breakdown of indicia evidencing eight common risk factors, and two additional factors relevant to genocide, the framework fails to discuss how different violations might target male and female victims differently. There is also no attempt to differentiate how early warning signs might manifest themselves in the form of gendered harms. The ten risk factors mention women only twice, and in both instances they are grouped together with children.

The first, in Risk Factor 7, references "increased serious acts of violence against women and children, or creation of conditions that facilitate acts of sexual violence against those groups, including as a tool of terror."<sup>190</sup> The second, Risk Factor 10, concerns the "development of policies or measures that seriously affect the reproductive rights of women, or that contemplate the separation or forcible transfer of children belonging to protected groups."<sup>191</sup> The language the Risk Factors use is problematically gendered. It continues the practice of grouping women with children, infantilizing women and bolstering the perception that women, though adults, require special protection that men belonging to the protected group do not require. The Risk Factors also do not countenance the possibility of men being the victims of sexual violence, nor do they pay heed to men as reproductive agents and the reproductive rights of male members of the group.

A similar de-gendering of genocide was seen in a 2008 United States Holocaust Memorial Museum report<sup>192</sup> that contained a list of ten factors associated with increased risk of genocide or mass atrocities. The list included a lack of membership "of General Agreement on Tariffs and Trade/World Trade Organization" as a factor, but failed to reference to gendered violence.<sup>193</sup> This includes the absence of any reference to sexual violence, which is so often misunderstood as being synonymous with the totality of gender-based violence.

183. *Bosnia v. Serbia*, ICJ Judgment, para [431], 2007. [Emphasis added].

184. The UN Secretary-General, in appointing the first Special Adviser on the Prevention of Genocide, referenced the United Nations' and international community's failure to prevent the Rwandan genocide, saying "one of the reasons for our failure in Rwanda was that beforehand we did not face the fact that genocide was a real possibility. And once it started, for too long we could not bring ourselves to recognize it, or call it by its name". See, UN Secretary-General, Press Release, SG/SM/9197 AFR/893, Apr. 7, 2004.

185. UN Security Council, "Letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council," S/2004/567, July 13, 2004, outlines the four main responsibilities of the Special Adviser as being (i) collecting existing information, in particular from within the United Nations system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide; (ii) acting as a mechanism of early warning to the Secretary-General, and through him to the Security Council, by bringing to their attention situations that could potentially result in genocide; (iii) making recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide; and (iv) liaising with the United Nations system on activities for the prevention of genocide and work to enhance the United Nations' capacity to analyze and manage information regarding genocide or related crimes.

186. Payam Akhavan, "Report on the Work of the Office of the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide," McGill University, Nov. 7, 2005.

187. Payam Akhavan, "Report on the Work of the Office of the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide," para [11.1], McGill University, Nov. 7, 2005.

188. Lawrence Woocher, "Developing a Strategy, Methods and Tools for Genocide Early Warning: A Report prepared for the Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide," Center for Conflict Resolution, Colombia University, Sept. 26, 2006.

189. UN, "Framework of Analysis for Atrocity Crimes," 2014.

190. UN, "Framework of Analysis for Atrocity Crimes," at [16], indicator [7.9], 2014: Events or measures, whether gradual or sudden, which provide an environment conducive to the commission of atrocity crimes, or which suggest a trajectory towards their perpetration.

191. UN, "Framework of Analysis for Atrocity Crimes," at [19], indicator [10.4], 2014: Signs of an intent to destroy in whole or in part a protected group

192. US Holocaust Memorial Museum, "Preventing Genocide: A Blueprint for US Policy Makers," 2008. This report drew upon the work of Barbara Harff. See, Barbara Harff, "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955," *Amer. Pol. Science Rev.* Vol. 97, No. 1, 97, at [57-73], 2003.

193. The ten factors listed are (i) armed conflict; (ii) state-led discrimination; (iii) history of genocide/mass atrocities; (iv) exclusionary ideology; (v) autocratic regime; (vi) leadership instability; (vii) nonviolent protest; (viii) high infant mortality; (ix) ethnically polarized elite; (x) low trade openness/non-member of General Agreement on Tariffs and Trade/World Trade Organization

The absence of a fully gendered analysis in the considered documents concerning early warning signs does not herald well for an understanding of gender in the assessment of whether a serious risk of genocide exists. Given the legal obligations that attach to a finding of serious risk of genocide, there has been some reluctance to use that language. Most recently, in September 2017, UN Secretary-General António Guterres stated that ethnic cleansing is taking place in Burma, leading to a “catastrophic” humanitarian situation for the Rohingya Muslim minority with nearly 380,000 people forced to flee to Bangladesh.<sup>194</sup> Secretary-General Guterres repeated this assertion of “ethnic cleansing” in an opinion piece in the Washington Post in July 2018.<sup>195</sup> Ethnic cleansing has not been recognized as an independent crime under international law, and there is no precise definition of this descriptive term, or the exact acts to be qualified as ethnic cleansing.

The Security Council also condemned the violence against the Rohingya, with Britain’s UN Ambassador Matthew Rycroft calling the statement—the first the UN’s most powerful body had made in nine years on the situation in Burma—“an important first step.”<sup>196</sup> By September 2017, hundreds, if not thousands, of Rohingya had been killed or subject to other heinous crimes including rape and other acts of sexual violence, their villages burnt down, all within the context of decades of discrimination and othering of the Rohingya community. Some were calling for the attacks on the Rohingya to be referred to as genocide.<sup>197</sup> Leaving aside whether the UN should have referred to these attacks as genocide, it is far more difficult to countenance the failure, on the part of both the UN Secretary-General and the Security Council, to refer directly to the serious risk of a genocide occurring in Burma.

*Duty to prevent ongoing genocides (also known as the duty to suppress or the duty to stop)*

Despite some early academic debate concerning the temporal reach of the duty to prevent,<sup>198</sup> it is now accepted that the legal obligation to prevent genocide continues to exist where genocides are in progress.<sup>199</sup> The 2007 ICJ Judgment made specific reference to the fact that the obligations of States depend on their capacity to influence the actions of people “likely to commit, or already committing, genocide.” Additionally, the ICJ quoted a general rule of the law on state responsibility, stating “the breach of an international legal obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that final obligation.”<sup>200</sup> In any event, it would be absurd for States and international organizations to be freed from their legal obligation to prevent genocide on the grounds that a genocide was already in progress.

194. Edith Lederer, “UN chief calls for end to ‘ethnic cleansing’ of Rohingya Muslims as Security Council condemns violence,” *The Independent (UK)*, Sept. 13, 2017.

195. António Guterres, “The Rohingya are victims of ethnic cleansing: The world has failed them,” *Washington Post*, July 10, 2018.

196. *The Independent*, UN chief: Myanmar Rohingyas are victims of ethnic cleansing,” Sept. 13, 2017.

197. For example, Gregory Stanton, Founding Chairman of Genocide Watch, in an opinion piece in the *Daily Star*, demanded that the United Nations refer to the crimes committed by the Myanmar army against the Rohingya as genocide. Gregory Stanton, “Call it Genocide,” *The Daily Star*, Nov. 20, 2017.

198. See Eyal Mayroz, “The Legal Duty to ‘Prevent’: after the onset of genocide,” *J. of Genocide Research*, Vol. 14, Issue 1, 79, at [79-98], 2012, for an overview of the arguments that the duty to prevent only precedes the onset of genocide, the support for which mainly appears to derive from the narrow linguistic definition of the verb ‘prevent’.

199. The duty to suppress is referenced in Article VIII of the Convention, but as the *Bosnia v. Serbia*, ICJ Judgment, 2007, makes clear, Article VIII does not create legal obligations on the States Parties but rather affirms the States Parties’ right to refer a situation believed to be genocidal to the “competent organs” of the United Nations. Nevertheless, the duty to prevent ongoing genocides is sometimes referred to as a legal duty to suppress genocide.

200. *Bosnia v. Serbia*, ICJ Judgment, para [431], 2007, citing the ILC, “Extension in time of the breach of international obligations”, ILC, “Articles on Responsibility of States for Internationally Wrongful Acts” Article 14, para. [3], Annex to General Assembly resolution 56/83, Dec. 12, 2001.

*(i) Reluctance on the part of States and the United Nations to recognize ongoing genocides*

States have gone to great lengths to avoid formally recognizing when a genocide is in progress. Perhaps the most notorious modern example was the April 1994 guidance issued by the US State Department under the Clinton administration, stating that the crimes being committed in Rwanda, notably the mass killings, should not be referred to as genocide. Instead, spokespeople were instructed to say, “acts of genocide may have occurred.”<sup>201</sup> “Genocide is a word that carries an enormous amount of responsibility,” a senior Administration official was reported as saying.<sup>202</sup>

The suppression of genocides in progress continues to be stymied by an unwillingness—perhaps better described as a skittishness—“on the part of States and the UN to call genocide by its name. For States, as the Clinton White House’s creative phrasing illuminated, referring to a situation as “genocide” comes with all the responsibilities that flow from States’ legal obligations under the Convention and under customary international law.

For the UN, the reluctance to formally recognize ongoing genocides appears to stem from different concerns. In a Guidance Note, titled “When to Refer to a Situation as ‘Genocide,’” which is emblematic of a standard position taken by UN bodies and national governments, the UN Office on Prevention of Genocide and the Responsibility to Protect asserted:

The legal definition of genocide is precise and includes an element that is often hard to prove, the element of “intent”. The determination as to whether a situation constitutes genocide is thus factually and legally complex and should only be made following a careful and detailed examination of the facts against relevant legislation. This examination is carried out for the purpose of establishing State responsibility or individual criminal responsibility for the crime of genocide and *must be done by a competent international or national court of law with the jurisdiction to try such cases*, after an investigation that meets appropriate due process standards...

The political organs of the United Nations play an important role in supporting the implementation of the Convention, but not in making a legal determination as to whether a situation constitutes genocide under the Genocide Convention or under international criminal law. Only a mandated judicial body can make a legal determination as to whether genocide did indeed occur, and who was responsible....

Notwithstanding, discussions about the nature of events that may constitute genocide and other atrocity crimes, past or present, should not be avoided. This means acknowledging serious violations of international human rights and humanitarian law that may have been committed in the past or are ongoing, including where there has not yet been a legal determination of the type of international crime that may have been committed. It may also involve making an assessment based on reliable information of whether there is risk of genocide in a particular situation, or whether genocide may be ongoing or may have taken place. Based on that assessment, different actors, including the United Nations, can and should advocate for action to prevent, investigate, halt and/or punish such “alleged” or “possible” crimes.<sup>203</sup>

201. Douglas Jehl, “Officials Told to Avoid Calling Rwanda Killings ‘Genocide,’” *New York Times*, June 10, 1994.

202. Douglas Jehl, “Officials Told to Avoid Calling Rwanda Killings ‘Genocide,’” *New York Times*, June 10, 1994.

203. UN Office on Prevention of Genocide and the Responsibility to Protect, “When to Refer to a Situation as ‘Genocide,’” Guidance Note 1, undated (emphasis added).



Nadia Murad, a Yazidi woman who escaped Daesh captivity, testifies about her experience in front of the United Nations Security Council. She was awarded the Nobel Peace Prize in 2018 for her outspoken advocacy on behalf of the Yazidis.

PHOTO  
UN Photo /  
Amanda Voisard

In essence, this approach requires a court determination of genocide prior to the assignment of State or individual responsibility for the commission of genocide. In practice however, States and UN bodies have run away with this “court determination” approach and consider that genocide is so complex a crime, by reason of its special intent, that determinations as to whether genocide did indeed occur and who bears responsibility in the event of its occurrence, can only be made by a mandated judicial body. This overly broad view has created a window for States and international organizations to say that obligations to prevent and punish genocide arise only upon a court’s determination of genocide. To date, no court has reached a judgment that genocide is being committed while it is in progress. That is hardly surprising given the difficulty of collecting evidence while crimes are still being committed, the challenges of apprehending a defendant, and the time required for the investigation, trial, and judgment. This renders it all but certain that the UN or States will never be able to recognize an ongoing genocide.

Determining the responsibility of an individual to a criminal standard of proof is undoubtedly the remit of a properly constituted judicial body. However, what is far more debatable is, first, whether the special intent for genocide is so complicated as to be beyond the abilities of UN legal analysts to discern; and second, whether, in fact, it requires a judicially mandated body to determine when genocide is occurring.

The privileging of genocide’s special intent—“for which judgments such as *Rutaganda* give clear guidance on how it may be evidenced”—has long been touted as a reason why genocide is difficult to prosecute. The consequence of this barrier—“debatably as much a psychological barrier as an evidentiary one”—is that charges of genocide are often not indicted, so a judicially mandated body never has the opportunity to make a determination. This is a *de facto* limitation on the obligation to punish.

It also creates a concerning circularity whereby international actors, including the UN, cannot name the complex crime of genocide as genocide until it is recognized by a court, but courts are less likely to make a determination of genocide, due to prosecutors’ reluctance to charge it because of the perceived difficulty of proving the crime’s special intent. This paper posits that while proving the special intent to

destroy, in whole or in part, may be complex, it is far from insurmountable for prosecutors, state officials, or UN human rights officers.

UN investigation and monitoring missions are founded on the principle of “do no harm.” The UN Manual on Human Rights Monitoring defines the principle as follows;

In all circumstances and at all times, HROs [Human Rights Officers] have an obligation not to jeopardize the life, *physical and psychological* safety, freedom and well-being of victims, witnesses and all those who enter into contact with them in the framework of their monitoring work. HROs have to make every effort to avoid causing harm when doing monitoring work.<sup>204</sup>

In practice this has been interpreted narrowly, and focuses primarily on how investigations and reporting affect victims, witnesses, and others in contact with the monitoring team. But a salient question remains: What harm is done when genocide victims are asked to provide accounts of the horrors to which they and their family were subjected, when there is no possibility that the crime they have suffered will be recognized in the ensuing reporting, advocacy, and justice efforts?

Another question looms: what are the consequences of a policy that makes it all but impossible to recognize a genocide while it is in progress? On one hand, as detailed above, a State’s obligation to prevent genocide arises “at the instant that the State learns of, or should normally learn of, the existence of a *serious risk* that genocide will be committed,” and does not depend on a determination of genocide.<sup>205</sup> On such a reading, the consequences of not making a determination of genocide, as a policy, are limited—as long as one is willing and able to make a finding of serious risk of genocide.

**“What are the consequences of a policy that makes it all but impossible to recognize a genocide while it is in progress?”**

On the other hand, and again as the response of the Clinton White House to the Rwandan genocide clearly shows, a recognition that genocide is in progress does create an obligation to take action. The reverberating call of “never again” is directed primarily to the inaction of the international community in the face of genocide. Consequently, a unambiguous recognition that a genocide is in progress creates a pressure point for activists and concerned citizens who are likely to object to their governments standing idly by while genocide is occurring.

When States and the UN fail to acknowledge genocides in progress, stifling outcries for action, who suffers? The duty to prevent ongoing genocides is particularly vital to female victims of genocide for the simple reason that they often survive the initial killings. In the failure to stem ongoing genocides are two major factors: (1) that continuing crimes are directed towards, and suffered by, women and girls, and in some instances younger boys; and (2) that the acts that these victims are subject to are, discriminatorily, not viewed as genocidal.

Daesh’s genocide of the Yazidis stands as a paradigmatic example of how genocides persist through crimes committed against women, girls, and younger boys. There is considerable evidence of Yazidi men and adolescent boys being executed, often in front of their families, in or near their own villages, shortly after being captured by Daesh in August 2014. Yazidi women and children, in contrast, were transferred

204. OHCHR, “Manual on Human Rights Monitoring: Chapter 2, Basic Principles of Human Rights Monitoring,” Chapter 2, at [4]. [Emphasis is in the original].

205. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina), ICJ Judgment, para. [431], Feb. 26, 2007.

around the Sinjar region of Iraq and then to holding sites in or near Mosul, as well as sites in Syria. After that, women and girls over nine years of age were sold into sexual slavery where it is believed several thousand remain today. Yazidi boys who were under 12 at the time of the August 2014 attack were taken into training camps where they were indoctrinated, trained to fight, and then deployed to battle. Four years later, Daesh's genocide is ongoing because of their continued horrific crimes against women, girls, and young boys.

*(ii) The consequence of privileging the act of killing*

The focus on killing also cuts short the discussion of what the duty to prevent genocide demands in circumstances where women and children are subjected to non-lethal genocidal acts committed over long periods of time. The privileging of killing over other constitutive acts of genocide effectively limits the ambit of the legal obligation to prevent genocide.<sup>206</sup> This leaves out women and children, who continue to suffer acts of genocide without legal protection, consequently denying them equal protection before the law.

The most recent example of this was the August 2014 statement by US President Obama authorizing targeted airstrikes to break Daesh's siege of Yazidis trapped on Mount Sinjar. In explaining why he had authorized airstrikes, and making specific reference to the legal obligation on the US to prevent genocide, Obama stated:

When we face a situation like we do on that mountain—with innocent people facing the prospect of violence on a horrific scale, when we have a mandate to help—in this case, a request from the Iraqi government—and when we have the unique capabilities to help avert a massacre, then I believe the United States of America cannot turn a blind eye. We can act, carefully and responsibly, to prevent a potential act of genocide.<sup>207</sup>

Undoubtedly, the American and Iraqi airstrikes, together with the Syrian Kurdish forces on the ground, saved those on Mount Sinjar from death. Obama, in the same speech, referenced accounts of Yazidi women being enslaved by Daesh. For this the coalition should be applauded, but it also needs to be acknowledged that their acts of prevention were too late. At the time of the airstrikes on Mount Sinjar, thousands of Yazidi women and girls were sitting in Mosul and Tel Afar waiting to be registered and sold. These women and girls were, and are, victims of genocide. No state action has ever been taken—or publicly discussed—to rescue them.<sup>208</sup>

Even when States have recognized ongoing genocides, they have not taken preventative action. Daesh's genocide against the Yazidis has been recognized by a number of governments, including Canada,<sup>209</sup> Australia,<sup>210</sup> and the United Kingdom,<sup>211</sup> as well as by supranational entities such as the European

Parliament.<sup>212</sup> Even after Daesh's 2017 loss of territory in Iraq and Syria, thousands of Yazidi women and girls are believed to remain captive, held in sexual enslavement, where they are beaten and forced to labor. There has been no attempt to prevent the ongoing genocide of which they remain the victims.

By privileging genocide's "strictly murderous dimension," focus is placed on what is predominantly the male experience of genocide, undervaluing the severity of non-lethal acts committed largely against women and girls.<sup>213</sup> One consequence of this is that it risks a failure "to apprehend genocidal processes in their early stages, before arriving at mass murder."<sup>214</sup>

*Broader interventions to prevent genocide*

Genocidal ideologies, and ultimately the crime itself, are nourished by the bigotries and sexism ingrained in pre-genocidal societies. Devaluation of a sub-group and a creeping acceptance of their marginalization provide fertile ground in which potentially pre-genocidal prejudices take root. The serious risk of genocide is heightened when this othering ceases to exist in thoughts and attitudes and becomes "a political and physical exercise where a specific targeted group was no longer seen as part of the larger polity."<sup>215</sup>

Genocidal and pre-genocidal regimes are united by an obsessive fixation on identity. Perpetrators are heavily invested in fantasies of the superiority of the identities to which they are most attached. This is often fed by the perception that the destruction of a particular group of people is a necessary step to return a nation to actual or imagined former glory,<sup>216</sup> whether that "nation" is Nazi Germany, Slobodan Milošević's Serbia, Rwanda's Hutu Power, or Daesh's "caliphate." For that reason, before and during genocides, genocidaires emphasize their role as a purifying force while dehumanizing their victims.

In some cases, genocides have been preceded by periods in which various rights and opportunities were stripped away from members of the protected group, by reason of their belonging to that group. During the first six years of Hitler's reign, German Jews felt the effects of more than 400 decrees and regulations that restricted all aspects of their public and private lives. In 1939 and 1940, German officials confiscated Jewish property, in many places required Jews to wear identifying armbands, and established ghettos and forced labor camps.<sup>217</sup> In Burma, the Rohingya community has suffered decades of state-sponsored discrimination, persecution, and oppression.<sup>218</sup> This includes the effective deprivation of their right to a nationality as a result of discriminatory laws, policies, and practices, most significantly in the 1982 Citizenship Law and the adoption of policies aiming to control their population.<sup>219</sup> This lack of citizenship has allowed the authorities in Burma to severely restrict the Rohingya Muslim community's freedom

206. For example, humanitarian intervention (as opposed to military intervention) has only been launched after the occurrence of mass killing. See, Samuel Totten, "The prevention of genocide: missed opportunities, complexities, and possibilities," *The prevention and intervention of genocide: a critical bibliographic review*, [163], New Brunswick; London: Transaction Publishers, Vol. 6, 2008.

207. The White House, "Statement by the President," Aug. 7, 2014. Available at: <https://www.whitehouse.gov/the-press-office/2014/08/07/statement-president>. (Emphasis added).

208. Jenna Krajeski, "The Daring Plan to Save a Religious Minority from ISIS," *New Yorker*, February 2018.

209. National Post, "Canadian government agrees with UN report saying ISIL is conducting genocide against Yazidis," June 16, 2016.

210. Susan Hutchinson, "The pain of hearing: Australia's parliament recognizes Yazidi genocide," *The Lowy Institute*, Mar. 8, 2018.

211. Patrick Wintour, "MPs unanimously declare Yazidis and Christians victims of Isis genocide," *The Guardian (UK)*, Apr. 20, 2016.

212. European Centre for Law and Justice (ECLJ), "The EU Parliament Recognises the Islamic State as Guilty of Genocide, and Invited Member States to Fight Against It," Feb. 2016.

213. Adam Jones, "Gendering Genocide," *Genocide: A Comprehensive Introduction*, [467], New York: Routledge, 2nd ed., 2011.

214. Von Joeden-Forgey, "Gender and the Future of Genocide Studies," at [299].

215. Holslag, "Exposed Bodies," at [93].

216. See Kiernan, *Blood and Soil*: [21], [27-29] for discussion of idealist cults of ancient glory or pristine purity as one of the ideological common features of genocide.

217. US Holocaust Memorial Museum, "The Holocaust - Timeline of Events." Available at: <https://www.ushmm.org/learn/timeline-of-events/1939-1941>.

218. Amnesty Int'l, "'We Are at Breaking Point': Persecuted in Myanmar, Neglected in Bangladesh," Dec. 2016; HRW, "'All You Can Do Is Pray': Crimes against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State," Apr. 2013; Irish Center for Human Rights, "Crimes against Humanity in Western Burma: The Situation of the Rohingyas," 2010; HRW, "Perilous Plight: Burma's Rohingya Take to the Seas," May 2009; Amnesty Int'l, "The Rohingya Minority: Fundamental Rights Denied," May 2004; Amnesty Int'l, "Rohingya: the Search for Safety," Sept. 1997; HRW, "The Rohingya Muslims: Ending a Cycle of Exodus?," Sept. 1996; and Amnesty Int'l, "Human Rights Violations against Muslims in the Rakhine," May 1992.

219. Amnesty Int'l & Int'l Commission of Jurists, "Myanmar: Parliament must reject discriminatory 'race and religion' laws," Joint Statement, Mar. 2015.

of movement.<sup>220</sup> Their access to healthcare, education, and work opportunities has also been severely limited.<sup>221</sup>

Pre-existing prejudices surface in the pejorative terms in which members of the protected group are described, the majority of which are widely in use in the pre-genocidal period. Armenians were described as “tubercular microbes.”<sup>222</sup> In Nazi Germany, which in 1935 passed “The Law for the Protection of German Blood and German Honor,” Jews were described as “lice” and “vermin.”<sup>223</sup> Rwandan Tutsis were referred to as “inyenzi,” meaning “cockroaches.”<sup>224</sup> For decades, adherents of the Yazidi faith were referred to as “devil-worshippers,” a term that Daesh would later use.<sup>225</sup> In Burma, members of the Rohingya Muslim community are referred to as “kalar,” a derogatory term derived from the Sanskrit for “black.”<sup>226</sup>

Bigotries also have their own intersectionalities through which members of the protected group may be targeted by genocidaires as a result of a number of overlapping identities, in addition to their belonging to the protected group. Genocidal acts primarily directed towards a protected group’s female members stand at the crossroads of hatred directed towards the group and misogyny. When committed against women and girls, genocide is a crime against a wider protected group, but it is equally a crime committed against a female, as an individual, on the basis of her sex.<sup>227</sup>

Of course, the othering of a group, including its political, social, and economic marginalization, does not lead inexorably to genocide. Genocides come about as a result of a confluence of factors, not all of them foreseeable. However, the othering process is an essential part of societies moving into pre-genocidal and then genocidal stages.

This raises broad issues about what meaningful preventative measures might look like, before the point at which serious risk (with its corresponding legal obligations) occurs. This requires education of the dangers of identity-based politics and of fixations on matters of identity in general. Moreover, it requires being alert to the devaluation and dehumanization of groups in society that are vulnerable to marginalization and discrimination, including but not solely by the State or those in territorial control of the areas in which those groups exist.

When it comes to women and girls, it also demands a tackling of the pre-existing structures that tolerate gender-based violence and gender inequality. If pre-existing structures of patriarchy, gender domination, and violence can contribute to genocidal violence against women and girls, and against men and boys who suffer violence aimed at emasculating them, then preventative measures should focus on misogynistic

220. Independent International Fact-Finding Mission on Myanmar, Report of the detailed findings, para. [459], U.N. Doc. A/HRC/39/CRP.2.

221. Amnesty Int’l, “We Will Destroy Everything,” at [9].

222. Vahkahn Dadrian, “The Determinants of the Armenian Genocide,” Yale Center for international and area studies, Working paper series, Genocide studies program; GS 02, [15], New Haven, CT: Yale Center for International and Area Studies, 1998; Peter Balakian, *The Burning Tigris: The Armenian Genocide and America’s Response*, [164], New York, NY: HarperCollins, 2003.

223. Gerald Fleming, *Hitler and the Final Solution*, [xxxv], Berkeley, CA: University of California Press, 1984.

224. HRW, “Leave None to Tell the Story,” Propaganda and Practice.

225. For example, in Dabiq, Daesh wrote, “Their [the Yazidis’] creed is so deviant from the truth that even cross-worshipping Christians for ages considered them devil worshippers and Satanists”; Dabiq, “The Revival of Slavery,” at [14].

226. See e.g. Independent International Fact-Finding Mission on Myanmar, Report of the detailed findings, para. [559, 610, 697], U.N. Doc. A/HRC/39/CRP.2.

227. See Van Schaack, “Engendering Genocide.”

attitudes and policies that underpin the treatment of human beings as objects, and that tolerate—and in some instances, support and incite—violence against women and girls in particular.<sup>228</sup>

While the obligation to prevent genocide stands as separate from the obligation to punish genocide, the two are linked. Research has shown that the States and societies most vulnerable to committing genocide and mass atrocity are those that have committed genocide in the past without taking responsibility for it: “Impunity is a breeding ground for genocide.”<sup>229</sup> Moreover, across eras, would-be perpetrators of mass atrocity, including genocide, consider earlier iterations of their intended crimes to be instructive precedents, and are heartened by impunity. “Who, after all, speaks today of the annihilation of the Armenians?” said Hitler in August 1939.<sup>230</sup>

## GENDER AND DUTY TO PUNISH

The duty to punish genocide, like the duty to prevent, forms part of customary international law. Over 80 countries have codified the crime of genocide (with varying definitions, centering on the Convention’s Article II definition) into their domestic criminal codes.<sup>231</sup> The ICJ held that the obligation to punish the crime of genocide flows from Article I as well as “other relevant provisions of the Convention.”<sup>232</sup> The Court remained silent on identifying other relevant provisions, but did confirm “Article I does impose distinct obligations over and above those imposed by other Articles of the Convention.”<sup>233</sup>

To punish genocide, one must have a clear understanding of what genocide is, and the various means by which it is committed. Gender, then, is a prism through which to comprehend genocide and its attendant obligations. As discussed below, where genocide has been punished, the majority of prosecutions have indicted massacres as genocide, while other crimes—such as crimes of sexual violence, torture, enslavement, and other inhumane acts—have been charged as crimes against humanity and/or war crimes, or are not charged at all. That the crimes more likely to be committed against men and adolescent boys are taken as genocide more than crimes against women and girls is a reflection of a society that accords men greater intrinsic value than women. “I had heard that in Nuremberg there was a discussion of whether to bring up the subject of rape,” one commentator recounted, “and somebody made a comment: ‘We don’t want a bunch of crying women in the courtroom.’”<sup>234</sup>

In examining the role of gender in the duty to punish, it is important to consider the gender make-up of the courts, particularly the prosecutors, investigators, Judges, and Chambers’ legal officers. While it is not the role of women to introduce matters of gender into investigatory strategy, prosecutorial charging decisions, or judicial ruminations, the impact of activist female voices in and on the courts trying genocide has motivated progress in recognizing gender violence in international crimes, including the crime of genocide.

228. See, Henry Theriault, “Gender and Genocide: New Perspectives for Armenian Genocide Research,” Strassler Center for Holocaust and Genocide Studies, Clark Univ., paper presented at the Armenian Genocide Workshop, 8-10 April 2010.

229. Araks Kasyan, “Elisa von Joeden-Forgey: Impunity is fertile ground for recurrence of genocide,” *Armenpress*, Apr. 23, 2016.

230. Louis Paul Lochner, *What About Germany?*, [1-4], New York: Dodd, Mead & Co., 1942. The Nuremberg Tribunal later identified the document as L-3 or Exhibit USA-28. For the German original cf. *Akten zur Deutschen Auswärtigen Politik 1918-1945*, [171-172], Serie D, Band VII, Baden-Baden, 1956.

231. Prevent Genocide International, “The Crime of Genocide in Domestic Laws and Penal Codes,” available at: <http://www.preventgenocide.org/law/domestic/>.

232. *Bosnia v. Serbia*, ICJ Judgment, para. [439], 2007.

233. *Bosnia v. Serbia*, ICJ Judgment, para. [165], 2007.

234. Dana Goldstein, “When Women Make Peace,” *The Nation*, Oct. 17, 2011.

### Territorial reach

States are obliged under Article I of the Convention to prosecute the perpetrators of genocide committed in their own territory. The Convention's duty to punish is encompassed by Articles II and III defining the punishable offences; Article IV providing that these offenses shall be punished irrespective of the status of the individuals who commit them; Article V obliging States to enact necessary legislation; and Article VI specifying that persons charged with genocide shall be tried "by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal" whose jurisdiction the State concerned had accepted.

In the *Bosnia v. Serbia* 2007 ICJ Judgment, the Court found Serbia in breach of Article VI for not cooperating with the ICTY, which it deemed to be an "international penal tribunal." It was the determination of the Court, therefore, that:

the particular obligation under Article VI implies that States will arrest persons accused of genocide who are in their territory, even if the crime of which they are accused was committed outside it, and, barring prosecution of these persons in the States' domestic courts, that they will hand them over for trial to a competent international tribunal.<sup>235</sup>

Both the duty to prevent and the duty to punish are therefore not limited by territory, with the ICJ specifying that "the substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question."<sup>236</sup>

### Punishing 'genocide'

In contrast to the duty to prevent—a metaphorical agora in which heated discussions take place about the lack of political will in the face of atrocity—the duty to punish genocide is viewed as an achievable goal towards which States and the UN alike should continually be working. The reason for this lies largely with the high-profile and "successful" prosecutions of genocide at the ICTY and ICTR.

Prosecutions for genocide continue to be brought today. In September 2010, two senior figures in the Khmer Rouge, Khieu Samphan and Nuon Chea, were indicted by the ECCC for the commission of genocide, committed through killings, against the Cham and the Vietnamese, among other crimes. In November 2018, Nuon Chea was found guilty of all charges of genocide of the Vietnamese and the Cham Muslim minority. Khieu Samphan was found guilty of the genocide of the Vietnamese, but was cleared of involvement in the genocidal extermination of the Cham.<sup>237</sup> National prosecutions have also received global attention, particularly at points in proceedings where a finding has been handed down that genocide had been committed. Such is the case, for example, in the *Rios Montt* Trial Judgment, where, on 10 May 2013, the former President of Guatemala was convicted of genocide and crimes against humanity and was sentenced to 80 years' imprisonment, before having his conviction overturned by the Constitutional Court of Guatemala ten days later.<sup>238</sup>

235. *Bosnia v. Serbia*, ICJ Judgment, para. [443], 2007.

236. *Bosnia v. Serbia*, ICJ Judgment, para. [183], 2007. See, also, M.C. Bassiouni and E.M. Wise, *Aut dedere aut iudicare: The Duty to Extradite or Prosecute in International Law*, Geneva: Graduate Institute Publications, 1995.

237. ECCC, *Prosecutor v. Chea and Samphan*, [Trial Judgment \(Summary\)](#), 16 November 2018. See also, Guardian (UK), [Khmer Rouge leaders found guilty of genocide in Cambodia's 'Nuremberg' moment](#), 16 November 2018. [INSERT CROSS REF to FN 33]

238. A retrial began in January 2015, but Rios Montt died in March 2018 before the retrial had concluded. See, Sofia Menchu, "Ex-Guatemalan dictator Rios Montt dies, leaving bitter legacy," Reuters, Apr. 1, 2018.

However, despite these precedents, an untold number of cases have not been brought to trial, and the existing judgments represent not much more than a smattering of accountability. And when it comes to ongoing genocides the political reluctance to voice specific concerns of genocide (as opposed to general concerns about the commission of atrocities) has knobbed any acts that could have been taken to prevent or punish. Nevertheless, there is a desire and, in instances where geopolitics allow, a push to ensure accountability for the crime of genocide.

It is impossible to punish the full spectrum of genocidal violence where the predominant belief is that genocide is committed, either primarily or entirely, through mass killing. The consequence is that massacre (predominantly of men and adolescent boys) is defined as genocide, while rape, enslavement, torture, and forced transfer are indicted as crimes against humanity, war crimes, or other uncategorized crimes—or are not prosecuted, and are erased from the historical narrative. In 2010, Milorad Dodik, President of Republika Srpska, the predominantly Serb-populated part of Bosnia-Herzegovina, said of Srebrenica, "it wasn't genocide because the women and children were not killed."<sup>239</sup> Echoing this same language, in November 2018, Serbian Prime Minister Ana Brnabic said in a televised interview on German channel DW's political talk show *Conflict Zone*, that while the Srebrenica massacre was a "terrible crime," that it was not genocide because "Genocide is when you are ... killing the entire population, the women, children and this was not that case."<sup>240</sup>

As discussed in Section III above, this privileging of "genocide as massacre" is a consistent thread in the jurisprudence of the *ad hoc* tribunals. Where genocidal intent is discerned, prosecutors have been relatively quick to charge killings as genocide. The violations suffered prior (and subsequent) to killing or which were entirely separate from the killings have often not been placed within the continuum of genocidal violence, nor have their gendered dimensions been acknowledged. For example, women and girls who were raped by Bosnian Serb Forces at Potocari-Srebrenica in July 1995 have not been included in the community of genocide victims.<sup>241</sup> In the ICTY *Krstić* case, the Trial Chamber heard evidence of the rape of Bosnian Muslim women on 12 July 1995 in Potocari, where the massacres of men and boys began.<sup>242</sup> Although the Chamber recognized that rape could be a constitutive act of genocide,<sup>243</sup> its finding was limited by the Prosecution's case that cited only the suffering endured by those who survived the executions as evidence of serious bodily or mental harm as an act of genocide.<sup>244</sup>

239. Warqar Azmi, "Gender and genocide: breaking the silence over the rape of Srebrenica's women," *New Statesman*, July 10, 2017.

240. DW, "Serbian PM Ana Brnabic: Srebrenica 'a terrible crime,' not genocide", 15 November 2018.

241. Albina Sorguc, "Srebrenica Anniversary: The Rape Victims' Testimonies," *Balkan Insights*, July 11, 2014.

242. *Krstić*, IT-98-33-T, paras. [45-46].

243. *Krstić*, IT-98-33-T, para. [513].

244. *Krstić*, IT-98-33-T, paras. [507], [514].



An indigenous woman from Guatemala's Ixil region attends the trial of former dictator Efraim Rios Montt in Guatemala City.

PHOTO  
REUTERS / Jorge Lopez

Why were crimes of sexual violence perpetrated in Potocari not charged by the Prosecution as part of the genocide? One explanation proffered was that, as the rapes were documented as occurring the day before the mass killings, they were a “prelude to genocide”<sup>245</sup> (where genocide and killings are seen as synonymous). Those who worked on building the Srebrenica cases have stated that only very limited evidence of rape was gathered during the investigations, which created limitations on the analysis of rape as a genocidal act. Why was there initial under-reporting? On one hand, it was argued that Bosnian Muslim women were not willing to come forward to speak about rape. This was also the early view of the ICTR Prosecution when called upon to explain why it had not gathered significant evidence of rape and sexual violence by Tutsi women during its initial investigations.<sup>246</sup> The more likely reason, as was true of the ICTR, is that the ICTY Prosecution focused its energy and expertise on the killings, and did not have the specialized expertise or strategy to collect evidence of sexual violence. According to one ICTY investigator who worked on the Srebrenica case, “the evidence of mass killings at Srebrenica, and the resulting mass graves, was overwhelming and required considerable resources to investigate. Given that, the Prosecution investigation team’s expertise and focus was directed towards documenting the killings, and not sexual violence. The belief that evidence of sexual violence is more difficult to document likely meant less time and effort was dedicated to this aspect of the Srebrenica investigation.”<sup>247</sup>

*Akayesu* is one of the most, if not the most, frequently cited judgments within the jurisprudence of genocide. The Trial Chamber, by surfacing gender in its legal analysis, brought to light the significance of examining female and male victims as gendered subjects, and how an understanding of gender by the perpetrators and the victims influences the planning, commission, and impact of a wider range of genocidal acts than had previously been recognized.

The emphasis on the groundbreaking nature of *Akayesu* often obscures, however, how little its gendered analysis influenced subsequent investigations and prosecutions of genocide. This is so even within the confines of the ensuing ICTR jurisprudence. The particular failure post-*Akayesu* to prosecute rape and sexual violence as constitutive acts of genocide was a consequence of an even larger prosecutorial fiasco: a failure to investigate and indict crimes of sexual violence on the whole.<sup>248</sup>

In a review of ICTR jurisprudence conducted in 2004, no rape charges had been brought by the Prosecutor’s Office in 70 percent of the 21 then-adjudicated cases.<sup>249</sup> There were also no charges in any cases linked to sexual slavery, despite the fact that it had been documented that some Tutsi women were forced into sexual servitude in exchange for their lives.<sup>250</sup> Of those 21 completed cases, there were 18 convictions and three acquittals.<sup>251</sup> Of the convictions, 90 percent of those judgments contained no convictions for rape.<sup>252</sup>

245. UN, International Residual Mechanism for Criminal Tribunal, “Landmark Case,” Krstić: Link between rape and ethnic cleansing. Available at: <http://www.icty.org/mk/node/9226>.

246. In a March 1996 interview with [Chief Prosecutor] Goldstone’s deputy prosecutor, he said they had not collected rape testimonies because “African women don’t want to talk about rape.... We haven’t received any real complaints. It’s rare in investigations that women refer to rape”. See Nowrojee, “Your Justice is too Slow,” at [10], fn. [8].

247. Author’s interview with ICTY investigator.

248. Magali Maystre, “Le Quasi Silence des Statuts des Tribunaux Internationaux Ad Hoc quant aux Actes de Violence Sexuelle: Obstacle ou Bénédiction pour la poursuite de ces crimes?,” *Droits Fondamentaux*, Université de Paris II, 2018.

249. Nowrojee, “Your Justice is too Slow,” at [iv].

250. HRW, “Shattered Lives,” at [59-60]; Meredith Turshen, “The Political Economy of Rape: An Analysis of Systematic Rape and Sexual Abuse of Women During Armed Conflict in Africa,” *Victims, Perpetrators, or Actors: Gender, Armed Conflict, and Political Violence*, [63], London, UK: Zed Books, 2001.

251. Nowrojee, “Your Justice is too Slow,” at [iv], [3].

252. Nowrojee, “Your Justice is too Slow,” at [iv], [3].

These statistics suggest either a lack of interest or lack of competence in pursuing evidence of sexual violence at the investigative and/or prosecutorial stages. In the cases of *Serushago*,<sup>253</sup> *Ndindabahizi*,<sup>254</sup> *Bisengimana*,<sup>255</sup> and *Nzabirinda*,<sup>256</sup> the Prosecution withdrew the charges of sexual violence. Where acquittals for rape were handed down in the *Niyitegeka*, *Muvunyi*, and *Kamuhanda* cases, the ICTR Prosecution failed to appeal the grounds for those acquittals.

The most remarked-upon cases concerned the crimes committed at Cyangugu, a city and region in western Rwanda.<sup>257</sup> Three military and government officials—André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishwe—were indicted but no charges of sexual violence were included.<sup>258</sup> Following pressure from Rwandan civil society, led by the Association of Widows of the Genocide of April 1994, the Prosecution announced it would amend the indictment against the three accused “as soon as possible” to include charges of rape. Months later, the Prosecution filed the Motion to Amend the Indictment but the then-Chief Prosecutor Carla del Ponte withdrew the motion.<sup>259</sup> When Prosecution witnesses gave evidence at trial concerning sexual violence, the Coalition for Women’s Human Rights in Conflict Situations<sup>260</sup> submitted an *amicus curiae* brief (as it had done in *Akayesu* when the same situation occurred)<sup>261</sup> urging the Trial Chamber to call on the Prosecution to amend the Indictment to include sexual violence charges. The Prosecution opposed the Coalition’s motion, arguing that the matter of what to charge was within its sole discretion. The Chamber denied the Coalition motion,<sup>262</sup> and following a Defence motion, excluded from the trial all evidence of uncharged crimes.<sup>263</sup>

When charges of sexual violence were included in the indictments post-*Akayesu*, they were often not charged as genocide. In the *Nyiramasuhuko* case,<sup>264</sup> the ICTR Trial Chamber noted the overwhelming

253. Prosecutor v. Serushago, Case No. ICTR-95-IC-T, Trial Judgment, para. [4], Jan. 5, 1999.

254. Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I, Trial Judgment, para. [13], July 15, 2004.

255. Prosecutor v. Bisengimana, Case No. ICTR-00-60-T, Trial Judgment, paras. [7], [12], Apr. 13, 2006.

256. Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-T, Trial Judgment, paras. [3], [4], [34], 23 Feb. 23, 2007.

257. See, Nowrojee, “Your Justice is too Slow,” at [14-17]; Van Schaack, “Engendering Genocide,” at [22-23].

258. Prosecutor v. Ntagerura, Case No. ICTR-99-46, Indictment, Jan. 29, 1998; Prosecutor v. Bagambiki, Case No. ICTR-99-46, Indictment, Oct. 13, 1997.

259. When questioned about this, del Ponte is reported to have said, “I can do this because I am a woman. If I were a man, there would be a fuss.” Nowrojee, “Your Justice is too Slow,” at [15].

260. The Coalition for Women’s Human Rights in Conflict Situations (the “Coalition”) was formed by feminist activists who, in 1996, mobilized around the ICTR’s failure to investigate and prosecute sexual violence.

261. The Coalition had, during the *Akayesu* case, submitted an *amicus curiae* brief calling upon the Trial Chamber in *Akayesu* to use its inherent authority to invite the Prosecution to amend the Indictment to include charges of rape and other serious acts of sexual violence. The *amicus* brief was extensive, but one of its suggestions was that the Prosecution charge rape as an act of genocide, arguing that rape and sexual violence were essential to the genocide, and were designed to “destroy a woman from a physical, mental or social perspective and [destroy] her capacity to participate in the reproduction and production of the community.” Coalition for Women’s Human Rights in Conflict Situations, [Amicus Brief Respecting Amendment of the Indictment and Supplementation of Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the Competence of the Tribunal](http://www.iccwomen.org/publications/briefs/docs/Prosecutor_v_Akayesu_ICTR.pdf), [http://www.iccwomen.org/publications/briefs/docs/Prosecutor\\_v\\_Akayesu\\_ICTR.pdf](http://www.iccwomen.org/publications/briefs/docs/Prosecutor_v_Akayesu_ICTR.pdf).

262. Prosecutor v. Ntagerura, Case No. ICTR-99-46, Decision on the Application to File an Amicus Curiae Brief According to Rules 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women’s Human Rights in Conflict Situations, May 24, 2001.

263. Prosecutor v. Ntagerura et al., ICTR-99-46-T, Decision on the Application to File an Amicus Curiae Brief according to Rule 74 of the Rules of Procedure and Evidence filed on behalf of the NGO Coalition for Women’s Human Rights in Conflict Situations, May 24, 2001.

264. Pauline Nyiramasuhuko was the first woman to be convicted of genocide before an international criminal tribunal. The Minister for Family Welfare and the Advancement of Women at the time of the 1994 genocide, Nyiramasuhuko was dispatched to her hometown of Butare in southern Rwanda to oversee the annihilation of the Tutsi community there, which she did. On 25 April 1994, thousands of Tutsis were instructed to go to the stadium in Butare, on the false promise that the Red Cross was providing food and shelter. The Interahamwe, led by Arsène Ntahobali, Nyiramasuhuko’s son and one of her co-defendants at trial, surrounded the stadium. Refugees were raped, tortured, killed, and their bodies were burned. Nyiramasuhuko was said to have told the militia, “before you kill the women,

evidence of rape that was entered into evidence, as well as the Prosecution's opening statement that made a reference to rape as genocide. Despite this, the Prosecution had failed to properly plead rape as genocide, charging it instead as a crime against humanity, and as outrages upon personal dignity, a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Trial Chamber, cognizant of the rationale of *Akayesu* and deprived of the ability to rely on it, censured the Prosecution: "although the evidence establishes in this case that rape was utilized as a form of genocide

**“As women and girls are more likely to survive genocide, any ensuing trials rely heavily on what they have seen, heard, and suffered. Women who have suffered are not going to cooperate with justice systems in which they are invisible.”**

[...] it would be prejudicial to the Accused to hold them responsible for a charge of which they had insufficient notice.”<sup>265</sup>

Following *Akayesu*, it could no longer be claimed that the principle of legality was a barrier to prosecutions for non-lethal genocidal violence. Still, as is evident from the lack of progress in the ICTR jurisprudence—perhaps better described

as a regression—on gendered violence as genocide, obstacles remain. These obstacles are “less visible than defects in positive law because they emerge in the practice of international criminal law at crucial yet shrouded stages of the penal process: investigation, charging, pre-trial plea negotiations, trial preparation, the provision of protective measures, and appeals.”<sup>266</sup> Indeed, Nowrojee observed, “over the past decade, sexual violence crimes at the ICTR have never been fully and consistently incorporated into the investigative and prosecution strategy of the Prosecutor’s Office.”<sup>267</sup> She noted further, “Investigators receive no training on interviewing methodology for rape victims, and the majority of the investigators are male. Often investigators come from backgrounds where they have not had any experience with this issue, or they believe this is not a crime that deserves serious attention.”

The totality of the blame does not lie, however, with those investigating and prosecuting genocide. The brilliance of the *Akayesu* Judgment, while feted by academics and activists, did not prompt States to support and push for a more gendered analysis by either their national courts or the international tribunals to which they were contributing.

When it comes to gender and the duty to punish, the lessons of the *ad hoc* tribunals are clear: positive law recognizing the gendered dimensions of genocide are insufficient where a commitment to, and understanding of, gender justice do not infuse all stages of investigatory and prosecutorial strategy. An understanding of gender is not only required in the legal and factual analysis, though this is undoubtedly necessary. Gendered understandings must seep into the more mechanical aspects of pursuing justice, including the recruitment of staff. Jurists have commented on the fact that the investigation, indictment, and prosecution for gender crimes in the ICTR and ICTY occurred only after widespread lobbying by women’s rights organizations and feminist scholars, and the inclusion of more women in the investigatory and prosecutorial wings of the courts.<sup>268</sup>

While it is not the duty of female lawyers and activists to bring to light in the trials, and the subsequent case law, the experience of women and girls or to surface gender in an institution’s working practices, this has often been the case. That sexual violence was entered into evidence in *Akayesu* was due, first, to the legal activism of the female-led Coalition which pushed to have the Indictment amended to include acts of sexual violence, and which first suggested the charging of rape as genocide.<sup>269</sup> Second, and more frequently acknowledged, is the work of the Judges, notably Judge Navi Pillay, who allowed Prosecution to amend their original Indictment to include sexual violence in its charges, and who delivered the pioneering Trial Judgment.<sup>270</sup> The role of the Judges’ Legal Officers who researched and drafted the Judgment should also be recognized.

Female investigators and prosecutors have also, in many cases, led the development of evidence of crimes of sexual violence, committed disproportionately against women and girls. Such was the case for the evidence base of ICTY trials, which examined responsibility for crimes committed in Foča. Three female lawyers and investigators led the development of this evidence, and approached it with an express focus on building a case that reflected the organized way in which rape was used as part of ethnic cleansing.<sup>271</sup> The *Kunarac* Judgment, underpinned by the results of these efforts, found that sexual enslavement and rape were crimes against humanity.<sup>272</sup> At the ICC, it was under the auspices of the first female Chief Prosecutor, Fatou Bensouda, that the Office of the Prosecutor developed its gender strategy for investigations and prosecutions.<sup>273</sup>

As women and girls are more likely to survive genocide, any ensuing trials rely heavily on what they have seen, heard, and suffered. A conception of genocide that relies on them bearing witness to the killings of their fathers, brothers, sons, and husbands, and which turns away from all non-lethal horrors visited on female and male members of the protected group, is a harm in itself. Women who have suffered are not going to cooperate with justice systems in which they are invisible. One survivor, having realized that charges of sexual violence would not be heard in the ICTR’s *Ntagerura* trial, commented, “If the tribunal does not change its approach to give value to women, then it’s not worth it for us to work with them.”<sup>274</sup>

Today, with the path to international criminal justice so often closed off—due to crimes not falling within the geographic and/or temporal jurisdiction of the ICC and/or due to the exercise of veto powers by the Permanent Members of the UN Security Council—it is increasingly likely that accountability for the crime of genocide will be sought and found in national courts. The possibility of multiple independent national prosecutions makes it all the more urgent that a more profound understanding of the gendered strategies of genocide, as well as the gender-specific impacts, inform prosecutors’ and courts’ understanding of the crime.

269. Prosecutor v. Nindabahizi, Case No. ICTR-2001-71-I, Trial Judgment, para. [13], July 15, 2004.

270. In *Akayesu*, the Trial Chamber allowed the Indictment to be amended, following testimony of sexual violence during the course of the trial, after the Presiding Judges concluded that it was “in the interests of justice to present evidence of sexual violence.” *Akayesu*, ICTR-96-4-T, para. [417]. See also, Van Schaack, “Engendering Genocide.”

271. John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, [176-178], Chicago, IL: University of Chicago Press, 2003.

272. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgment, Feb. 22, 2001.

273. ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014. Notably the Policy Paper states, on p. 5, that the Office “will apply a gender analysis to all crimes within its jurisdiction, examining how those crimes are related to the inequalities between women and men, and girls and boys, and the power relationships and other dynamics which shape gender roles in a specific context.”

274. Nowrojee, “Your Justice is too Slow,” at [12].

you need to rape them”. She was also said to have provided gasoline to members of the Interahamwe and ordered them to burn a group of Tutsi women to death.

265. Nyiramasuhuko, ICTR-98-42, paras. [5835], [5864]. See also, Drumbl, “She Makes Me Ashamed to Be a Woman.”

266. Beth Van Schaack, “Obstacles On The Road To Gender Justice: The International Criminal Tribunal for Rwanda As Object Lesson,” *Amer. U. J. of Gender, Social Policy & the Law*, Vol 17, No. 2, 364, at [401-459], (2009). See also, Patricia V. Sellers, “The ‘Appeal’ of Sexual Violence: *Akayesu/Gacumbitsi* Cases,” *Center for Human Rights, Gender-Based Violence in Africa: Perspectives from the Continent* 51.

267. Nowrojee, “Your Justice is too Slow,” at [8].

268. Kelly D. Askin, “Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles,” *Berkeley J. Int’l Law*, Vol. 21, Issue. 2, 288, [317], 2003.



## VI. GENOCIDE AND INTERNATIONAL ORGANIZATIONS

The drafters of the Convention, negotiating in the aftermath of the Second World War, understood that the State on whose territory genocidal acts were being perpetrated would be unlikely to prevent, suppress, or punish the crime of genocide. Respect for state sovereignty was almost certain to impede meaningful action by other States. This remains as true today as it was in 1948.

As the Convention's framework was being knitted together, the question of how to bolster State compliance with their obligations came to the fore. The result was Article VIII, which contemplates that States "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide" or any of the punishable acts set out in Article III of the Convention.<sup>275</sup> The importance of the United Nations, as an organization and an ideal, was woven throughout into the Convention. Decades later, in January 2014, UN Secretary-General Kofi Annan recalled this, stating, "There can be no more important issue, and no more binding obligation, than the prevention of genocide. Indeed, this may be considered one of the original purposes of the United Nations."<sup>276</sup>

Article VIII did not intend to add to the existing powers of the UN organs, and consequently is viewed as expository.<sup>277</sup> It has only been invoked once, by US Secretary of State Colin L. Powell before the US Senate Foreign Relations Committee, where General Powell indicated that, based on Article VIII of the Genocide Convention, the US would "propose that the next UN Security Council Resolution on Sudan request a United Nations investigation into all violations of international humanitarian law and human rights law that have occurred in Darfur, with a view to ensuring accountability."<sup>278</sup> This proposal resulted in Security

275. The acts enumerated in Article III of the Convention are: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

276. UN, Press Release, "Genocide is Threat to Peace Requiring Strong, United Action, Secretary-General tells Stockholm International Forum," G/SM/9126/REV.1\*, Feb. 11, 2004.

277. The ICJ has held that Article VIII did not intend to add to the existing powers of the UN organs. See, ICJ, Provisional Measures Order, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v/ Yugoslavia (Serbia and Montenegro)," Apr. 8, 1993.

278. US Department of State, "The Crisis in Darfur," Secretary Colin L. Powell: Testimony Before the Senate Foreign Relations Committee, Washington DC, Sept. 9, 2004.

Council Resolution 1564 (2004), which created the International Commission of Inquiry on Darfur.<sup>279</sup> The final report of the Commission recommended that the Security Council refer the situation in Sudan to the ICC, motivating the first Security Council referral to the ICC.<sup>280</sup>

It is clear that the most competent organ to take such action is, or should be, the Security Council acting under Chapter VII of the UN Charter. Despite this—or perhaps because of it—a 2000 study indicated that the Security Council made fewer references to genocide than any other political organ in the UN.<sup>281</sup> The first reference to genocide in a Security Council resolution came only in 1993, and even then obliquely as a reference made in the context of Resolution 827, which established the ICTY and included mention of its mandate to prosecute genocide. A year later, for identical reasons, genocide was referenced in Resolution 944, establishing the ICTR. It was not until 2000 that the Security Council made reference to the Convention, in its Resolution 1291 concerning the conflict in the Democratic Republic of the Congo.

The Security Council has also linked the prevention and punishment of genocide to the Women, Peace and Security agenda, which seeks to promote gender equality and strengthen women's rights, protection, and participation during conflict and its aftermath. In Resolution 1325 (2000), the Security Council emphasized the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide.<sup>282</sup> In its Resolution 1820 (2008), the Security Council called for effective steps to prevent and respond to acts of sexual violence as a way of contributing to the maintenance of international peace and security—including urging Member States to comply with their obligations for prosecuting the perpetrators of sexual violence.<sup>283</sup> In the same resolution, the Security Council also recognized conflict-related sexual violence as a matter of international peace and security.

279. UN Security Council, "Security Council Resolution 1564 (2004) [on Darfur, Sudan], S/RES/1564 (2004), Sept. 18, 2004.

280. UN International Commission of Inquiry on Darfur, "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General," paras. [571-572] Jan. 25, 2005. Controversially the Darfur Commission did not make a determination of genocide: see, David Luban, "Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report," *Chicago J. of Int'l Law*, Vol. 303, No. 7, 2006. Following its own investigation, the ICC Prosecutor issued a warrant for the arrest of Sudanese President Omar Hassan Ahmad Al Bashir on five counts of crimes against humanity, two counts of war crimes, and three counts of genocide allegedly committed in Darfur, Sudan. See, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Case Information Sheet, Situation in Darfur, Sudan, last updated April 2018.

281. Schabas, *Genocide in International Law*, [453-479]. See also, Giorgio Gaja, "The Role of the United Nations in Preventing and Suppressing Genocide," *The UN Genocide Convention: A Commentary* [402-404] ed. Gaeta, Oxford Commentaries on International Law, 2009.

282. UN Security Council, Resolution 1325 (2000), S/RES/1325 (2000), Oct. 31, 2000.

283. UN Security Council, Resolution 1820 (2008), S/RES/1820 (2008), June 19, 2008.

Though the subject of debate during the Convention's negotiations, genocide is now accepted as a threat to international peace. UN Secretary-General Annan, in the same 2014 speech, acknowledged,

Genocide, whether imminent or ongoing, is practically always, if not by definition, a threat to the peace. It must be dealt with as such—by strong and united political action and, in extreme cases, by military action.<sup>284</sup>

Despite this, the Security Council—as well as other “competent organs” such as the General Assembly—has rarely been called upon to take appropriate action to prevent or suppress genocide. In the Security Council, there has, as yet, been no vote to specifically draw upon Chapter VII powers to prevent genocide. After the resolutions creating the ICTR and ICTY, no Security Council resolution has referred a situation to justice with reference to Article VIII of the Convention.<sup>285</sup> Security Council Resolution 1593 (2005), which referred the situation in Darfur to the ICC, made no mention of the Convention or of the crime of genocide, though it did recognize that the “situation in Sudan continues to constitute a threat to international peace and security.”<sup>286</sup>

Resolutions aimed at a Security Council referral of situations (where genocide has not been specified) to the ICC have often failed because one of the Permanent Members exercised its veto.<sup>287</sup> Such was the fate of the May 2014 draft resolution, sponsored by 65 Member States, that sought to refer the situation in the Syrian Arab Republic to the ICC, and which was vetoed by Russia and China.<sup>288</sup> In other situations (also not involving allegations of genocide), such as the violations reportedly committed in Gaza in 2009 and 2018, in Ukraine occurring since 2014, and in Burma in 2017, the threats and likelihood of a veto have prevented even an attempt to refer the situations to the ICC.

Given the Security Council's failure to prevent or suppress genocide, a threat to international peace, what then of individual State obligations under the Convention to prevent and punish genocide? States are not absolved of their obligations under the Convention when acting collectively, including when voting as part of the Security Council, or as part of any other competent UN organ. As asserted by Judge Gaja of the ICJ:

States parties to the Genocide Convention are not relieved of their obligations under the Convention when they act as members of an international organization. Thus, a state party to the Convention would infringe its obligations if it did not, as far as possible, prevent or repress the commission of genocide when acting as a member of an international organization [...] since genocide is plainly regarded as representing a threat to peace, the Security Council would not only be entitled to take measures under Chapter VII of the UN Charter, but should do so with a view to ensuring compliance with the obligations to prevent and repress genocide that are imposed on the UN.<sup>289</sup>

It is important to note that if the States on the Security Council were bound by the Convention's legal obligations during their deliberations, this would not mean that every draft resolution concerning genocide would receive a positive outcome. This is particularly so as regards the duty to prevent, where there is discretion to consider what measures would be likely to prevent genocide. However, the explicit

deliberation of the Convention's duties—including potentially gendered discussions of what factors signal the existence of serious risk of genocide—would make turning away from a situation of genocide much harder to justify.

#### *Other international organizations*

Judge Gaja's remarks, it will be noted, did not only apply to the UN, but to all international organizations of which States are members: “International organizations are also under obligations to prevent and repress genocide that have their origin in general international law.”<sup>290</sup> This view is an extrapolation from the ICJ's 2007 Judgment, which determined that “responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.”<sup>291</sup> That international organizations comprised of Member States would have the same obligation is reasonable, and arguably essential, where international organizations are in a position to take effective steps to prevent genocide.

The Draft Articles on the Responsibility of International Organizations, with Commentaries 2011 recognizes the breach of an international obligation by an international organization<sup>292</sup> when “an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.”<sup>293</sup> In some instances, the constitutions of the international organizations explicitly set out this obligation. For example, Article 4(h) of the Constitutive Act of the African Union authorizes the African Union to intervene in a Member State in respect of grave circumstances, namely war crimes, the crime of genocide, and crimes against humanity.

Where international organizations' founding documents do not include a statement of their obligation to prevent and punish genocide, such an obligation may be implicit in their obligation to maintain international or regional peace and security to which genocide is a direct and cogent threat. The Common Provisions of the Treaty of the European Union (EU), for example, expressly mandate an obligation on the EU to promote European and international peace and security, protect human rights, and observe international law.<sup>294</sup> Additionally, the Common Provisions call for the EU to “define and pursue common policies and actions” in order to “preserve peace, prevent conflicts and strengthen international security,” and “assist populations, countries and regions confronting natural or man-made disasters.”<sup>295</sup> Similarly, Article 2(a) of the Charter of the Organization of American States (OAS) states that the first essential purpose of the OAS is, “to strengthen the peace and security of the continent.” In specific regard to collective security, the OAS Charter mandates a collective response to any threats against Member States “affected by... an extra-continental conflict... or by any other fact or situation that might endanger the peace of America.”

While the Convention in text is explicitly limited to those countries that have ratified it, the evolution of the customary law of genocide, state responsibility, and the responsibility of international organizations, makes clear that the Convention's requirements to prevent, suppress and punish genocide also bind those who are not Parties to the Convention. It will be a significant step forward when international organizations, and notably the UN, recognize that the obligation to prevent and punish genocide also apply to them, and make meaningful efforts in line with these obligations.

284. UN Security Council, Resolution 1820 (2008), S/RES/1820 (2008), at fn. [267], June 19, 2008.

285. While not referring the situation in Iraq to justice, the Security Council in its Resolution 2379, referenced genocide in its request to the the Secretary-General to establish an ‘Investigative Team,’ to “support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da’esh) in Iraq, to the highest possible standards ... to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request...” UN Security Council, Resolution 2379 (2017), S/Res/2379 (2017), Sept. 21, 2017.

286. UN Security Council, Resolution 1593 (2005), S/Res/1593 (2005), Mar. 31, 2005.

287. Scott Sheeran, “The U.N. Security Council veto is literally killing people,” Washington Post, Aug. 11, 2014; HRW, “UN Security Council: Address Inconsistency in ICC Referrals,” Oct. 16, 2012.

288. UN Security Council, S/2014/348, May 22, 2014.

289. Gaja, “The Role of the United Nations,” at [405].

290. Gaja, “The Role of the United Nations,” at [405].

291. Bosnia v. Serbia, ICJ Judgment, para. [430], 2007.

292. For the purposes of this paper, an international organization is defined as “an organizations established by a treaty or other instrument governed by international law and possessing its own international legal personality.” See, ILC, “Draft articles on the responsibility of international organizations,” Article 2(a).

293. ILC, “Draft Articles on the responsibility of international organizations,” Article 10(1). Article 10 (2) reads, “Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.”

294. European Union, “Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union,” Title I: Common Provisions, Official Journal C 326, 26/10/1202 P. 0001-0390.

295. European Union, “Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union,” Title I: Common Provisions, Official Journal C 326, 26/10/1202 P. 0001-0390.



Rwandan genocide survivors relay a symbolic torch at the Ecole Technique Officielle in Kigali.

REUTERS /  
ARTHUR ASIIMWE

## VII. CONCLUSION

Genocide is a crime that seeks to erase a community from the world, to render it irrelevant, invisible, and eventually unworthy of memory. When an understanding of women and men, girls and boys as gendered subjects is failed to be considered from the crime of genocide, women and girls in particular become a legal, if not a factual irrelevance, and are removed from the narrative history that forms in the aftermath of a genocide.

For too long, understandings of genocide have centered on killings, the vast majority of victims of which are men and boys. But a genocide persists largely because of the harms perpetrators inflict on the bodies and minds of female survivors, and of males not selected for execution. Non-killing acts of genocide—more likely to be directed against female members of the protected group—are often not recognized as intrinsic parts of the continuum of genocidal violence. Women and girls, having survived the initial killings, have been raped, enslaved, beaten, starved, repeatedly subjected to degradation, and forcibly transferred. It is these non-killing acts, particularly when they are geographically and temporally distant from the killings, that tend to be denied acknowledgment as part of a campaign of genocidal violence. Moreover, in privileging the act of killing, other acts of violence committed against men and boys—such as torture, rape, and enslavement—have also been obscured.

The ongoing failure to acknowledge the multifaceted expression of genocide beyond killing—and the distinct ways in which genocide is planned and committed against men and women, boys and girls, by reason of their gender—has weakened the legal obligations to prevent and punish genocide, to the detriment of the victims, their communities, and the international community of which we all form part. When it comes to the prohibition against genocide—an *erga omnes* obligation with *jus cogens* status—the consequence of a gender-blind approach to the crime of genocide is that female victims are denied equal protection of the law, and all victims, regardless of gender, suffer from a narrow conception of genocide that fails to engage the legal obligations first established by the Convention.

The unwillingness to grapple with the gendered commission and impacts of genocide has created room for equivocation, and for retreat from the legal obligations of the Convention by States and international organizations. One cannot punish or prevent what one does not recognize. Fifty years elapsed between the Convention's formal recognition that the crime of genocide existed, and the gendered analysis of the *Akayesu* Trial Judgment. Amidst halting progress, arguments for the importance of a gendered understanding of genocide must still, therefore, be made.

# ANNEX A: EXAMPLES OF GENOCIDES COMMITTED SINCE 1915

## I. ARMENIAN GENOCIDE (1915-1916)

In 1908, junior army officers, who would become known as the Young Turks, seized power, determined to strengthen and “Turkify” the then-Ottoman empire. In 1914, they entered World War I on the side of Germany. Following a military defeat to the Russians in the Caucasuses, the government moved to portray the Armenian community as a threat to the State. On 24 April 1915, several hundred Armenian intellectuals were rounded up, arrested and later executed. Armenians mark this as the start of the genocide, though similar massacres had occurred in 1894, 1895, 1896, 1909, and again between 1920 and 1923.

The Young Turks, who gave themselves the moniker “the Committee of Unity and Progress,” put in place a number of discriminatory measures against the Armenians, including a law authorizing the military and government to deport anyone they “sensed” was a security threat. A later law allowed the confiscation of abandoned Armenian property. Armenians in the army were disarmed and transferred into labor battalions where they were either killed or worked to death. Armenians were killed in mass executions, by shooting, crucifixion, and drowning, as well as through death marches of men, women, and children across the Syrian desert to concentration camps, with many dying along the way of exhaustion, exposure and starvation. Women and girls were often raped while being forced along. As part of its “Turkification” campaign, the Government abducted young Armenian boys, forcibly converted them to Islam, and gave them to Turkish families to raise. Armenian women and girls were abducted, categorized by age, marital status and physical appearance before being sold, with senior Ottoman officials given the “first choice.”

## II. THE HOLOCAUST (1933-1945)

The Nazis who came to power in Germany in January 1933, aimed to create an ethnically ‘pure’ Germany. Hitler, who sat at the helm of the Nazi regime, believed that Germans were “racially superior” and that the Jews, deemed “inferior,” were an alien threat to the so-called German racial community. During the era of the Holocaust, German authorities also targeted other groups because of their perceived “racial inferiority”: Roma, the disabled, and some of the Slavic peoples (Poles, Russians, and others). Other groups were persecuted on political, ideological, and behavioral grounds, among them Communists, Socialists, Jehovah’s Witnesses, and LGBTQ people.

The Nazi plan was implemented in stages. Beginning in 1933, the Nazi government passed laws excluding the Jewish population from German society. The Nuremberg Laws were introduced in 1935, which effectively stripped the Jewish and Romani people of citizenship. After invading Poland in 1939, ghettos were set up to segregate the Jewish people. Following the invasion of the Soviet Union in June 1941, *Einsatzgruppen* (mobile killing units) and, later, militarized battalions of Order Police officials, moved behind German lines to carry out mass-murder operations against Jews, Roma, and Soviet state and Communist Party officials. German SS and police units, supported by units of the *Wehrmacht* and the *Waffen SS*, murdered more than a million Jewish men, women, and children, and hundreds of thousands of others.

The policy of extermination, which Nazi officials called the “final solution to the Jewish question,” was discussed at the Wannsee Conference in Berlin in January 1942. By mid-1942, anti-Jewish measures were radicalized and millions of Jews from Germany were deported from occupied territories, and from the countries of many of its Axis allies, to extermination camps in sealed freight trains. The Nazis made extensive use of gas chambers for mass killing. In the final months of the Second World War, SS guards

moved camp inmates by train or on forced marches, often called “death marches,” in an attempt to prevent the Allied liberation of large numbers of prisoners.

Approximately six million Jews were murdered in the Holocaust, nearly two out of every three Jews in Europe. The crimes committed during the Holocaust devastated most European Jewish communities and eliminated hundreds of Jewish communities in occupied Eastern Europe entirely.

## III. CAMBODIAN GENOCIDE (1975-1979)

The Communist Party of Kampuchea, known as the Khmer Rouge, rose to power after seizing control of the Cambodian capital in 1975. Under the leadership of Pol Pot, the Khmer Rouge maintained power for four years, unleashing a brutal and nearly indiscriminate reign of abuse, terror, and mass killing. By 1979, the Khmer Rouge had killed roughly two million people, targeting those who were highly educated, anyone associated with the previous government, and any religious or ethnic minorities. Vietnamese, Chinese, and Muslim minorities were especially attacked, and all religion was ardently repressed. Those who were unable to work in the labor camps would also be killed, including the elderly, the disabled, and children too young to be used for labor or as child soldiers.

Although colloquially referred to as “the Cambodian genocide,” the Extraordinary Chambers in the Courts of Cambodia (ECCC) determined that ethnic Khmer were targeted because they belonged (or were perceived to belong) to a political group, or to a particular social class, which are not protected groups under the Genocide Convention. Only the Khmer Rouge’s targeting of Cambodia’s Cham Muslim and Vietnamese populations would be charged before the ECCC as genocide, with convictions for genocide being delivered in November 2018 against two of the most senior Khmer Rouge figures, Nuon Chea and Khieu Samphan. The majority of the crimes, including the extermination of over 1.3 million ethnic Khmer, were charged as crimes against humanity.

## IV. GUATEMALAN GENOCIDE (1981-1983)

Within the broader conflict of the Guatemalan civil war (1960-1996), the military government carried out the genocide of Mayan civilians, with the most heightened and systematic violence occurring between 1981 and 1983. During that time span, the Guatemalan government and militia carried out over 600 massacres and destroyed hundreds of Mayan villages. While the terrorization of indigenous communities had been occurring long before the civil war, it became more systematic in the late 1970s. The government, which already saw Mayan peoples as subhuman, accused the Mayan population of communism and allying with the guerrilla insurgency. In response, the government initiated “Operation Sophia,” which aimed to end insurgent guerrilla warfare by destroying the civilian base in which they hid. This program specifically targeted the Mayan population, who were believed to be supporting the guerrilla movement.

Over the next three years, the Guatemalan army destroyed 626 villages, killed or “disappeared” more than 200,000 people and displaced an additional 1.5 million, while more than 150,000 were driven to seek refuge in Mexico. Forced disappearance policies included secretly arresting or abducting people, who were often killed and buried in unmarked graves. Women and girls suffered brutal rapes, including public gang rapes. Pregnant women were eviscerated. In addition, the government instituted a scorched earth policy, destroying and burning buildings and crops, slaughtering livestock, fouling water supplies and violating sacred places and cultural symbols. Many of these actions were undertaken by the army, specifically through special units known as the “Kaibiles,” in addition to private death squads, who often acted on the advice of the army.

## V. KURDISH GENOCIDE (1986-1989)

The Anfal genocidal campaign occurred toward the end of the Iran-Iraq War as part of an overall operation to destroy Kurdish villages in Iraq and combat insurgents. From 1986 to 1989, 4,500 Kurdish

villages were destroyed and as many as 180,000 people were killed during attacks carried out by the Ba'ath regime and led by Ali Hassan al-Majid, an Iraqi military commander of the Intelligence Services. The perpetrators used chemical gas weapons, concentration camps, bombings, mass executions, and enforced disappearances to target and annihilate Kurdish populations. Within the concentration camps, prisoners were subject to extreme filth, consistent beatings, and torture.

Men of possible fighting age and suspected of insurgency were executed often summarily, while women and children largely perished from gas attacks, starvation, or deprivation. On at least two documented occasions, women were killed in mass executions as well. Approximately 17,000 people were disappeared. For those Kurds forced off their land, as well as some who had been released from prisons, the Government trucked them to locations far from their homes, with little to no provision for relief, housing, clothing or food, and forbade them to return to their villages of origin on pain of death. In these conditions, many died within a year of their forced displacement.

The Iraqi government also launched a number of chemical gas attacks, using agents such as mustard gas and the nerve agent GB, or Sarin, on approximately a dozen Kurdish villages. The most infamous of these attacks occurred in Halabja in March 1988. The attack killed between 3,200 and 5,000 people and injured 7,000 to 10,000 more. Years later, people living in the areas where the chemical attack occurred had high rates of birth defects and cancers. The Anfal campaign was part of a broader tactic of Arabization aimed at redistributing the population and forcing Kurds off of valuable land. Presently, many Kurdish survivors still suffer from the aftermath of chemical attacks, and the successful Arabization missions have stemmed lasting resentment between Arabs and Kurds.

## VI. RWANDAN GENOCIDE (1994)

Rwanda experienced decades of ethnically motivated violence post-independence, with roots in the differential treatment of various ethnic groups by the Belgian colonial authorities. On April 6, 1994, a plane carrying Rwandan President Habyarimana and Burundian President Ntaryamira was shot down over the capital city of Kigali, leaving no survivors (it has never been conclusively determined who downed the plane). Within an hour of the plane crash, the Presidential Guard, together with members of the Rwandan armed forces (FAR) and a Hutu militia group known as the *Interahamwe* (“Those Who Attack Together”), set up roadblocks and barricades and began slaughtering Tutsis and moderate Hutus with impunity. Within a day, the Hutus had successfully eliminated Rwanda’s moderate leadership.

The mass killings in Kigali quickly spread from that city to the rest of Rwanda, with some 800,000 people slaughtered over the next three months. Hutu extremists set up radio stations and newspapers which broadcast hate propaganda, urging people to “weed out the cockroaches,” meaning “kill the Tutsis.” The names of those to be killed were read out over the radio. Approximately 800,000 Tutsis and Hutu moderates were slaughtered over the 100-day period from April 7 to mid-July 1994.

In addition to the brutal mass killings, systematic rape—often taking the form of gang rapes in public—was a key facet of the Rwandan genocide. The exact number is unknown, but it is estimated that between 250,000 and 500,000 women and girls were raped. The pervasive use of rape and other forms of sexual violence, directed primarily against Tutsi women and girls as a means of dehumanization and subjugation, caused lasting trauma as well as a spike in HIV infection and children born of rape. Genocidaires killed many Tutsi women and girls following the rapes. For those who survived the brutal sexual violence, they suffered lasting physical and/or psychological wounds.

## VII. BOSNIAN GENOCIDE (1995)

In 1991, Yugoslavia began to collapse along ethnic lines. The Republics of Slovenia and Croatia declared independence. Fighting in the region escalated after the Republic of Bosnia and Herzegovina declared

independence in 1992. In 1995, as part of a wider ethnic cleansing campaign throughout areas controlled by the Army of Republika Srpska (VRS), Bosnian Serb forces killed more than 8,000 Bosniak (Bosnian Muslim) men and boys in the town of Srebrenica, many of whom were buried in mass graves. In an attempt to hide the evidence of these murders, Bosnian Serb authorities later moved many bodies to secondary or even tertiary mass gravesites. Under the command of General Ratko Mladić, the VRS expelled 25,000-30,000 Bosniak civilians, mainly women and girls, from Srebrenica. Many women and girls were subject to torture, rape, and other forms of sexual violence.

While the only recognized incident of genocide occurred at Srebrenica, the war itself saw a range of violations including but not limited to murder, rape, sexual violence, forced impregnation, torture, and other cruel and inhumane treatment. These were later charged at the International Criminal Tribunal for the former Yugoslavia as crimes against humanity and war crimes. During the war, an estimated 100,000 people were killed, 80 percent of whom were Bosniaks. The numbers who suffered rape and other forms of sexual violence is unknown. The atrocities committed by Bosnian Serb forces at Srebrenica are widely considered to be the worst in Europe since the Holocaust.

## VIII. DARFUR GENOCIDE (2003)

Beginning in 2003, *Janjaweed* militias and Sudanese military forces have killed upwards of 300,000 Darfuri men, women, and children, and displaced more than three million people. Existing regional tensions stemming from past civil wars were exacerbated in February 2003, when the Sudanese government responded to a rebellion in the Darfur region, carried out by rebel forces predominantly consisting of ethnic minority groups like the Zaghawa, Masalit, and Fur. Under the command of Sudanese President Omar al-Bashir, the military forces responded by engaging in a campaign to systematically destroy villages inhabited mostly by those minority groups. The scorched earth campaign was characterized by the intentional burning of homes, villages, and crops, and the systematic destruction of food stores. They targeted civilian populations with aerial bombs, mass killings, widespread rape including public gang rapes, and the intentional impediment of humanitarian aid.

In 2010, the Sudanese government and Darfuri rebels signed a ceasefire agreement followed by long-term peace talks. Steps were taken by the Sudanese government to provide Darfur with increased regional autonomy. Since 2011, however, there has been no additional progress. The ongoing conflict in Darfur has led the International Criminal Court (ICC) to indict several individuals for crimes against humanity, rape, forced transfer, and torture, including in particular al-Bashir for the crime of genocide.

## IX. YAZIDI GENOCIDE (ONGOING)

On August 3 2014, Daesh fighters from bases in Syria and Iraq swept across the Sinjar region in northern Iraq. The region is home to the majority of the world’s Yazidis, a distinct and historically persecuted religious community whose beliefs and practice span thousands of years, and whose adherents Daesh publicly reviles as infidels. Within hours, Yazidis who had been unable to escape to the nearby Kurdish city of Duhok found themselves encircled by armed, black-clad Daesh fighters.

Those who fled early enough to reach the upper plateau of Mount Sinjar found themselves besieged. Daesh trapped tens of thousands of Yazidi men, women, and children in temperatures rising above 50 degrees Celsius and prevented them from accessing to water, food, or medical care. Hundreds of Yazidis—including infants and young children—died on Mount Sinjar before being rescued by Syrian Kurdish forces, operating under the shield of Iraqi and US airstrikes.

On lower ground, Daesh fighters captured thousands of Yazidis in their villages or on the roads as they fled. On capture, Daesh fighters swiftly ordered the separation of males and females, with the exception of boys who had not reached puberty, who were allowed to remain with their mothers. The majority of men and older

boys were executed shortly after captured. Over 40 mass graves have so far been uncovered. Women and girls were taken to holding sites, where they were registered and categorized by age, marital status and physical appearance before being sold to Daesh fighters to be held in sexual slavery. While held by Daesh, Yazidi women and girls over the age of nine have been subjected to brutal sexual violence. They are also beaten and made to labor in the fighters' homes. They are kept locked inside with inadequate food, water, heat, or medical care. Several have committed suicide while in captivity. Younger Yazidi boys, aged seven and above, were forced into Daesh training camps, where they were indoctrinated, beaten and made to learn how to fight. Some later died in suicide missions. It is estimated that several thousand Yazidi women and children remain held by Daesh.

## X. ROHINGYA GENOCIDE (ONGOING)

The Rohingya are an ethnic minority primarily located in the Rakhine State of Burma and who have long been the target of systemic discrimination and persecution by the Burmese government. Though the majority of Rohingya in the Rakhine State were born in Burma, the government has repeatedly refused to acknowledge their citizenship, instead labeling them illegal migrants. As a result of the 1982 Citizenship Law, which links citizenship with "national races," the Rohingya have been deprived access to education, employment, unrestricted movement, adequate healthcare services, and the right to having a nationality.

The history of discrimination and prosecution perpetrated against the Rohingya by the Burmese government has run parallel with multiple violent expulsions under the guise of immigration policy. The violence increased following violent clashes in October 2016 between police forces and Rohingya insurgents. Since August 2017, 700,000 civilians, over 80 percent of the Rohingya population in Rakhine State, have been forced to flee to Bangladesh. Rohingya villages have been destroyed and farmlands razed in a methodical attempt to push the Rohingya into starvation. Throughout the systematic campaign to eliminate the Rohingya from Burma, the military has enacted brutal "clearance operations" targeting the Rohingya with mass killings, rape and sexual violence, torture, arbitrary detentions, and forced disappearances. This genocide is ongoing.

## ANNEX B: THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, 1948.

The Contracting Parties,

*Having considered* the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world.

*Recognizing* that at all periods of history genocide has inflicted great losses on humanity, and

*Being convinced* that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

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.

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

#### Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

#### Article VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

#### Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

#### Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

#### Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

#### Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any nonmember State to which an invitation to sign has been addressed by the General Assembly. The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations. After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

#### Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a proces-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI. The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession. Any ratification or accession effected, subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

#### Article XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force. It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period. Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

#### Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

#### Article XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General. The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

#### Article XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

- (a) Signatures, ratifications and accessions received in accordance with article XI;
- (b) Notifications received in accordance with article XII;
- (c) The date upon which the present Convention comes into force in accordance with article XIII;
- (d) Denunciations received in accordance with article XIV;
- (e) The abrogation of the Convention in accordance with article XV;
- (f) Notifications received in accordance with article XVI.

#### Article XVIII

The original of the present Convention shall be deposited in the archives of the United Nations. A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

#### Article XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.



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