

THE JUSTICE CASCADE FOR WARTIME SEXUAL VIOLENCE

A JOURNEY TO RECOGNITION AND PROSECUTION THROUGH RWANDA, BOSNIA AND MYANMAR

By

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Dedication

To my *nonno*, who taught me that hard work and determination can achieve everything and that dreams can come true when one puts in the work. He has also been my biggest supporter from day one and I will be forever grateful.

To my *mammetta* and daddy, who stuck with me through everything and always supported me, no matter what. I would not be who I am today if it weren't for your love and sacrifices.

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Abstract

Constructivist scholar Kathryn Sikkink coined the term “justice cascade” to refer to a new trend in international relations and international law leading to the prosecution of leaders for gross human rights violations. According to Sikkink’s theory, such prosecutions led to the opening of other similar cases and had the potential to act as a deterrent for future situations. While Sikkink’s study focuses mostly on Latin America, the term justice cascade can be used to explain the process leading to the recognition of rape and sexual violence as forms of genocide and crimes against humanity through the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). In fact, in the 1990s, the judgements of these two *ad hoc* international courts in cases such as *Akayesu*, *Kunarac* and *Furundžija* built a definition of rape and sexual violence in international law as forms of genocide and crimes against humanity. This identification has led to more prosecution efforts not only in Bosnia and Rwanda, but also in more recent cases, such as the current genocide against the Rohingya in Myanmar, which continues to go unpunished, reinforcing the suspicion that the norm of Responsibility to Protect (R2P) is a hollowed one. Sexual violence is in the foreground in cases brought to the International Court of Justice (ICJ) by the Gambia (*The Gambia v. Myanmar*), and at the International Criminal Court (ICC) by Bangladesh, which represent the only concrete attempts to date to hold the perpetrators of the Rohingya genocide accountable.

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Introduction

This thesis is concerned with the stark dichotomy in the actions of states and international courts when they are dealing with genocidal and ethnic cleansing campaigns. After the Holocaust, back when the word “genocide” had barely been coined¹ and the pictures of the survivors of the Nazi concentration camps started surfacing, bringing some of the horrors of the Holocaust with them, vows of “never again” began echoing all over the West. It seemed unfathomable that something so unjustifiably terrible could have happened in the very heart of Europe, and Western leaders were determined to make sure that it would not happen again. In the 1990s, when two instances of internal ethnic tensions burst into genocidal campaigns in the former Yugoslavia, and more specifically in Bosnia,² and in Rwanda,³ these vows were put to the test.

Despite the existence of international norms, such as Responsibility to Protect (R2P),⁴ which allow states to circumvent sovereignty concerns⁵ to save victims of genocide and crimes against humanity, states are often reluctant to act to do so, and their record is largely inconsistent. Sometimes, there are too many humanitarian emergencies happening at the same time;⁶ sometimes, taking part in the fight against such gross crimes is judged as not in a country’s best

¹ The term “genocide” was coined by Polish lawyer and jurist Raphael Lemkin in his book *Axis Rule in Occupied Europe* (Washington, D.C.: Carnegie Endowment for International Peace, 1944). It was then inscribed into international law with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

² As a consequence of the Bosnian War, some 100,000 people died and another 2.2 million were displaced, making it the worst humanitarian catastrophe in Europe since World War II.

³ The death toll of the genocide in Rwanda is estimated to be between 800,000 and 1 million.

⁴ At the moment, the most relevant of these norms is Responsibility to Protect (R2P), which is an evolution of humanitarian intervention and has somewhat incorporated its predecessor. R2P was formalized in the early 21st century as a result of the high-level UN World Summit of 2005.

⁵ Reus-Smit, Christian, *International Law in The Globalization of World Politics: An Introduction to International Relations*, Oxford: Oxford University Press, 2016.

⁶ In the 1990s, for instance, the Yugoslav Wars were in full swing; at the same time, a genocide happened in Rwanda; a civil war began ripping through Somalia; a military coup destabilized Haiti; Iraq invaded Kuwait.

national interest;⁷ sometimes, the ghost of a failed past intervention makes it impossible to try to intervene again;⁸ sometimes, there is just too much resistance, either at the national or at the international level. As Adam Hehir puts it, military intervention can be easily regulated by those it seeks to punish and confront as opposed to an independent body. This means that the very governments behind such crimes can often have a voice in the decision-making process, allowing them to stop military interventions that would prevent them from carrying out genocidal campaigns. For all these reasons, there has been a relative lack of timely and adequate response to prevent or stop genocidal and ethnic cleansing campaigns.⁹ This, in turn, has given way to a generally pessimistic verdict about the international community's willingness to make the vows of "never again" a reality and, despite a growing global acceptance of R2P, to the judgement of this norm as one that is "hollow."¹⁰

While such skepticism about the willingness of the international community to prevent genocidal campaigns, and thus about the acceptance of R2P, is certainly warranted, this thesis argues that it misses certain fundamental developments in international law that provide accountability for human rights violations over sovereignty concerns. Kathryn Sikkink and others refer to this development as "justice cascade," a term which "refers to a new global trend of holding political leaders criminally accountable for past human rights violations through domestic and international prosecutions. In just three decades, state leaders have gone from being immune to accountability for their human rights violations to becoming the subjects of highly publicized trials

⁷ US Secretary of State James Baker was quoted saying "We do not have a dog in this fight" when referring to Yugoslavia. Michael Dobbs, "Bosnia Crystalizes U.S. Post-Cold War Role", *The Washington Post*, December 3, 1995.

⁸ In 1994, when the genocide in Rwanda happened, U.S. President Clinton was very cautious in pledging an intervention because of the fiasco in Somalia months before. The two situations were seen as too geographically close to justify a possible repetition of what had happened in Mogadishu. This phenomenon is known as "Mogadishu effect."

⁹ Hehir, Aidan, *Hollow Norms and the Responsibility to Protect*, London: Palgrave Macmillan, 2019.

¹⁰ *Ibid.*

in many countries of the world,” which “often result in convictions, including of some high-level state officials.”¹¹

This study contributes to the growing “justice cascade” literature with a detailed analysis of several genocidal campaigns and the subsequent response to them by the international community, and especially by international criminal tribunals. It maintains that, in a very important sense, a “justice cascade” has emerged in response to the obstacles noted by Hehir, to allow states to circumvent them. This response may be understood as a shift towards the *individual criminal responsibility* model, which seeks to prosecute the individual state officials for their crimes, rather than their state as a whole.

Military intervention on the part of the international community has been so difficult and so inconsistent that the United Nations Security Council has sought other means of intervention. In the 1990s, facing the genocides in Bosnia and Rwanda, the UN established two *ad hoc* international criminal tribunals which did not stop the genocides, but opened the path to institutional alternatives for the punishment of crimes against humanity and genocide: the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹² and the International Criminal Tribunal for Rwanda (ICTR).¹³ These courts have become pivotal milestones in international law, in particular for inscribing sexual violence among the existing categories of crimes against humanity and genocide. They were also necessary steps in the process of

¹¹ Kathryn Sikkink and Hun Joon Kim, “The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations,” 9 *Annual Review of Law and Social Science*, 2013.

¹² S/RES/827(1993).

¹³ S/RES/955(1994).

establishing a permanent international criminal tribunal, the International Criminal Court (ICC), which was founded in 2002 and now has 123 member states.

As the criminalization of wartime sexual violence has become part of the prohibition of genocide and ethnic cleansing, sexual violence has not only become a more visible issue; it has also had an impact on the prosecution of state leaders for genocide and crimes against humanity. Building on cases such as *Akayesu*,¹⁴ at the ICTR, as well as *Tadić*,¹⁵ *Furundžija*,¹⁶ and *Kunarac*,¹⁷ at the ICTY, this thesis will show how the investigation and prosecution of sexual violence in genocide could leverage an intervention in humanitarian crises where intervention seemed impractical or impossible. This is the case of Myanmar, where lack of military intervention by the UN, or by individual states, to stop the genocide against the Rohingya has been filled by the filing of a case, *The Gambia v. Myanmar*,¹⁸ at the International Court of Justice (ICJ), and the referral of the Rohingya crisis to the ICC, which has prompted an investigation into war crimes and crimes against humanity.¹⁹ In both cases, sexual violence is a crucial issue to make the case for genocide.

At this moment in time, the International Criminal Court seems to be taking on a much more prominent role, with the referral of the Rohingya case but also, for instance, with the

¹⁴ Judgement of the International Criminal Tribunal for Rwanda of September 2, 1998, ICTR-96-4-T, *The Prosecutor v. Jean-Paul Akayesu*.

¹⁵ Judgement of the International Criminal Tribunal for the Former Yugoslavia of May 7, 1997, IT-94-1-T, *The Prosecutor v. Duško Tadić*.

¹⁶ Judgement of the International Criminal Tribunal for the Former Yugoslavia of December 10, 1998, IT-95-17/1-T, *The Prosecutor v. Anto Furundžija*.

¹⁷ Judgement of the International Criminal Tribunal for the Former Yugoslavia - Appeals Chamber of June 12, 2002, IT-96-23 & IT-96-23/1-A, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*.

¹⁸ Order of the International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, No. 178, January 23, 2020.

¹⁹ International Criminal Court, Pre-Trial Chamber III, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, No. ICC-01/19, November 14, 2019.

agreement to begin the trial against former Sudanese president Omar al-Bashir for crimes he allegedly committed in Darfur in the early 2000, including sexual violence. Bashir has been at large for a decade, before the current government of Sudan agreed to hand him over to the Court.

Important steps have also been taken, very recently, by US President Biden, to officially recognize the Armenian genocide of 1915. It is a symbolic but nonetheless very important change in policy, and one that signals that the new American administration might be ready to take other similar steps and stances regarding other current instances of genocidal campaigns, setting aside the usual fear of responsibility and retribution.

International Relations, International Law and the Justice Cascade

Realist theorists of international relations argue that the only actors that really matter in international politics are sovereign states that act in their national interests. They assume that states constantly struggle to maximize their power in an international system whose most important features are constant security competition²⁰ and anarchy.²¹ As a consequence, realist scholars “cast doubt on the significance of international law”²² in shaping the behavior of states. Their view partly overlaps with legal positivism, according to which international law’s imperative nature is inconsistent with the sovereignty of states in an anarchic international system.²³ Otherwise put, states tend to observe international laws and institutions only when doing so accommodates their interests and power calculations. For instance, according to John Mearsheimer, institutions, including international laws,²⁴ “are based on the self-interested calculations of great powers, and they have no independent effect on state behavior.”²⁵

On the other hand, Robert Keohane, a liberal institutionalist, argues that the anarchic nature of the international system as depicted by Mearsheimer belies the need for institutions and laws:

²⁰ In the words of Hans Morgenthau, one of the most prominent realist scholars of the twentieth century, states are “continuously preparing for, actively involved in, or recovering from organized violence in the form of war” (Morgenthau, Hans, *Politics Among Nations: The Struggle for Power and Peace*, New York: Alfred A. Knopf, 1948).

²¹ Reus-Smit, Christian, *International Law in The Globalization of World Politics: An Introduction to International Relations*, Oxford: Oxford University Press, 2016.

Anarchy is recognized as the main feature of the international system by John Mearsheimer in *The Tragedy of Great Power Politics* (New York: W.W. Norton & Co., 2001).

²² Armstrong, David, *International Law and International Relations*, Cambridge: Cambridge University Press, 2012.

²³ Reus-Smit, Christian, *International Law in The Globalization of World Politics: An Introduction to International Relations*, Oxford: Oxford University Press, 2016.

²⁴ In the existing literature, institutions are typically defined as a collection of rules, practices and norms that “prescribe behavioral roles, constrain activity, and shape expectations.” (Robert O. Keohane, “International Institutions: Two Approaches,” *International Studies Quarterly* 32, n. 4, 1988, pp. 379-396, 383).

²⁵ Mearsheimer, John J., “False Promise of International Institutions”, *International Security*, Vol. 19, No. 3, Winter 1994-1995, pp. 5-49.

Far from demonstrating the irrelevance of international institutions, Mearsheimer's characterization of conflict in world politics makes institutions appear essential if states are to have any hope of sustained cooperation, and of reaping its benefits. This necessity for institutions does not mean that they are always valuable, much less that they operate without respect to power and interests, constitute a panacea for violent conflict, or always reduce the likelihood of war.²⁶

Constructivism's criticism of realism, on the other hand, focuses on the lack of attention to the complex character of national interests, claiming that identity is fundamental for the formulation of such interests.²⁷ Constructivists "focus [their] attention upon the role that culture, ideas, institutions, discourse, and social norms play in shaping identity and influencing behavior."²⁸ In the words of Adam Hehir, "the constructivist understanding of international relations, at its most basic, challenged the dominant pre-existing understanding of state behavior by focusing on the role of, and influence exerted by, norms."²⁹ It is precisely because of this focus on norms that constructivism better accounts for the importance of international law in the process leading to the formation of the identity and behavior of states in the international system. The belief in the relevance of norms in shaping interests and behavior is something constructivist scholars and international lawyers generally have in common. This view helps us avoid the faulty assumption that the nature and interests of states are fixed and only focused on maximizing power.

According to constructivist scholars Martha Finnemore and Kathryn Sikkink, norms have a life cycle in international politics: they emerge from the efforts of a plurality of actors, both state and non-state, and try to reach as broad an audience as possible; then, norms cascade and are

²⁶ Robert O. Keohane and Lisa L. Martin, "The Promise of Institutional Theory", *International Security*, Vol. 20, No. 1, Summer 1995, pp. 39-51.

²⁷ Dunoff, Jeffrey L., Pollack, Mark A., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge: Cambridge University Press, 2012.

²⁸ *Ibid*, p. 121.

²⁹ Hehir, Aidan, *Hollow Norms and the Responsibility to Protect*, London: Palgrave Macmillan, 2019.

adopted by states because of international pressure exerted by international and transnational actors, including NGOs and civil society organizations; finally, norms are internalized and codified internationally.³⁰

Consistently with this notion of norms cascade, Sikkink then coined the term “justice cascade”³¹ to explain a theory according to which there is a new global trend of holding political leaders accountable for gross human rights violations, whether present or past, through either domestic or international prosecution mechanisms. In fact, since Nuremberg, the number of state leaders and other individuals holding high positions of power who have had to face trials, and sometimes even convictions, has increased considerably: this is a significant change from when they were virtually immune from any kind of accountability. It also reflects a shift away from the norms that sought to hold states, rather than individuals, accountable, circumventing the norms and laws that emphasize the primacy of the sovereignty of states, as well as the state interests highlighted by realist scholars.

Sikkink provides a systematic research which analyzes national prosecutions in Latin America and the subsequent amendments to national amnesty laws, but also the judicial efforts initiated by the transitional governments in Portugal, Greece and Spain. She then analyzes the impact of the *ad hoc* international criminal tribunals of the 1990s, the ICTY and the ICTR, and of the ICC since its inception. Her research suggests that the scope and number of these trials keeps expanding and is leading to convictions with increasing frequency. This trend has been shown to have a decisive effect on the behavior of political leaders worldwide, who fear very lengthy, very

³⁰ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52, Fall 1998, pp. 887-917.

³¹ Sikkink, Kathryn, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, New York: W.W. Norton, 2011.

public trials and the potential of being sentenced to long periods in jail. Sikkink's research also shows the general improvement of human rights practices following the aforementioned prosecution efforts.

In this thesis, I borrow from liberal institutionalist scholars an approach that recognizes the relevance of international institutions to the international order. States have created relatively effective formal and informal international institutions to shape each other's behavior and to create an international order, and the international *ad hoc* courts for Yugoslavia and Rwanda, as well as the ICC, are significant examples of such institutions. I also use the constructivist school's approach to the formation and cascade of norms and justice, which has helped make international courts increasingly effective in punishing those who commit gross human rights violations. In particular, I also focus on the role that the ICJ and the ICC might have in the ongoing Rohingya crisis in Myanmar in the absence of any other intervention.

I will begin by discussing instances in which international courts have inscribed norms into their statutes and proceedings, focusing on the norm against sexual violence in war. Contrary to the realist assumption that non-state actors are not as relevant as states in the international system, I will illustrate how civil society groups help establish international norms and how, together with institutions, they make the justice cascade possible. The prosecution of rape and sexual violence as forms of genocide and crimes against humanity in international courts constitutes one of the most relevant examples of this point.

The Crime of Genocide, Lack of Intervention and International Courts

The term genocide has been, since it was coined by Polish jurist Raphael Lemkin in 1944, loaded with significance, especially because of its association with the Holocaust. It has also been right at the intersection of international relations and international law. The term itself is a combination of the Greek word γένος (*genos*, i.e., race, people) and the Latin verb *caedere* (i.e., to kill).³² Formally, in international law and international relations alike, the term gained recognition in December 1946, when the UN General Assembly passed Resolution 96(I) on the crime of genocide. It reads:

Genocide is the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.³³

The Convention for the Prevention and Punishment of the Crime of Genocide was approved by the UN General Assembly in December 1948, and it represented an expansion of the 1946 Resolution. It is relevant to note that it opens by making genocide a crime under international law, both in time of war and peace.³⁴ Furthermore, it provides a much more detailed – although still quite broad – definition of genocide:

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;

³² Lemkin, Raphael, *Axis Rule in Occupied Europe*, Washington, D.C.: Carnegie Endowment for International Peace, 1944.

³³ A/RES/96(I).

³⁴ Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948.

- 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.³⁵

The same definition of genocide was adopted in the 1990s for the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY)³⁶ and of the International Criminal Tribunal for Rwanda (ICTR),³⁷ as well as later in the Rome Statute of the International Criminal Court (ICC).³⁸

Many instances of such components of the crime of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern,³⁹ and, in Article I of the Genocide Convention, the 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.”⁴⁰ This can be taken to constitute a pledge, on the part of the Parties to the Convention as actors within the international community, as well as of the international community as a whole, to protect all peoples of the world from genocide. The Convention also explicitly states, in Article VIII, that the Parties “may call upon 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,”⁴¹ which constitutes an even more explicit obligation for states to intervene to prevent and stop these genocidal campaigns. On the basis of these provisions, the international community has developed

³⁵ *Ibid.*

³⁶ S/25704(1993), article 4.

³⁷ S/RES/955(1994), article 2.

³⁸ Rome Statute of the International Criminal Court, article 6.

³⁹ A/RES/96(I).

⁴⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Article I.

⁴¹ *Ibid.*, Article VIII.

certain norms, such as humanitarian intervention and, more recently, Responsibility to Protect (R2P), which will be explained in more detail later, to allow states to intervene and be in compliance with the international treaties such as the Genocide Convention and the UN Charter.

Despite these provisions and norms, however, there have been, even in recent years, several instances of genocidal campaigns, which have often been met with little, if any, military – or otherwise – intervention to stop them. In *A Problem from Hell*, Samantha Power presents a number of case studies of these genocides, mostly from the 1990s and early 2000s (e.g., Bosnia and Rwanda), and analyzes the response of the international community with a specific focus on the role of the United States.⁴² She underlines a number of failures in the handling of these situations and calls for a different approach in future instances. By using the term “bystander,” she refers to the international community as a whole, and to the United States in particular, as somewhat passive spectators to the tragedies she describes. Power further points at the lack of political will and of clear strategic and national interests to characterize this position and urges the same actors to become “upstanders” in the future.⁴³ This view is shared and also expressed by Richard Goldstone, who criticizes the conduct in response to the genocide in Rwanda and to the events unfolding in the former Yugoslavia of a number of actors in the international scenario while he was a prosecutor.⁴⁴

The issue of sovereignty, one of the cornerstones of international relations and international law, has often served as the justification for choices to avoid military interventions to prevent

⁴² Power, Samantha, *A Problem from Hell. America and the Age of Genocide*, New York: Harper Perennial, 2002.

⁴³ *Ibid.*

⁴⁴ Goldstone, Richard J., *For Humanity: Reflections of a War Crimes Investigator*, New Haven: Yale University Press, 2000.

genocidal campaigns, contributing to the notion that the international system is still essentially based on the so-called “Westphalian system.” The next section examines this important issue.

The Issue of Sovereignty

In the realm of international relations, political interests are a very powerful force when it comes to choosing whether to intervene against a state that is committing atrocities against its own citizens or not. However, sovereignty is also one of the most relevant concepts in both international relations and international law,⁴⁵ and the source of great dilemmas when it comes to interventions, and especially to military interventions. The principle of sovereignty is enshrined in the UN Charter. According to its Article 2(4), “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state [...]”⁴⁶ Article 2(7) of the Charter further mandates that no state, nor the UN itself “shall [...] intervene in matters which are essentially within the domestic jurisdiction of any state.”⁴⁷ This particular provision of Article 2(7) has been used as a justification for failures to intervene or for choosing to block resolutions authorizing interventions in the Security Council against states committing genocide or crimes against humanity.⁴⁸

There are, and there have been for some time now, certain international norms with near-universal recognition, born specifically out of the necessity to circumvent the sacred principle of

⁴⁵ Reus-Smit, Christian, *International Law in The Globalization of World Politics: An Introduction to International Relations*, Oxford: Oxford University Press, 2016.

⁴⁶ Charter of the United Nations, Article 2(4).

⁴⁷ Charter of the United Nations, Article 2(7).

⁴⁸ This use of sovereignty as a justification for non-intervention has been criticized by prominent diplomat Kofi Annan, during his time as UN Secretary-General: “Is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked? If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond [...] to gross and systematic violations of human rights that offend every precept of our common humanity?” (Kofi Annan, “Two Concepts of Sovereignty,” *The Economist*, September 18, 1999, 49.

sovereignty in situations such as genocide and crimes against humanity. After the end of the Cold War, a debate on humanitarian intervention took place within the international community, especially after NATO forces intervened in Kosovo against Serbia in 1999. There has since been a significant lack in consensus on a definition of humanitarian intervention. D.J.B. Trim and Brandan Simms give a rather comprehensive one which includes its three components:

A humanitarian intervention is: 1. Carried out in, or intended to affect events within, a foreign state or states [...]; 2. Aimed at the government of the target state(s), or imposed on and only accepted reluctantly by it/them [...]; 3. Intended, at least nominally (and at least to some extent actually), to avert, halt, and/or prevent recurrence of large-scale mortality, mass atrocities, egregious human rights abuses or other widespread suffering caused by the action or deliberate inaction of the de facto authorities in the target state(s).⁴⁹

The legality of humanitarian intervention has long been debated in international law and within the UN.⁵⁰ It was never accepted, and such an intervention is widely understood as illegal, although legitimate.⁵¹ As a consequence, it never emerged as an internationally recognized norm. A further elaboration of the idea of intervention has led instead to the emergence of the norm known as Responsibility to Protect (R2P) in 2001,⁵² which was accepted and included in the Outcome Document of the 2005 high-level UN World Summit.⁵³ R2P was developed and

⁴⁹ Simms, Brendan, Trim, D.J.B., *Humanitarian Intervention: A History*, Cambridge: Cambridge University Press, 2012.

⁵⁰ In the UN Charter, the use of force is forbidden for all member states in the conduct of international relations: Article 2(4) states that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state [...]”. The only exception envisioned in the Charter to this provision is the right to “individual or collective self-defense,” contained in Article 51.

⁵¹ “Wars begun in the pursuit of humanitarian rescue are now seen as different from wars fought for other purposes. They are now legally, politically, and conceptually separate from wars of conquest and wars of national security [...]” – Ian Hurd, “Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World,” *Ethics & International Affairs*, 25, no. 3, 2001, pp. 293-313.

⁵² International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001.

⁵³ A/RES/60/1, paragraphs 138-140, p. 30.

implemented as a norm around three separate but interconnected pillars after a 2001 Report by the International Commission on Intervention and State Sovereignty: prevention, intervention and reconstruction. R2P is still considered an emerging and evolving norm, embedded in UN documents and resolution, although, as Adam Hehir notes, “human rights violations and mass atrocity crimes have increased as R2P has become more embedded in international politics.”⁵⁴

According to Hehir, there is a very profound difference between Responsibility to Protect as a theoretical norm and its application in practical, real life situations that would require practical solutions.⁵⁵ From its inception, R2P was largely ignored and circumscribed, which is why it holds so little actual relevance – in part because of the long-standing dilemma of sovereignty, in part because of the lack of political will and, perhaps more importantly, the lack of strategic interests that still play such a pivotal role in any choice about intervention. The international community itself has contributed to water down the main pillar of R2P, intervention.

UN Secretary-General Ban Ki-moon interpreted the three pillars of R2P as: “the protection responsibilities of the State,”⁵⁶ “international assistance and capacity-building,”⁵⁷ and “timely and decisive response.”⁵⁸ More specifically, Ban Ki-moon describes pillar one as “the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement,”⁵⁹ pillar two as “the commitment of the international community to assist States in meeting those obligations. It seeks to draw on the cooperation of Member States, regional and subregional arrangements, civil

⁵⁴ Hehir, Aidan, *Hollow Norms and the Responsibility to Protect*, London: Palgrave Macmillan, 2019.

⁵⁵ *Ibid.*

⁵⁶ General Assembly, *Implementing Responsibility to Protect. Report of the Secretary-General*, A/63/677, January 12, 2009.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

society and the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system;”⁶⁰ and pillar three as “the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection.”⁶¹

Hehir concludes that R2P has, as a norm, been hollowed because “while [it] might very well meet the general criteria for recognition as a norm, it constitutes a particular type of norm which compromises its efficacy and positive impact.”⁶² Thus, while there is little doubt that R2P is indeed a norm, this only suffices to say that such a formulation “commands a degree of consensus that is widely used.”⁶³ Hehir’s definition of R2P as a “hollow norm” means that it “is inherently malleable, can be affirmed without cost, and regulated by those it seeks to contain rather than either an impartial body or those it seeks to protect.”⁶⁴

A possible substitute of R2P is the use of international courts, either those established by the UN or, in the case of the ICC, permanent ones. There is a deep link between law and politics, as Gary Bass shows through a number of case studies including Nuremberg and the Hague.⁶⁵ This link leads to the use of international courts as forms of intervention in instances of genocide when there is a lack of political will to proceed with a military intervention. In order to circumvent the issue of sovereignty, these courts rely on the principle of individual criminal responsibility, a rather new concept in international law which was introduced at Nuremberg; in fact, before that,

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Hehir, Aidan, *Hollow Norms and the Responsibility to Protect*, London: Palgrave Macmillan, 2019.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Bass, Gary Johnathan, *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals*, Princeton: Princeton University Press, 2002.

international law had only dealt with inter-state disputes – or issues where a state was responsible for a wrongful act against an individual.

Clear examples of international courts being used as substitutes of R2P are the *ad hoc* International Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). In his memoir as Chief Prosecutor of the ICTY,⁶⁶ Richard Goldstone recounts the significance of the court for its legacy and the precedents it helped established. When, after the Srebrenica massacre, the ICTY indicted Mladić⁶⁷ and Karadžić,⁶⁸ it was the first truly high-profile case for the tribunal, as well as a strong and comprehensive overview of the crimes committed during the war and of the breadth of the tribunal's jurisdiction. In Goldstone's words, it was "a kind of accounting for much of the Serb war in Bosnia. The charges were a grotesque litany of the cruelty Karadžić and Mladić presided over."⁶⁹ The aforementioned charges were of genocide and crimes against humanity and, more specifically, they included shelling of and sniping at civilians, running concentration and rape camps, murder, kidnapping, torture and rape. In particular, indictment and prosecution of individuals for rape as a form of genocide and as a crime against humanity was made possible in this case because of the previous jurisprudence of the ICTY and of that of the ICTR.

⁶⁶ Goldstone, Richard J., *For Humanity: Reflections of a War Crimes Investigator*, New Haven: Yale University Press, 2000.

⁶⁷ Ratko Mladić was a colonel-general of the Bosnian Serb army in the 1990s. He was one of the orchestrators of the occupation of the UN-declared "safe areas" of Žepa and Srebrenica, where he ordered the massacre of some 8,300 Muslims. This got him the nickname "butcher of Bosnia."

⁶⁸ Radovan Karadžić was the president of the Republika Srpska, the Bosnian Serb administration in Bosnia. In this capacity, he was the commander of the Bosnian Serb army, which made him responsible for many of the crimes committed in Bosnia.

⁶⁹ Goldstone, Richard J., *For Humanity: Reflections of a War Crimes Investigator*, New Haven: Yale University Press, 2000.

Rape as a Form of Genocide

In 1998, the use of sexual violence in war formally became a war crime (Article 8(2)(b)(xxii)), a crime against humanity (Article 7(1)(g)) and a form of genocide (Article 6(d)) in the Rome Statute of the International Criminal Court (ICC). This pivotal step forth has been possible because of the prosecution efforts of the ICTY and ICTR, on the one hand, and because of civil society organizations, on the other. In fact, while the jurisprudence of the *ad hoc* tribunals and the pattern of prosecution they established have built new international law norms, the overall context in which these courts operated made the time right for such a move. Civil society organizations were, in fact, raising awareness on women's rights in the 1990s, when the prosecution efforts in the former Yugoslavia and in Rwanda began.

A decade later, in 2008, the United Nations Security Council passed a resolution condemning the use of sexual violence as a weapon of war – a very widespread phenomenon in situations of genocide and ethnic cleansing. According to Kerry Crawford, despite this fundamental recognition, which is an important step forward and partly built on the experiences of the 1990s in Bosnia and Rwanda, sexual violence is still used frequently as a weapon of war (e.g., in Myanmar).⁷⁰

Di Lellio and Kraja analyze the use of sexual violence as a weapon of war in Kosovo at the hands of Milošević's regime and its consequences on the population, and especially on women,⁷¹ mapping how women and their bodies became battlefields on which the ethnic cleansing campaign was carried out. While this mapping efforts do not hold predictive power, they shows patterns of

⁷⁰ Crawford, Kerry F., *A Security concern: Sexual Violence and the UN Security Council Resolution 1820*, Washington, D.C.: Georgetown University Press, 2017.

⁷¹ Anna Di Lellio and Garentina Kraja, "Sexual Violence in the Kosovo Conflict: a lesson for Myanmar and other ethnic cleansing campaigns," *International Politics*, 2020.

policy and violence observable in other similar cases, such as the more recent crisis involving the Rohingya in Myanmar. This knowledge can be used to stop the same from happening in Myanmar any further, as well as to provide policy tools to prevent future campaigns from reaching the same level of widespread atrocities.

When rape, and sexual violence more broadly, are used as weapons of war, they often become integral part of genocide and ethnic cleansing campaigns. Being a weapon of war, and thus a war crime, does not, however, automatically make rape and sexual violence a form of genocide and/or of crimes against humanity. In fact, the burden of proof⁷² and the standard of proof⁷³ are both quite higher for crimes against humanity and genocide than they are for war crimes. The process which led to the inclusion of sexual violence in the components of crimes against humanity and genocide is remarkable in and of itself.

Prosecution of the Crime of Rape as a Form of Intervention in Genocide Cases

In selecting and analyzing relevant cases of sexual violence as a crime against humanity, I built on existing research developed by the scholars presented here. Marc Ellis provides a rather comprehensive explanation of the process which ultimately led, in the 1990s, to the inclusion of rape and sexual violence among the recognized forms of genocide and crimes against humanity.⁷⁴ Ellis begins his analysis with the Tokyo Trials, which took place in the aftermath of World War II, of which rape was an important but understudied component, and then forms a path through

⁷² The legal term “burden of proof” stands to signify the obligation, on the part of the prosecution, to prove that the accused is indeed guilty of the crimes he allegedly committed.

⁷³ The “standard of proof” is the level of certainty, and the degree of evidence, which are necessary to establish proof in a legal proceeding, whether it is a civil or a criminal one.

⁷⁴ Mark Ellis, “Breaking the Silence: Rape as an International Crime,” 38 *Case Western Reserve Journal of International Law*, 2007.

some of the relevant cases from the ICTY and the ICTR, including the *Akayesu*, *Furundžija*, and *Kunarac* cases which will be analyzed in later sections. A similar analysis is presented by David Cohen who, however, provides a more in-depth discussion of the understated role played by the prosecution of crimes of sexual violence at the International Military Tribunal for the Far East (IMTFE).⁷⁵ In fact, Cohen writes, “while crimes of sexual violence were not treated to any significant degree [...] at Nuremberg, rape, enforced prostitution, and sexual slavery were all the subject of serious investigation and prosecution at the International Military Tribunal for the Far East.”⁷⁶ However, the investigation and prosecution efforts were not part of what was considered the priority, meaning the crimes against peace case; as a consequence, the vast majority of the evidence was not included in the judgement and, thus, is only available through the archived transcripts. Nevertheless, the Japanese generals on trial were convicted for the crime of rape.

Beth Van Schaack’s analysis of the *Akayesu* case and its significance in international law as establishing a number of “firsts” focuses on the establishment of genocidal rape as a crime in international law.⁷⁷ It was because of this particular case that a number of other individuals could later be prosecuted for genocidal rape: the *Akayesu* case was the starting point for the entire jurisprudence on the subject, including the relevant Article in the 1998 Rome Statute mentioned in the previous section.

Philip Weiner’s work in the *Boston College Law Review* strengthens Van Schaack’s analysis of the significance of the *Akayesu* case, especially because of its contribution to the

⁷⁵ Cohen, David, *Prosecuting Sexual Violence From Tokyo to the ICC in Understanding and Proving International Sex Crimes*, Beijing: Torkel Opsahl Academic EPublisher, 2012.

⁷⁶ *Ibid.*

⁷⁷ Beth Van Schaack, “Engendering Genocide: the Akayesu Case Before the International Criminal Tribunal for Rwanda,” Santa Clara University School of Law, 2008.

definition of rape as an international crime.⁷⁸ Weiner also analyzes a number of other cases, some of which will also be analyzed in the coming sections, to display how the ICTY and the ICTR also identified the components of rape as an international crime and, more specifically, as a form of genocide and as a crime against humanity.

Paul Kirby agrees with Van Schaack's assessment that the recognition of rape as a weapon of war (and as a form of genocide and crime against humanity) is a pivotal milestone. However, he approaches the topic in a critical manner, and says that such a milestone should not be considered a point of arrival.⁷⁹ Instead, Paul Kirby argues that the international community should further analyze and distinguish different instances, components and practices connected to rape and sexual violence in the aforementioned contexts (Rwanda and Bosnia). Doing so would provide much the same judicial and policy tools mentioned by Di Lellio and Kraja both to prosecute current perpetrators and to prevent similar instances from happening in the future.

In addition to these prescriptive implications, the literature analyzed in this section further validates the growing importance of the justice cascade by illustrating the criminalization of sexual violence in international law and practice. As noted previously, this phenomenon will be further discussed in the coming sections. In the next section, I briefly outline the research design used in the construction of the cases that comprise the rest of the research.

⁷⁸ Phillip Weiner, "The Evolving Jurisprudence of the Crime of Rape in International Law," 54 *Boston College Law Review*, 2013.

⁷⁹ Paul Kirby, "How is Rape a Weapon of War?: Feminist international relations, modes of critical explanation and the study of wartime sexual violence," *European Journal of International Relations*, 2013.

Methodology

The data and information used for this thesis has been obtained from relevant literature and official documents, such as the ones released by the United Nations and the relevant international tribunals. Various seminal documentaries on the genocide in Rwanda, as well as on the Bosnian War, have also been consulted. In the main, this study utilizes a qualitative method to illustrate its thesis regarding the role of international courts in establishing new norms. The research also relies on interpretive analysis, aiming to explain the complex situations which led to the aforementioned court cases and the subsequent prosecution efforts in their socio-historic context. Accordingly, it is based on three chronologically ordered cases: Rwanda, Bosnia and Myanmar. Despite their differences, these three cases exemplify how international courts built, through their jurisprudence, a set of new norms, such as the criminalization of sexual violence, to be inscribed in existing international law frameworks and provide tools for intervention in humanitarian crises such as genocides and crimes against humanity.

The three cases will be presented and analyzed separately, because each one of them has its own features which cannot be generalized. The use and analysis of international treaties, resolutions, and norms will increase the depth of the understanding of the theoretical framework, both for international relations and for international law. It will show the process, followed by the tribunals, to find suitable definitions for crimes no tribunal had prosecuted before, as well as the development of new norms through the jurisprudence of the very same courts.

The order in which the three cases will be presented follows the chronology of the relevant court cases instead of that of the atrocities which were committed. This is because the ICTY and the ICTR operated at the same time and their judgements are deeply intertwined.

Chapter 1 – Rwanda: 1994

Introduction

Rwanda is a small, landlocked country located in central-eastern Africa. After being a German colony for a short period of time in the early twentieth century, it became, after World War I, part of the Belgian colonial empire. While under Belgian rule, the population of Rwanda underwent a process of racial division: in fact, the Tutsi, one of Rwanda's ethnic minorities, were favored over the Hutu, the ethnic majority, because they were thought to have come from elsewhere to settle in Rwanda. This belief stemmed from their apparently more organized social structure. According to Mahmood Mamdani,

The idea that the Tutsi were superior because they came from elsewhere, and that the difference between them and the local population was a *racial* difference, was an idea of colonial origin. It was an idea shared by rival colonists [...] that wherever in Africa there was evidence of organized state life, there the ruling groups must have come from elsewhere.⁸⁰

On the basis of these misguided conceptions, the Belgians made race policy a top priority and, within a decade, were able to enact a number of comprehensive reforms to make sure that all key institutions and institutional positions would be ruled and occupied by the Tutsi. The Tutsi were also granted historical rights over pieces of land, which in turn favored them over the Hutu. Perhaps even more significantly, “the reform was capped with a census that classified the entire population as Tutsi, Hutu, or Twa, and issued each person with a card proclaiming his or her official identity.”⁸¹

⁸⁰ Mamdani, Mahmood, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, Princeton: Princeton University Press, 2020.

⁸¹ *Ibid.*

This process of racialization and its institutionalization of race made the relationship between the different ethnic groups difficult at best, and it planted the seeds for the hatred and resentment that eventually culminated in the 1994 genocide.

The Arusha Accords and UNAMIR

In October 1990, the militants of the Rwandan Patriotic Front (RPF), a group of Tutsi fighters who had fled to Uganda to escape marginalization and repression, invaded northern Rwanda from Uganda and clashed with the Rwandan Army. This was the beginning of a bloody civil war which lasted almost two years until July 1992, when negotiations began for the Arusha Accords.⁸² In March 1993, a ceasefire was instituted between the Rwandan government and the leaders of the RPF.

Months of negotiations followed, during which Rwandan president Juvénal Habyarimana worked on the consolidation of Hutu power in the country to develop a common front against the RPF. During the same period, several extremist tendencies emerged within the Hutu. Nevertheless, the Arusha Accords were signed in August 1993 and allowed the return of Tutsi refugees, who had been expelled, to Rwanda as well as establishing a new, power-sharing government. The enforcement of the Arusha Accords was to be supervised by a UN peacekeeping mission, the United Nations Assistance Mission for Rwanda (UNAMIR), established by the UN Security Council in October 1993 with Resolution 827.⁸³ Roughly at the same time, Hutu extremists who opposed the Arusha Accords began training and arming the *interahamwe*, their own extremist

⁸² Power, Samantha, *A Problem from Hell. America and the Age of Genocide*, New York: Harper Perennial, 2002.

⁸³ S/RES/827(1993).

army, to exterminate the Tutsi minority. They began receiving guns, grenades and, most of all, machetes by planeloads. Death-lists were being prepared meticulously with the names, addresses and license plates of the intended Tutsi victims.

In January 1994, Gen. Romeo Dallaire, the commander of UNAMIR, received information from an anonymous Hutu informant who told him about the extremists' intentions and described how they were training and arming the *interahamwe*.⁸⁴ The informant, Jean-Pierre, claimed to be a high-level official in the Rwandan government and disclosed some very detailed pieces of information to convince Dallaire of his sincerity.⁸⁵ Dallaire immediately reported back to New York asking for permission to raid Hutu compounds to search for arms and evidence, but was forbidden to do so. Instead, he was told to notify Rwandan president Habyarimana and the Western ambassadors in Kigali of the new intelligence he collected. When he tried to obtain reinforcements and/or an extension of his mandate, he was told that he would not get any support for those requests, especially not from the United States. He was also told not to fire nor to respond to fire. In March 1994, several political assassinations began.

The Genocide

On the night of April 6, 1994, president Habyarimana's falcon jet was shot down near Kigali airport;⁸⁶ this was very likely a false flag operation orchestrated by the Hutu extremists in order to have something concrete to accuse the Tutsi of. The president died, and the Hutu extremists did indeed accuse the Tutsi and the RPF of having killed their leader. The authorities

⁸⁴ Power Samantha, *A Problem from Hell. America and the Age of Genocide*, New York: Harper Perennial, 2002.

⁸⁵ Jean-Pierre informed Dallaire about the registrations of Tutsis which had been happening and he revealed his suspicion that the purpose of such registrations was to exterminate them. He also revealed the extremists' plan to kill the Belgian peacekeepers, so as to cause Belgium to withdraw from the country.

⁸⁶ The jet was carrying Rwandan president Habyarimana and Burundian president Cyprien Ntaryamira.

immediately instituted a curfew and Hutu militants, together with government soldiers, erected roadblocks around and inside the city of Kigali. The extremists took control of the army under the command of Colonel Théoneste Bagosora and then proceeded to seize control of the capital. The Tutsi were not the only targets, moderate Hutus and supporters of the Arusha Accords were also in grave danger. This was the beginning of “the fastest, most efficient killing spree of the twentieth century.”⁸⁷

On April 8, Gen. Dallaire sent a cable to the UN headquarters in New York describing what was happening and defining it as mostly political killing, but nevertheless recognizing that ethnicity was one of the main dimensions motivating it. He noted that it was a “very well-planned, organized, deliberate and conducted campaign of terror.”⁸⁸ The following day, Dallaire’s executive assistant, Major Brent Beardsley, received a radio call from a Polish church on the other side of Kigali asking them to “Come get us, they are massacring people here.”⁸⁹

There was no intention to intervene nor to expand the mandate of UNAMIR. The only intervention, “Operation Turquoise,” was deployed by France on April 9, three days and already thousands of deaths into the slaughter. Around 1,000 paratroopers from France, Belgium and Italy arrived at the airport in Kigali with the specific mandate of bringing their fellow countrymen back home safe. They arrived with several Western journalists who followed them to the places where their compatriots were hiding. On their way to pick up their fellow countrymen, they encountered many groups of Tutsi who had chosen to hide with Europeans in the hope that they would be safe.

⁸⁷ Samantha Power, “Bystanders to Genocide. Why the United States Let the Rwandan Tragedy Happen,” *The Atlantic Monthly*, September 2001, p. 84.

⁸⁸ Power, Samantha, *A Problem from Hell. America and the Age of Genocide*, New York: Harper Perennial, 2002.

⁸⁹ *Ibid.*

The paratroopers left with the European citizens and left the Tutsi behind, effectively giving the *interahamwe* the go ahead to slaughter them.

In the words of Michael Barnett,

[...] the United States and others in the Security Council insisted that by the Council's own criteria the UN had no business being in Rwanda. Rwanda was surely a humanitarian nightmare but it was not a genuine threat to international peace and security.⁹⁰

According to Barnett, one of the main factors influencing the choice of the international community not to intervene was the unwillingness of the member states of the UN to do so and to contribute troops and resources to the contingent.⁹¹ Such doubts were greatly influenced and inflated by what had happened in Somalia during the Fall of 1993 in the context of the US-led intervention known as "Operation Restore Hope." In October 1993, while conducting a raid of Mogadishu against Somali warlord Mohamed Farah Aideed, two US Black Hawk helicopters were shot down and 18 American special forces soldiers were killed and subsequently dragged around Mogadishu with cameras filming. The images were broadcast all over the world, and all over the West. This greatly discouraged the US and all other Western governments when they were called to consider another intervention in Africa after such a short amount of time.

Another relevant factor was the hesitancy of the UN Secretariat, whose officers and officials knew of the scarce preparation of the UNAMIR contingent and did not wish to put their

⁹⁰ Barnett, Michael, *Eyewitness to a Genocide. The United Nations and Rwanda*, Ithaca: Cornell University Press, 2002.

⁹¹ *Ibid.*

soldiers at greater risk. The complicated bureaucratic process of the UN and its chain of command also played a key role in slowing down the decision-making process.

Recognition of the slaughter, which caused an estimated 1 million victims and, according to the United Nations, as many as 250,000 women to be raped⁹² in a little over three months, as genocide came hard and late.⁹³ The use of the term genocide, in fact, was understood as implying a responsibility of the other countries to intervene, through the UN, to put an end to the killings.⁹⁴ For instance, US Secretary of State Warren Christopher circulated, in May, an internal cable authorizing US diplomats to acknowledge that “acts of genocide” had been committed in Rwanda, instead of saying that a genocide was happening.⁹⁵ The reason behind such a distinction, which is only formal and not really substantial, is that, by refusing to define the situation as a full-blown genocide, no international legal obligation would be triggered, thus allowing the US to remain out of Rwanda. According to Barnett, the international community was very cautious when talking about Rwanda, and usually referred to it as a civil war with its roots in ethnic hatred rather than what it was, a genocidal campaign.⁹⁶

After the genocide had effectively ended, US President Bill Clinton traveled to Rwanda and expressed his regret for the lack of timely action on the part of his country and of the international community as a whole. UN officials also admitted, after the end of the atrocities, that they did not consider the situation as they should have done. Iqbal Riza, the Assistant Secretary-

⁹² Outreach Programme on the Rwanda Genocide at the United Nations, *Sexual Violence: a Tool of War*, March 2014.

⁹³ Power, Samantha, *A Problem from Hell. America and the Age of Genocide*, New York: Harper Perennial, 2002.

⁹⁴ Article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) states: “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 [...]”.

⁹⁵ Power, Samantha, *A Problem from Hell. America and the Age of Genocide*, New York: Harper Perennial, 2002.

⁹⁶ Barnett, Michael, *Eyewitness to a Genocide. The United Nations and Rwanda*, Ithaca: Cornell University Press, 2002.

General in the Department of Peacekeeping Operations, famously said “Mistakes were made”⁹⁷ in late May 1994. UN resolutions kept referring to the slaughter happening in Rwanda as merely “crimes punishable under international law.”⁹⁸

In November 1995, the UN Security Council instituted the International Criminal Tribunal for Rwanda (ICTR), which was tasked with the prosecution of genocide and crimes against humanity in the context of the Rwandan genocide.⁹⁹

The ICTR represents a very important milestone in international law because it was the very first court to indict, prosecute and convict someone for genocide, and thus the first court to apply the 1948 Genocide Convention and its definition of genocide. As a consequence, its jurisprudence created some important precedents in international law. For instance, the ICTR indicted and convicted Jean Kambanda, the Prime Minister of Rwanda during the genocide, who pleaded guilty and was sentenced to life in prison.¹⁰⁰ This showed that nobody could be immune from prosecution if they had been involved in planning and carrying out the atrocities.¹⁰¹

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ S/RES/955(1994).

¹⁰⁰ Judgement and Sentence of the International Criminal Tribunal for Rwanda of September 4, 1998, ICTR-97-23-S, *The Prosecutor v Jean Kambanda*.

¹⁰¹ According to Article 6(2) of the Statute of the ICTR, “the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

Sexual Violence at the ICTR

Throughout the three-months long genocidal campaign, rape and sexual violence, mostly against Tutsi women, were regular occurrences in Rwanda. According to a 1996 report by Human Rights Watch,

Rwandan women were subject to sexual violence on a massive scale, perpetrated by [...] the *Interahamwe*, by other civilians, and by soldiers of the Rwandan Armed Forces [...]. Administrative, military and political leaders at the national and local levels, as well as heads of militia, directed or encouraged both the killings and sexual violence to further their political goal: the destruction of the Tutsi as a group. [...]. Although the exact number of women raped will never be known, testimonies from survivors confirm that rape was extremely widespread and that thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery [...] or sexually mutilated. These crimes were frequently part of a pattern in which Tutsi women were raped after they had witnessed the torture and killings of their relatives and the destruction and looting of their homes. According to witnesses, many women were killed immediately after being raped. Other women managed to survive, only to be told that they were being allowed to live so that they would "die of sadness."¹⁰²

Those crimes were among the main components of the trials and convictions of the ICTR, which recorded a number of firsts. In fact, the ICTR convicted, for instance, the first woman for incitement to genocidal rape, Pauline Nyiramasuhuko.¹⁰³

Most importantly, it delivered the first conviction for rape as genocide in the landmark 1998 *Akayesu* case. The ICTR has thus contributed to the recognition of rape and sexual violence as crimes under international law and as components of genocide and ethnic cleansing. This

¹⁰² Human Rights Watch, *Shattered Lives. Sexual Violence during the Rwandan Genocide and its Aftermath*, September 1996.

¹⁰³ Judgement of the International Criminal Tribunal for Rwanda of June 24, 2011, ICTR-98-42-T, *The Prosecutor v. Pauline Nyiramasuhuko et al.*

passage is particularly significant because, before the 1990s, rape and sexual violence were considered under international law only as war crimes.

ICTR-96-4-T: *The Prosecutor v. Jean-Paul Akayesu*

Jean-Paul Akayesu was *bourgmestre* (mayor) of Taba commune (Prefecture of Gitarama) at the time of the genocide in 1994.¹⁰⁴ The indictment against him, first submitted on February 13, 1996 and later amended on June 17, 1997,¹⁰⁵ included counts of genocide, crimes against humanity, incitement to commit genocide and violations of Article 3 Common to the Geneva Conventions. The Court charged him for individual criminal responsibility according to article 6(1)¹⁰⁶ and 6(3)¹⁰⁷ of the ICTR Statute. Akayesu pleaded not guilty to all the counts against him.

The *Akayesu* trial is particularly significant because it is the first time in which rape is defined in international law and in which it is established that rape can constitute genocide. This is because, at the International Tribunal for the Far East, sexual violence crimes played such an understated role, and the ICTR was the first to actively and properly deal with this issue. As stated in the *Akayesu* judgement, rape can become a form of genocide in the framework of Article 2(d)

¹⁰⁴ Rwanda was divided into eleven prefectures, under the control of a prefect. Each prefecture was further divided into communes, under the authority of a *bourgmestre*. At the communal level, the *bourgmestre* was the most important authority and was appointed directly by the President of the Republic (following a recommendation of the Minister of the Interior). The *bourgmestre* enjoyed a *de facto* authority much greater than the one he had *de jure*.

¹⁰⁵ Judgement of the International Criminal Tribunal for Rwanda of September 2, 1998, ICTR-96-4-T, *The Prosecutor v. Jean-Paul Akayesu*.

¹⁰⁶ “1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 [genocide, crimes against humanity or violations of Article 3 common to the Geneva Conventions and of Additional Protocol 2] of the present Statute, shall be individually responsible for the crime.” – S/RES/955(1994).

¹⁰⁷ “3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” – S/RES/955(1994).

of the Genocide Convention, according to which “[genocide means] imposing measures intended to prevent births within the group.”¹⁰⁸ In the words of the ICTR Chamber,

[...] the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, 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.¹⁰⁹

This passage is very important first and foremost because it laid the ground for future prosecutions beyond Rwanda and the ICTR, such as *Furundžija* and *Kunarac* in the ICTY, as well as establishing the potential for prosecution of perpetrators of sexual violence in the context of other ethnic cleansing campaigns, such as that against the Rohingyas in Myanmar. It is also particularly relevant because it set the stage for the elaboration of a definition of rape in international law. In fact, the definition of the crime of rape drawn from domestic jurisdictions was the only one available at the time, but, focused as it was on sexual penetration and demonstrable lack of consent, it was too restrictive to accommodate all the actions described by the witnesses.¹¹⁰ According to the Chamber, “rape is a form of aggression [and] the central elements of the crime

¹⁰⁸ Convention for the Prevention and Punishment of the Crime of Genocide, 1948, Article 2(d).

¹⁰⁹ Judgement of the International Criminal Tribunal for Rwanda of September 2, 1998, ICTR-96-4-T, *The Prosecutor v Jean-Paul Akayesu*.

¹¹⁰ All the witnesses who testified during the entire trial were kept anonymous for security concerns and are identified with letters of the alphabet in the transcripts. However, it is important to note that they were all cross-examined by the prosecution and the defense in order to ensure maximum transparency and accuracy.

of rape cannot be captured in a mechanical description of objects and body parts,”¹¹¹ but it must include other forms of degradation, humiliation and torture. The issue of consent was also revised to relieve victims from the burden of proof, in the realization that consent can never exist in the context of a conflict, which is always coercive in nature. Thus, in order for rape to be understood in the framework of a genocidal campaign,

The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under *circumstances which are coercive* [emphasis added by the author]. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:

- a. As part of a widespread or systematic attack;
- b. On a civilian population;
- c. On certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious.¹¹²

During the trial, many women were called to testify to the sexual violence they endured during the genocide in Akayesu’s presence. It was established that, while seeking refuge at the bureau communal, “female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises.”¹¹³ Section 12B of the indictment established Akayesu’s role in the systematic sexual violence campaigns that took place at the bureau communal:

Jean Paul AKAYESU knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. **Jean Paul AKAYESU** facilitated the commission of the sexual violence, beatings and

¹¹¹ Judgement of the International Criminal Tribunal for Rwanda of September 2, 1998, ICTR-96-4-T, *The Prosecutor v Jean-Paul Akayesu*.

¹¹² *Ibid.*

¹¹³ *Ibid.*

murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, **Jean Paul AKAYESU** encouraged these activities.¹¹⁴

The testimonies of the numerous witnesses, which corroborated the evidence about Akayesu's direct involvement in the systematic sexual violence campaign, led the Chamber to find "beyond reasonable doubt that the Accused had reason to know and in fact knew that sexual violence was taking place."¹¹⁵ On September 2, 1998, Akayesu was found guilty of genocide (including rape) and incitement to commit genocide, and of crimes against humanity (including rape, torture, extermination and murder).¹¹⁶ He was sentenced to life in prison, the maximum sentence according to Article 23 of the ICTR Statute.¹¹⁷

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ "1. The penalty imposed by the Trial Chamber shall be limited to imprisonment." – S/RES/955(1994).

Chapter 2 – Bosnia: 1992-1995

Introduction

The Bosnian War was one of the conflicts that enveloped the Balkans and, more specifically, the former Yugoslavia for a decade during the 1990s. It was perhaps the most brutal, and the one that caused the most damage and had the longest lasting consequences. More precisely, the conflicts involved several ethnic cleansing campaigns, mostly against Bosnian Muslims (Bosniaks), as well as some instances of full-blown genocide (e.g., in Srebrenica in July 1995).

The Socialist Federal Republic of Yugoslavia, better known simply as Yugoslavia, was formed in 1946, after Josip Broz Tito and his communist partisans helped free the country from Nazi rule. The Federation included six republics: Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, Serbia (with the autonomous provinces of Kosovo and Vojvodina) and Macedonia.¹¹⁸ Until Tito's death, the federation managed to balance socialist centralization and the significant autonomy awarded to the republics. This was made possible by the careful use and equilibrium of state repression and decentralization policies. After, Joseph Stalin, expelled Tito from the Cominform, the Communist international alliance, Tito began to develop a more independent form of socialism, often referred to as national communism. After the leader's death in 1980, strong centrifugal tendencies emerged which began to challenge the supra-national character of the federation and, in 1990, Yugoslavia broke into five independent countries along the former republics' borders, with Serbia and Montenegro constituting the Federal Republic of Yugoslavia.

¹¹⁸ Silber, Laura, Little, Allan, *Yugoslavia: Death of a Nation*, New York: Penguin Books, 1997.

Without entering into the debate about the causes of the country's collapse,¹¹⁹ I will limit this introduction to the descent of those centrifugal trends into a series of conflicts. The first, between Yugoslavia and Slovenia (1991), lasted only two weeks and ended with a diplomatic negotiation process. Soon after, the tension which had been mounting in Croatia for months exploded in the Croatian War of Independence, a bloody conflict with Serbia (1992-1995) over the control of land inhabited by a sizable Serbian minority. As mentioned above, the most violent of the Yugoslav Wars exploded in 1992 in Bosnia between Bosnian Serbs, backed by the Federal Republic of Yugoslavia (FRY), at that point composed only by Serbia and Montenegro, and Bosniaks. It caused more than 100,000 victims. The last of these wars happened in the Serbian province of Kosovo, between 1998 and 1999, and ended with a NATO-led humanitarian intervention against Serbia.

The Bosnian War, Ethnic Cleansing and Genocide

In Bosnia and Herzegovina, the Bosniaks wanted to preserve the territorial integrity of the new republic, which declared its independence with a referendum in 1992, while the Bosnian Serbs and the Bosnian Croats favored partitioning it along ethnic lines. As soon as Bosnia's independence was recognized by the United States and the European Community, the Bosnian Serb forces, supported by the FRY, surrounded and bombed Sarajevo, Bosnia's capital.¹²⁰ Soon after, they started attacking primarily areas with a large Bosniak population and Serbian minorities, forcing Bosniaks to leave the region through a violent campaign of ethnic cleansing. Within six

¹¹⁹ For a survey of possible causes, see Jasna Dragović Soso, "Why Did Yugoslavia Disintegrate? An Overview of Contending Explanations," in Leonard J. Cohen and Jasna Dragović Soso (editors), *State Collapse in South Eastern Europe: New Perspectives on Yugoslavia's Disintegration*, West Lafayette: Purdue University Press, 2008, 1-39.

¹²⁰ Power, Samantha, *A Problem from Hell. America and the Age of Genocide*, New York: Harper Perennial, 2002.

weeks, Bosnian Serb forces under the command of General Ratko Mladić controlled roughly two thirds of the territory of Bosnia and Herzegovina.

In the north of the country, Serb forces established *de facto* concentration camps for the Muslim and Croat populations: the most infamous were Omarska, which was also the biggest one, and Trnopolje. According to Samantha Power, “the camps in Bosnia were not extermination camps, though killing was a favorite tool of many of the commanders in charge. Nor could they really be called death camps, though some 10,000 prisoners died in them. [...] Although injury and humiliation were inevitable, death was only possible.”¹²¹ There were rape camps for women, and concentration camps for men, where rape and other forms of sexual violence were also very common practices.

In this context, the United States did not, under President G.H.W. Bush, take any significant step to address the situation in the Balkans. In Power’s words, “the Bush administration took a number of [tame] steps aimed at signaling its displeasure.”¹²² Public opinion in the US was much more in favor of an intervention in Bosnia than the administration: the situation in Eastern Europe was getting incessant coverage in the media, including by prominent outlets such as CNN, and the fact that the events were unfolding in Europe significantly shook the Western public. Bill Clinton, the Democratic opponent of President Bush in the 1992 US presidential elections, picked up on this sentiment and began campaigning on the promise of intervening, even militarily if necessary, to close the camps and end the atrocities in Bosnia. He was quoted saying that the US “should be prepared to lend appropriate support, including military” to achieve this goal.¹²³

¹²¹ Power, Samantha, *A Problem from Hell. America and the Age of Genocide*, New York: Harper Perennial, 2002.

¹²² *Ibid.*

¹²³ *Ibid.*

The United Nations chose to deploy the UN Protection Force (UNPROFOR),¹²⁴ a peacekeeping force, to Bosnia and Croatia in 1992.¹²⁵ In Bosnia, its first task was to deliver humanitarian aid to Sarajevo by creating and monitoring a security corridor between the airport and the city.¹²⁶ Almost a year after its first deployment and a few expansions of its tasks, UNPROFOR's mandate was expanded once more to include the protection of certain towns and villages called "Safe Areas" by the United Nations which were supposed to be "free from any armed attack or any other hostile attack."¹²⁷ Initially, that denomination was given only to Srebrenica, and Bihać, Sarajevo, Goražde, Žepa and Tuzla were added less than a month later.¹²⁸ All those towns were primarily inhabited by Bosniaks and stood out in Bosnian-Serb territory.

UNPROFOR's mandate did not initially include the permission to use force, which was added to the mandate later,¹²⁹ and Bosnian Serb forces kept attacking the safe areas without finding any resistance.

Srebrenica, which was guarded by a small Dutch contingent (Dutchbat) that was part of UNPROFOR, fell to General Mladić's forces in July 1995, and became the stage of the single largest instance of genocide in European history since the Holocaust.¹³⁰ More than 8,500 Bosniak men and boys were slaughtered, while women and girls were forcibly displaced to Tuzla, where

¹²⁴ S/RES/743(1992).

¹²⁵ UNPROFOR's mandate in Croatia was to find grounds for a ceasefire and a subsequent peace agreement.

¹²⁶ S/RES/758(1992).

¹²⁷ The idea of creating safe enclaves for Bosnian Muslims in their areas of residence was first presented by the ICRC in a position paper on October 30, 1992: "Today there are at least 100,000 Muslims living in the north of Bosnia-Herzegovina, who are terrorized and whose only wish is to be transferred to a safe haven. If the international community wants to assist and protect these people, the "safe haven" concept must be transformed into reality." (International Committee of the Red Cross, *Establishment of Protected Zones for Endangered Civilians in Bosnia and Herzegovina*, October 30, 1992).

¹²⁸ S/RES/819(1993).

¹²⁹ S/RES/836(1993).

¹³⁰ Judgement of the International Criminal Tribunal for the Former Yugoslavia of November 22, 2017, IT-09-92-T, *The Prosecutor v. Ratko Mladić*.

they had to endure mass rape and other kinds of violence.¹³¹ Only after the fall of Srebrenica did NATO conduct isolated airstrikes against Bosnian Serb targets. Roughly a month after the massacre in Srebrenica, the governments of Bosnia, Serbia and Croatia began a peace negotiation process in Dayton, Ohio, in the United States. They eventually signed the Dayton Agreement in November 1995, which split Bosnia in two parts: the Republika Srpska, predominantly Serbian, and the Bosnian Federation, predominantly Bosniak with a Croatian minority.

In 1992, with Resolution 780, the Security Council “request[ed] the Secretary-General to establish an impartial Commission of Experts [...] with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.”¹³² In a 1994 report to the Security Council, the UN Commission of Experts focused in particular on the relationship between “ethnic cleansing” and rape and other forms of sexual violence:

the practice of so-called ‘ethnic cleansing’ and **rape and sexual assault** [emphasis added by the author], in particular, have been carried out by some of the parties so systematically that they strongly appear to be the product of policy, which may also be inferred from the consistent failure to prevent the commission of such crimes [...].¹³³

Between the Fall of 1991 and the end of 1993, the Commission reported that some 2,500 individuals had been victims of rape and/or sexual violence, as well as some 500 instances of rape

¹³¹ Power, Samantha, *A Problem from Hell. America and the Age of Genocide*, New York: Harper Perennial, 2002.

¹³² S/RES/780(1992).

¹³³ S/1994/674.

and/or sexual violence with an unknown number of victims had occurred. About eighty percent of the reported cases happened when the victims were held in custody, and the perpetrators “included military personnel, special forces, local police and civilians.”¹³⁴ The Commission noted, first and foremost, that the number of reported rapes was too low to be representative of the actual widespread occurrence of the crimes, as women, and sometimes even men, belonging to all ethnic groups were reluctant to speak out. Credible estimates put the toll at thousands of victims.¹³⁵

Sexual Violence at the ICTY

In May 1993, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY), which was tasked with the prosecution of grave breaches of the Geneva Conventions, war crimes, crimes against humanity and genocide happening in the context of the Balkan Wars.¹³⁶ The Tribunal had jurisdiction over individuals of all nationalities involved in the conflict. The ICTY was the first tribunal of its kind. It was instituted with a Chapter VII resolution,¹³⁷ making it legally binding on all member states of the UN, including Yugoslavia.¹³⁸

The ICTY played a pivotal and historic role in the prosecution of wartime sexual violence not only for Bosnia, and Yugoslavia as a whole, where an estimated 50,000 people have been victims of some form of sexual violence during the 1990s wars. Together with the ICTR, the ICTY

¹³⁴ *Ibid.*

¹³⁵ Outreach Programme on the Rwanda Genocide at the United Nations, *Sexual Violence: a Tool of War*, March 2014.

¹³⁶ S/RES/827(1993).

¹³⁷ The powers of the UN Security Council are outlined in Chapters V, VI and VII of the UN Charter. While Chapter V deals with the structure, membership and procedural rules of the Council, Chapters VI and VII define its prerogative to settle disputes: the former deals with “Pacific Settlement of Disputes,” while the latter with “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.”

¹³⁸ Action taken by the UN Security Council under Chapter VII has legally binding value on all UN Member States, this means that they are obligated to comply.

was the first international criminal tribunal to bring explicit charges for wartime sexual violence, both against men and women and for crimes committed against both men and women.

IT-94-1-T: *The Prosecutor v. Duško Tadić*

The 1997 *Tadić* case is a landmark case in international law, first and foremost because it was the first international war crimes trial since Nuremberg and Tokyo. The accused was a Serbian member of the paramilitary groups who targeted Bosniaks for persecution. He was the first individual to be charged for rape and sexual violence against men as war crimes and crimes against humanity. Because of the lack of sufficient evidence, he was not convicted for directly perpetrating rape or sexual violence. He was, however, convicted for aiding and abetting perpetrators of those crimes.¹³⁹ The conviction was confirmed on appeal, two years later, when he was also sentenced for inhumane treatment and willfully causing great suffering (grave breaches of the 1949 Geneva Conventions). According to the Appeals Chamber of the ICTY, “Through his presence, Duško Tadić aided and encouraged the group of men actively taking part in the assault.”¹⁴⁰

The significance of this case lies in the fact that it showed that the tools given to the prosecutors by existing international laws and conventions could be enough for them to end the impunity surrounding sexual violence crimes in wartime, and that punishment for the perpetrators was indeed a concrete possibility. It also significantly paved the way for future cases in which these crimes were identified as forms of genocide and crimes against humanity.

¹³⁹ Judgement of the International Criminal Tribunal for the Former Yugoslavia of May 7, 1997, IT-94-1-T, *The Prosecutor v. Duško Tadić*.

¹⁴⁰ Judgement of the International Criminal Tribunal for the Former Yugoslavia of July 15, 1999, Appeals Chamber, IT-94-1-A, *The Prosecutor v. Duško Tadić*.

IT-96-21-T: *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*

The four people on trial in this 1998 case were members of the Bosnian Serb army. Three of them, Mucić, Delić and Landžo, were charged with sexual violence against Bosniaks in the Čelebići prison camp, in central Bosnia.

Landžo, a camp guard, was directly responsible for acts of sexual violence on a number of male prisoners, for which he was found guilty. Significantly, Mucić, who was the camp commander, was also found guilty for Landžo's actions, since he was his superior; the same happened for a number of his other subordinates. This helped set an important precedent for war crimes prosecutions: superiors are responsible for the actions of their subordinates, even if they tacitly give their consent or if they look away while they happen.

Delić was the deputy camp commander and was found guilty of raping two women during interrogation. According to the Trial Chamber, he raped them to obtain information and to punish them for not being able to provide any form of information; the Judges also found that his actions were discriminatory: he had raped them because they were women. This particular instance constituted an important steppingstone in international law: rape was qualified as a form of torture for the first time by an international criminal tribunal. The Judges also held that rape can constitute torture under customary international law. According to the Trial Chamber, "the rape of any person [is] a despicable act which strikes at the very core of human dignity and physical integrity."¹⁴¹

¹⁴¹ Judgement of the International Criminal Tribunal for the Former Yugoslavia of November 16, 1998, IT-96-21-T, *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*.

IT-95-17/1-T: *The Prosecutor v. Anto Furundžija*

Anto Furundžija was the commander of a special Croatian police unit in Bosnia which conducted interrogations by beating, torturing and raping the subjects; he was often present and chose not to put an end to these practices but to encourage the perpetrators instead.

He was charged for rape as a violation of Article Three Common to the Geneva Conventions,¹⁴² a first in international law.¹⁴³ This meant that the wording of Common Article Three had to be interpreted and applied to the circumstances of the case at hand. The Chamber made its decision, in December 1998, taking into account the Judgement rendered by the ICTR in *Akayesu*; however, it also took a step forward. The ICTY Chamber, in fact, went deeper than the ICTR and, by focusing on the *actus reus*¹⁴⁴ of the crime and its features, established a more detailed definition of one of the components of the crime of rape:

[...] the objective elements of rape:

- (i) The sexual penetration, however slight:
 - a. Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - b. Of the mouth of the victim by the penis of the perpetrator;
- (ii) By coercion or force or threat of force against the victim or a third person.¹⁴⁵

¹⁴² Common Article Three deals with “conflicts not of an international character” and is considered a treaty within the treaties because it lays out the obligation, applicable to all parties to a conflict, to treat those who are not actively participating humanely. Common Article Three has a quite low triggering threshold, but its application is rather broad, and it has come to be considered customary international law. It is also widely accepted that a violation of the provisions contained in the Article constitutes a grave breach of the Convention, which amounts to war crimes and is thus prosecutable by the International Criminal Court (ICC).

¹⁴³ Judgement of the International Criminal Tribunal for the Former Yugoslavia of December 10, 1998, IT-95-17/1-T, *The Prosecutor v. Anto Furundžija*.

¹⁴⁴ The *actus reus* is defined as the physical conduct element of a criminal offense; most crimes also have an intent component to them, which is known as *mens rea*.

¹⁴⁵ Judgement of the International Criminal Tribunal for the Former Yugoslavia of December 10, 1998, IT-95-17/1-T, *The Prosecutor v. Anto Furundžija*.

IT-96-23-T & IT-96-23/1-T: *The Prosecutor v. Dragoljub Kunarac, Rodomir Kovac and Zoran Vukovic*

Kunarac, Kovac and Vukovic were members of the Bosnian Serb forces that carried out the attacks on the Bosnian Muslim civilians; furthermore, they played a pivotal role in the conception, maintenance and organization of rape camps in Eastern Bosnia. During the trial, several witnesses testified that they had taken direct part in raping and perpetrating other forms of sexual violence, as well as attesting to their role in the planning and organization of the system of rape camps as a whole. In 2001, they became the first individuals to be convicted of rape as a crime against humanity.

This particular case is also significant because the Chamber further expanded the jurisprudence on rape as a crime in international law, and, building on the *Akayesu* definition, it completed the deeper analysis started in *Furundžija*. In fact, the Chamber added a *mens rea* element to the existing *actus reus* as delineated by the *Furundžija* Court and found that:

the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.¹⁴⁶

This definition of rape, with the explanation of its components, was later endorsed by the Appeals Chamber of the ICTY, thus giving it a further source of legitimacy. It is significant, first

¹⁴⁶ Judgement of the International Criminal Tribunal for the Former Yugoslavia of February 22, 2001, IT-96-23-T & IT-96-23/1-T, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*.

and foremost, because of the delineation of “consent,” which “must be given voluntarily, as a result of the victim’s free will.”¹⁴⁷ During a conflict, when one is being targeted because of their ethnicity and/or religion, the very concept of consent becomes much blurrier, and the perpetrators, who are in a position of power, are free and able to disregard it completely.

¹⁴⁷ *Ibid.*

Chapter 3 – Myanmar: 2016-2017 and 2017-present

Introduction

Myanmar, formerly known as Burma,¹⁴⁸ is a country located in mainland Southeast Asia. It is very ethnically diverse: in fact, according to the 1982 Burmese Citizenship Law, there are 135 recognized ethnic groups in Myanmar. However, the Rohingya, a Muslim group living in the Rakhine State, which borders Bangladesh, are not one of them.¹⁴⁹ According to a report by the Public International Law & Policy Group (PILPG), they are considered “illegal ‘Bengali’ migrants who pose a threat to national security. [As a consequence,] the Rohingya are effectively ineligible for citizenship or associated rights.”¹⁵⁰ The term “Rohingya” itself is also disputed: they are often referred to as “the Muslims of the Rakhine State,” which is much more derogatory and is used to highlight that they do not belong in Myanmar.¹⁵¹ The Rohingya are, in fact, stateless.

In a country which has increasingly defined its identity as Buddhist, the Rohingya have long been the target of military operations, forced displacement campaigns and ethnic cleansing campaigns for decades. At the beginning of the 1990s, they were persecuted by the Burmese military and were victims of forced labor campaigns, rape, confiscation of property and a ban on their religious practices.¹⁵² As a consequence, some 250,000 Rohingyas crossed the border into Bangladesh, where they were welcomed by a military deployment along the border to prevent further crossings and limit their chances to settle within Bangladesh.

¹⁴⁸ Burma is the colonial name given by the country by the British, who ruled it from 1824 until its independence in 1948.

¹⁴⁹ Human Rights Watch, “Rohingya.”

¹⁵⁰ Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State*, 2018.

¹⁵¹ Eleanor Albert and Lindsay Maizland, “The Rohingya Crisis,” *Council on Foreign Relations*, January 23, 2020.

¹⁵² *Ibid.*

The Recent Genocide

In October 2016, three Burmese border posts along the Myanmar-Bangladesh border were attacked by insurgents; several Burmese guards died in the attacks. Soon after, reports began surfacing about human rights violations perpetrated by the Burmese army against the Rohingya. This was the beginning of a brutal crackdown on the Rohingya in the Rakhine State, which resulted in very widespread human rights violations at the hands of security forces. Among these were mass rape, beatings and extrajudicial killings.¹⁵³

After a period of relative calm in 2017, in August of the same year Myanmar security forces began carrying out clearance operations in the North of the Rakhine state, with the ultimate goal of entirely removing the Rohingya from Myanmar.¹⁵⁴ While the military and the government justified the campaigns as retaliation for the rebels' attacks on the security forces, several human rights reports note that the operations were widespread and indiscriminate, and that they were carried out with the ultimate purpose of purging the Rohingya from Myanmar in deliberate ethnic cleansing and/or genocidal campaigns. According to a report by Médecins Sans Frontières (MSF), at least 9,000 Rohingya civilians died within the first month.¹⁵⁵ In the same amount of time, an

¹⁵³ *Ibid.*

¹⁵⁴ Simon-Skjodt Center for the Prevention of Genocide at the United States Holocaust Memorial Museum, "'They tried to kill us all' – Atrocity Crimes against Rohingya Muslims in the Rakhine State, Myanmar," Bearing Witness Report, November 2017.

¹⁵⁵ Médecins Sans Frontières, *MSF surveys estimate that at least 6,700 Rohingya were killed during the attacks in Myanmar*, December 12, 2017.

estimated 400,000 Rohingyas left Myanmar and sought refuge in neighboring countries – mostly in Bangladesh.¹⁵⁶

Despite moments of de-escalation in the crackdown against the Rohingya resulting in periods of relative calm in the refugee crisis and in the forced displacement flows, the situation has largely remained the same since the Fall of 2017. The number of forcibly displaced Rohingyas has now reached 1 million, although estimates are most likely conservative.¹⁵⁷ More than 150,000 remain internally displaced in central Rakhine State. Furthermore, when crossing into Bangladesh to escape prosecution and violence, the Rohingya end up facing a largely similar treatment in their new host country, where they remain stuck in camps with inhumane standards of living and have to endure violence at the hands of the Bangladeshi army. They are also often pressured to go back to Myanmar by the government of Bangladesh and by its army.

According to a report of the UN Human Rights Council, “rape and other forms of sexual violence were perpetrated on a massive scale. [...] Sometimes up to 40 women and girls were raped or gang-raped together. [...] Rapes were often in public spaces and in front of families and the community, maximizing humiliation and trauma.”¹⁵⁸

International Response

While many in the international community, including governments, the UN, NGOs and the media, have criticized the behavior of Myanmar’s security forces and the lack of response on

¹⁵⁶ Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, A/HRC/39/64, September 10-28, 2018.

¹⁵⁷ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), “Rohingya Refugee Crisis.”

¹⁵⁸ *Ibid.*

the part of Aung San Suu Kyi, the *de facto* Burmese head of government¹⁵⁹ at the time and a Nobel Peace Prize laureate, no action followed these condemnations. The very precarious state of the power-sharing agreement between the military and the civilian, democratically elected government were easy justifications for the choice not to take any action, at the international level, to stop the genocide against the Rohingya.

This situation only left international courts as means to hold the perpetrators, including the government of Myanmar, accountable. The fact that women were raped and subjected to other forms of sexual violence during clearance operations, while being searched and robbed of their valuables and being detained in military camps and often gang raped was among the catalysts for some form of intervention and accountability. Girls as young as six years old were gang raped.¹⁶⁰

The Gambia v. Myanmar

In November 2019, The Gambia filed a suit against Myanmar at the International Court of Justice on the grounds of violations of the Genocide Convention¹⁶¹ on the part of Myanmar. The basis for the suit are the atrocities committed by the Burmese army, starting in 2016, against the Rohingya in the Rakhine State. The case was brought by The Gambia based on Article 9 of the Genocide Convention, which allows disputes between state parties related to the “responsibility of a State for genocide” at the International Court of Justice.¹⁶² Even though The Gambia is not

¹⁵⁹ In the power-sharing agreement with the military after the 2015 elections, Aung San Suu Kyi’s party won by a landslide, with a big enough margin for her to become President. However, because her husband and children are foreign citizens, a clause in the Constitution forbade her from assuming the office. Instead, she became State Counsellor, a role similar to that of a Prime Minister or Head of Government.

¹⁶⁰ Razia Sultana, “Rape by Command: Sexual Violence as a Weapon Against the Rohingya,” Chittagong: Kaladan Press Network, 2018.

¹⁶¹ Myanmar ratified the Genocide Convention in 1956, which means that it is legally bound by its provisions.

¹⁶² Convention for the Prevention and Punishment of the Crime of Genocide, Article 9.

directly impacted by the situation of the Rohingya in Myanmar, its suit was deemed legitimate by the Court because “all States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity.”¹⁶³

This is the first, and, so far, the only effort by a state to hold the government of Myanmar accountable for the crimes which are being committed against the Rohingya people in the Rakhine State. It is worth mentioning that the government of Myanmar has been steadily and repeatedly denying any forms of wrongdoing against the Rohingya and has instead insisted that “there is violence on both sides.”¹⁶⁴ In 2019, in her opening statement in front of the ICJ as Foreign Minister of Myanmar, Aung San Suu Kyi reiterated the same point and maintained that the violence was part of “an internal armed conflict [...] between the Arakan Army, an organized Buddhist armed group with more than 5,000 fighters, and the regular Myanmar Defense Services.”¹⁶⁵ Blaming genocidal campaigns on ancient hatred and maintaining that there is right and wrong on both sides are rather popular arguments when condoning such campaigns and refusing to take action against them. The same arguments were used to justify the genocidal campaigns in Bosnia and Rwanda, and also by the international community as a further reason not to intervene.

The Gambia also requested provisional measures to “protect against further, irreparable harm to the rights of the Rohingya group under the Genocide Convention,”¹⁶⁶ *de facto* asking the Court to urge the government of Myanmar to take action to protect its own people. In January

¹⁶³ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order, January 23, 2020.

¹⁶⁴ Aung San Suu Kyi, then leader of the opposition to the military junta in Myanmar, in a bilateral meeting with Samantha Power in October 2012. – Power, Samantha, *The Education of an Idealist*, New York: Dey Street Books, 2019.

¹⁶⁵ Aung San Suu Kyi, Opening Statement in *The Gambia v. Myanmar*, International Court of Justice, December 11, 2019.

¹⁶⁶ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application, November 11, 2019.

2020, the Court, siding with The Gambia, ordered that the government of Myanmar enact protection measures in favor of the Rohingyas to prevent further atrocities. As a consequence, Myanmar is now required to submit periodic reports to the Court detailing the provisions being taken to prevent genocidal acts against the Rohingya. If they fail to comply with the current provisional measures, The Gambia has the option to ask the Court for additional measures. Rape and sexual violence were, and continue to be, among the crimes committed by the Burmese army in the context of the violations of the Genocide Convention.

The government of Myanmar still maintains its position downplaying the extent of the atrocities against the Rohingya. The International Court of Justice can only issue advisory opinions, which are not legally binding and are, thus, difficult to implement. However, the ruling of the ICJ recognizing the campaigns against the Rohingya as genocide is significant for the legitimization of potential future prosecution efforts.

ICC-01/19: Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar

In July 2019, the Office of the Prosecutor of the International Criminal Court filed a request for authorization to investigate the crimes against the Rohingya in Myanmar, which is not a party to the Court.¹⁶⁷ On November 14, 2019, the ICC's Pre-Trial Chamber III has authorized the Court's Prosecutor to open an investigation into the alleged crimes, within the Court's jurisdiction,

¹⁶⁷ Because Myanmar is not a party to the Rome Statute, it does not accept the jurisdiction of the International Criminal Court over its territory or its people. In order for the Court to be able to investigate matters related to the Rohingya situation, the situation needs to be referred to the ICC either by the UN Security Council or by a third party who is impacted by the Rohingya crisis.

committed in the situation in Bangladesh/Myanmar against the Rohingya people. The request presented by Bangladesh has been supported by hundreds of thousands of alleged victims.

This case already represents a steppingstone in international law, first and foremost because of the action taken by Bangladesh to refer a situation to the ICC when the balance of power in the UN Security Council prevented it from doing so itself. It is important to note, however, that precisely because the case has been brought to the Court by a third party, the only actions under investigation are those which directly impact the third party – in this case, Bangladesh. Thus, the ICC has jurisdiction to examine any and all actions of the Burmese army against the Rohingya in the context of their forced deportation to Bangladesh – a crime against humanity – and persecution on grounds of their ethnicity and/or religion. This limits the scope of the potential investigation, but nonetheless represents a very significant development in international law.

The request for the investigation submitted to the International Criminal Court includes a section dedicated to the explanation of the crime against humanity of deportation in the context of the forcible migration of the Rohingya to Bangladesh. Section 87 reads:

By means of a range of coercive acts, members of the *Tatmadaw* and others forcibly displaced at least 700,000 Rohingya from Myanmar, where they were lawfully present, into Bangladesh. The coercive acts included: killings; **rapes and other forms of sexual violence** [emphasis added by the author]; acts of physical and psychological violence intentionally causing great suffering, or serious injury to body or mental or physical health; and the destruction of property including homes, livestock and entire villages.¹⁶⁸

It is clear, then, that rape and sexual violence will be significant components of this investigation, since they have been, and continue to be, significant components of the violence

¹⁶⁸ International Criminal Court, Pre-Trial Chamber III, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19, July 4, 2019.

perpetrated against the Rohingya by the Burmese army in their effort to forcibly deport them to Bangladesh. According to a 2018 report by the UN Human Rights Council,

Rape and sexual violence have been a particularly egregious and recurrent feature of the targeting of the civilian population [in Rakhine State] since 2011. Similar patterns of rape and sexual violence have been reported for at least three decades. Rape, gang rape, sexual slavery, forced nudity, sexual humiliation, mutilation and sexual assault are frequently followed by the killing of victims. The scale, brutality and systematic nature of these violations indicate that rape and sexual violence are part of a strategy to intimidate, terrorize or punish a civilian population, and are used as a tactic of war. This degree of normalization is only possible in a climate of long-standing impunity.¹⁶⁹

The recognition, on the part of the Human Rights Council, of the fact that rape and sexual violence are “part of a strategy to intimidate, terrorize or punish a civilian population”¹⁷⁰ puts what is happening in Myanmar directly in line with the events of Rwanda and Bosnia. It is a further step towards openly defining the campaign against the Rohingya as a genocide. It also, however, puts this situation in the context of Sikkink’s analysis: impunity, and especially “long-standing impunity,”¹⁷¹ only makes it easier for the same actions to be repeated over and over again. The investigation opened by the International Criminal Court has, on the other hand, the potential to begin a cascade of justice and accountability.

¹⁶⁹ Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, A/HRC/39/64, September 10-28, 2018.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

Conclusion and Future Implications

The recent and still open developments concerning the prosecution of individuals responsible for the genocide against the Rohingya in Myanmar constitute a direct continuation of the efforts initiated in the 1990s with the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda. The two current cases at the ICJ and at the ICC are instances of third-party governments being willing to hold another government and its agents accountable for gross human rights violations, as well as attempts to circumvent issues concerning a court's jurisdiction.

The importance of these steps is not fundamental for the Myanmar case alone, but also for all the other instances of gross human rights violations which are happening right now all over the world without eliciting any international intervention to protect the victims, rendering R2P an empty commitment. For instance, a case similar to *The Gambia v. Myanmar* has been initiated at the International Court of Justice by The Netherlands against Syria on the grounds of violations of the 1984 Torture Convention.¹⁷²

International law also makes another tool available for war crimes prosecution: universal jurisdiction. It is a principle which allows any national court to prosecute individuals for the most serious crimes in international law (genocide, crimes against humanity, and war crimes) committed anywhere, because they cause harm to the international community and to the international order in its entirety. As a result, any third-party state can act to protect them. According to Human Rights Watch, “universal jurisdiction is a crucial tool by which victims of grave international crimes can

¹⁷² Dutch Ministry of Foreign Affairs, *The Netherlands Holds Syria Responsible for Gross Human Rights Violations*, September 18, 2020.

obtain redress.”¹⁷³ Universal jurisdiction reduces the chances for perpetrators to travel to third party countries and escape accountability, and it provides an additional tool to circumvent any jurisdictional limitation of international courts such as the International Criminal Court. Universal jurisdiction seems to be a rather promising tool for war crimes and crimes against humanity prosecution in the absence of intervention to prevent or stop gross violations of human rights. A case involving a low-level Syrian Intelligence officer has recently been closed with a sentence to four-and-a-half years in prison by a court in Koblenz, Germany. The defendant, Eyad al-Gharib, was brought to court because of his role in the arrest and transfer of Syrian protesters to an interrogation center known for torture. Therefore, he was convicted for crimes against humanity, more specifically, for “aiding and abetting the torture of detained protesters in Damascus.”¹⁷⁴ The Koblenz case paves the way to concrete possibilities for the prosecution of individuals involved in the genocidal campaign against the Rohingya people in Myanmar, including for genocidal rape.

The jurisprudence on rape and sexual violence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda has played a pivotal role in the open Myanmar cases at the ICJ and especially at the ICC because of the prominence of rape and sexual violence in the genocidal campaigns against the Rohingya. It also has the potential to provide a basis for any potential case brought against Burmese individuals who might be prosecuted through universal jurisdiction in national courts.

The choice, on the part of foreign governments and international courts, to open cases and investigations into the situation of the Rohingya is another piece of evidence to support Kathryn

¹⁷³ Human Rights Watch, “Basic Facts on Universal Jurisdiction.”

¹⁷⁴ Amnesty International, *Germany/Syria: Conviction of Syrian official for crimes against humanity a historic victory for justice*, February 24, 2021.

Sikkink's justice cascade theory. In fact, the prosecution of those responsible for the crimes in Bosnia and Rwanda in the 1990s created the conditions for more and more similar prosecutions to happen, as the case of Myanmar shows. The "dialogue" between cases being opened concerning the situation in Myanmar and in Syria, using the different mechanisms made available in international law, is further unmistakable proof of the same idea. It is likely that, going forward, more and more cases will be opened, thus creating a true cascade of justice and accountability. Prosecution efforts have come to fill the void left by the failure to intervene through Responsibility to Protect because of its current classification as a hollow norm. As a consequence, this cascade of justice and accountability assumes greater importance.

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