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GENOCIDE AND THE RAPE OF ARMENIA

JEREMIAH HARRELSON*

"Why is my lord weeping?" asked Hazael.
"Because I know the harm you will do to the Israelites," [Elisha] answered. "You will set fire to their fortified places, kill their young men with the sword, dash their little children to the ground, and rip open their pregnant women."
—II Kings 8:12 (NIV)

Rape has been variously charged in international criminal law as a crime against humanity, as a war crime, and as genocide. This essay concerns rape as genocide. The first division considers the treatment of rape in international criminal law, particularly as it relates to the crime of genocide. The second examines gender-specific violence in the Armenian Genocide of 1915–1917 through the lens of modern international law with the aim of determining whether the rapes of Armenians might be understood as genocidal rape—rape that, if it occurred today, could be charged as genocide in an international criminal court. The paper concludes by asking what the international community might do if the Armenian Genocide were being repeated today, in 2010.

RAPE IN CONVENTIONAL INTERNATIONAL LAW

Rape is forbidden in international law in a number of *loci*, both in conventional and in customary law. Its prohibition is sometimes implicit, as a violation of "family honour," for example, in the laws governing occupation under Article 46 of the Fourth Hague Convention (1907).[1] The prohibition is slightly stronger, but similarly implicit, in Common Article 3 of the Geneva Conventions (1949), which prohibits "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in

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1. Laws of War: Laws and Customs of War on Land Hague Convention IV art. 46, Oct. 18, 1907, http://avalon.law.yale.edu/20th_century/hague04.asp.

particular humiliating and degrading treatment."[2] Here, rape would fall under Common Article 3(1)(a) or (c). The Fourth Geneva Convention goes further, stating that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[3] Additional Protocol I to the Geneva Conventions (applicable to international conflicts) explicitly protects women against rape, forced prostitution, and indecent assault;[4] and Additional Protocol II (applicable to non-international conflicts) classifies the same offenses as "outrages upon personal dignity."[5]

Prior to the Geneva Conventions, rape was criminalized in occupied Germany under Control Council Law No. 10 (Dec. 20, 1945), which authorized the occupying powers in the post-war period to charge and try individuals for crimes within their respective zones of authority. The Law defines "Crimes against Humanity" as "[a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population."[6]

The cases tried by the International Criminal Tribunal for the former Yugoslavia (ICTY) are an important source for interpretation of this conventional law. In 1992, Bosnia-Herzegovina began a war of secession from the former Socialist Federal Republic of Yugoslavia. The United Nations (UN) Security Council took notice of the hostilities and affirmed that parties to the conflict were bound by "international humanitarian law and in particular the Geneva Conventions of 12 August 1949."[7] The Security Council commissioned a report from the Secretary-General with a view to determining whether there were any "grave breaches of the Geneva Conventions and other violations of international humanitarian law" being

2. *See* Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War art. 3(1)(a)-(c), Aug. 12, 1949, http://avalon.law.yale.edu/20th_century/geneva07.asp [hereinafter Geneva Convention].

3. *Id.* at art. 27.

4. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 76(1), June 8, 1977, http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument.

5. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(2)(e), June 8, 1977, http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument.

6. Control Council Law No. 10 art. II(1)(c), Dec. 20, 1945, http://avalon.law.yale.edu/imt/imt10.asp. The Charter of the International Military Tribunal, which created the court responsible for the Nuremberg trials, identifies various "crimes against humanity," but does not explicitly include rape among them. *See* Charter of the International Military Tribunal—Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") art. 6(c), Aug. 8, 1945, http://www.unhcr.org/refworld/docid/3ae6b39614.html.

7. S.C. Res. 764, ¶ 10, U.N. Doc. S/RES/764 (July 13, 1992).

committed.[8] The commission of experts that produced the report for the Secretary-General interpreted "international humanitarian law" in accordance with Additional Protocol I, Article 2(b), as a reference to conventional and customary international law. Aside from the Geneva Conventions explicitly mentioned by the Security Council, the commission understood this to mean, inter alia, the Additional Protocols to the Geneva Conventions (1977), the Fourth Hague Convention (1907), and the Genocide Convention (1948).[9]

The commission found that "in the former Yugoslavia, 'ethnic cleansing' has been carried out by means [including] murder, torture . . . , rape and sexual assault."[10] The findings of the commission led to the creation of the ICTY—the body responsible for prosecuting crimes committed during the war in Bosnia-Herzegovina.[11] Thus, the cases tried by the ICTY are important for interpreting and applying the conventional law on rape and genocide.

RAPE IN CUSTOMARY INTERNATIONAL LAW

The ICTY cases also provide an important interpretation and application of the relevant principles of customary international law. The ICTY was created to apply "international humanitarian law" to the situation in Bosnia-Herzegovina. The wording of Article 2 ("Grave breaches of the Geneva Conventions of 1949") of the Statute creating and governing the ICTY comes directly from the Geneva Conventions; that of Article 4 ("Genocide"), directly from the Genocide Convention; and that of Article 5 ("Crimes against humanity"), directly from Control Council Law No. 10.[12] "Article 3 of the Statute is a general and residual clause covering all serious violations of international humanitarian law not falling under Articles 2, 4 or 5 of the Statute. It includes, *inter alia*, serious violations of Common article 3. This provision is indeed regarded as being part of customary

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8. S.C. Res. 780, ¶ 2, U.N. Doc. S/RES/780 (Oct. 6, 1992). See also The Secretary-General, *Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council*, U.N. Doc. S/25274 (Feb. 10, 1993) [hereinafter *Letter Dated 9 February 1993*].

9. *Letter Dated 9 February 1993*, *supra* note 8, ¶¶ 37–39 (referencing the Convention on the Prevention and Punishment of the Crime of Genocide Dec. 9, 1948, http://www.un-documents.net/cppcg.htm [hereinafter Genocide Convention]).

10. *Id.* ¶ 56.

11. The ICTY was formed on the legal grounds that it was a judicial body created as an enforcement measure "to maintain or restore international peace and security" under Chapter VII of the U.N. Charter. The Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶¶ 18–30, *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993) [hereinafter *Report Pursuant to Res. 808*]; S.C. 827, U.N. Doc. S/RES/827 (May 25, 1993). *See* U.N. Charter art. 39.

12. *See* Updated Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 2, 4, 5 (Sept. 2009), *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

international law . . . ."[13] Each of the sources mentioned has "beyond doubt become part of international customary law."[14] In fact, in drafting the Statute, the Secretary-General intended that these articles should derive their authority from customary international law.[15] Rape could be charged under any of these articles.

It is worth note that Article 5 of the Statute was intended to provide a basis for charging rape as a crime against humanity: "Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian populations on national, political, ethnic, racial or religious grounds."[16]

In the earlier ICTY cases, rape was charged under Article 3 of the Statute as a violation of the laws or customs of war and under Article 5 as a crime against humanity. Rape is not explicitly mentioned in Article 3 but has been prosecuted under that article as an "outrage upon personal dignity" in violation of Common Article 3(c).[17]

The first international criminal case to state that rape and sexual violence may constitute genocide, however, was not an ICTY case, but one decided by the International Criminal Tribunal for Rwanda (ICTR).[18] The ICTR was established by the Security Council in a manner similar to the ICTY.[19] And, drawing directly from the Genocide Convention, the Statute of the ICTR criminalizes genocide with the same words as the Statute of the ICTY.[20] Since the article criminalizing genocide in the Statute of the ICTY (Article 4) derives its authority from customary international law, and indeed from peremptory norms of international law,[21] the same is necessarily true of the article criminalizing genocide in the Statute of the ICTR (Article 2).[22] Thus, when the ICTR draws a link between rape and genocide, it does so on the authority of customary international law, which means that the link between rape and genocide can be drawn in any

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13. Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 68 (June 12, 2002).

14. *Report Pursuant to Res. 808*, *supra* note 11, ¶ 35.

15. *See id.* ¶¶ 37, 41, 44, 45, 47.

16. *Id.* ¶ 48.

17. *See* Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 436 (Feb. 22, 2001).

18. Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT'L L. 225, 232 (2006–07). The case was *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998). Jean-Paul Akayesu was charged with and convicted of genocide by rape. Akayesu, Case No. ICTR-96-4-T, ¶ 734.

19. *See supra* note 11; Akayesu, Case No. ICTR-96-4-T, ¶ 2; S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

20. Statute of the International Criminal Tribunal for Rwanda art. 2 (2007), *available at* http://www.ictr.org/ENGLISH/basicdocs/statute/2007.pdf [hereinafter Statute of the ICTR].

21. U.N. Doc. S/25274 ¶ 46 (1993).

22. As confirmed by the Trial Chamber in *Akayesu*, Case No. ICTR-96-4-T, ¶ 495.

(modern) context involving international law. It does not depend on the contexts or statutes unique to the ICTR and ICTY.

GENOCIDE

As a consequence of the Second World War, when the Nazi Government of Germany systematically murdered an estimated six million Jews, the General Assembly of the newly-formed United Nations, on December 11, 1946, declared genocide to be a crime under international law.[23] Two years later, on December 9, 1948, the General Assembly adopted the *Convention on the Prevention and Punishment of the Crime of Genocide*.[24] Article 1 of the Convention proclaims, "[G]enocide, whether committed in time of peace or in time of war, is a crime under international law."[25] Article 2 defines the crime:

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a. Killing members of the group;
>
> b. Causing serious bodily or mental harm to members of the group;
>
> c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> d. Imposing measures intended to prevent births within the group;
>
> e. Forcibly transferring children of the group to another group.[26]

This is the definition of genocide adopted by the Statutes of the ICTY,[27] the ICTR,[28] and the International Criminal Court (ICC).[29]

In *Prosecutor v. Akayesu*, the ICTR explained that genocide is a crime of special intent; that is, it must be shown that the defendant had a *clear intent* or *clearly sought* "to destroy, in whole or in part," a particular group by committing one of the acts listed in Article 2 of the Statute[30] (which is

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23. G.A. Res. 96 (I), U.N. Doc. A/64/Add. 1 (July 1, 1946).
24. Genocide Convention, *supra* note 9.
25. *Id.* at art. 1.
26. *Id.* at art. 2.
27. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 12, arts. 2, 4, 5.
28. Statute of the International Criminal Tribunal for Rwanda, *supra* note 20, art. 2.
29. Rome Statute of the International Criminal Court, A/CONF.183/9, art. 6 (July 17, 1998), *available at* http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm.
30. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 498, 518, 520 (Sept. 2, 1998).

the equivalent of Article 2 of the Genocide Convention): "The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group."[31] Genocidal intent may be deduced from the context in which the act occurs. It may be shown by "the perpetration of other culpable acts systematically directed against that same group, whether those acts were committed by the same offender or by others." [32] The scale of the atrocities and the deliberate targeting of a particular group or an individual on account of membership in a particular group to the exclusion of others—these too may allow an inference of genocidal intent.[33] Thus, it is genocide when an offender commits one of the acts listed in the Genocide Convention, Article 2(a)–(e),with the *intent* to destroy a national, ethnical, racial or religious group in whole or in part, irrespective of whether the group is actually destroyed.[34]

The "acts" which constitute genocide under the Convention are broadly defined, and so inclusive of a wide range of particular actions. There are innumerable ways, for example, to "impose measures intended to prevent births within the group,"[35] and any of those ways would qualify as genocide, as long as the special intent is present. Rape is one such way. The Trial Chamber in *Akayesu* held:

> [T]he 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 a 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.[36]

After the decision in *Akayesu*, rape is chargeable as genocide, provided that special intent is present.[37]

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31. *Id.* ¶ 520.
32. *Id.* ¶ 523.
33. *Id.* ¶ 523.
34. *Id.* ¶ 497–99.
35. Genocide Convention, *supra* note 9, art. 2(d).
36. *Akayesu*, Case No. ICTR-96-4-T, ¶¶ 507, 508.
37. *Akayesu* also held that rape could be genocide by "causing serious bodily or mental harm to members of the group" (Statute of the ICTR art. 2(2)(b); Genocide Convention art.

Notice that the link *Akayesu* draws between rape and genocide has two sides, physical and psychological. As for the physical aspect, rape can lead to sterility, particularly in its most vicious manifestations. If the perpetrator intends to prevent births through forcing sterility or sexual mutilation in this manner, then the rape is an act of genocide.

The psychological aspect of rape as genocide is a bit less obvious. It is true that the person raped might refuse subsequently to procreate, as noted in *Akayesu*. But it is also true that what the perpetrator says during the rape and the manner in which the perpetrator accomplishes the rape can send profound psychological messages both to the immediate and to the "collateral" victims. An example is in order.

Rape was conducted on a massive scale in Bosnia-Herzegovina.[38] The rapes occurred in patterns. In one pattern, irregular Bosnian-Serb forces would enter a village, capture Bosnian-Herzegovinian women, rape them publicly, and leave. A few days later, regular Bosnian-Serb soldiers or the Yugoslav army would enter the same village and the residents would flee. Rape was used to intimidate the entire Bosnian-Herzegovinian population into leaving. In a second pattern, people held in Serb concentration camps were raped as a prelude to death. In a third pattern, women and girls were taken to rape/death camps where they were subjected to repeated rape for long periods of time. Sometimes they were killed, sometimes they were forced to become pregnant and then to carry the child past the time when the baby could safely be aborted. Then they would be released.[39]

Under the first pattern, rape was used to communicate Serb dominance and to feminize the entire (Muslim) Bosnian-Herzegovinian population. By raping some Bosnian-Herzegovinian women publicly, the Serb forces symbolically raped the entire community and simultaneously gendered themselves as masculine and the Bosnian-Herzegovinians as feminine. The intended psychological effect on the community, as evidenced by the flight of the Bosnian-Herzegovinians before the subsequent advance of the regular Yugoslav army, was to drive the Bosnian-Herzegovinians to complete submission.

2(b)):

> With regard [to] . . . rape and sexual violence . . . , they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even . . . one of the worst ways to inflict harm on the victim as he or she suffers both bodily and mental harm.

Id. ¶ 731 (footnote omitted).

38. The Secretary-General, *The Situation of Human Rights in the Territory of the Former Yugoslavia*, ¶ 82–85, *delivered to the Security Council and General Assembly* U.N. Doc. A/48/92, S/25341 (Feb. 26, 1993) [*hereinafter* The Situation of Human Rights].

39. These patterns are set out in *The Situation of Human Rights*, *supra* note 38, *Annex II* ¶ 48, and in BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA 62 ff. (University of Minnesota Press 1996).

The third pattern is quite significant in terms of genocide. Assuming for the moment that the Serbs intended to commit "ethnic cleansing" against the Bosnian-Herzegovinians, it appears strange at first that they should set some of their victims free just when they showed the most promise of bearing children. The key to understanding this tactic is that the raped women were convinced they would give birth to Serb children.[40]

Beverly Allen comments on the illogicality of the Serb policy of impregnating Bosnian Muslim women in order to destroy their race (since, of course, the babies would have been genetically the offspring of the mother as well as of the rapist father): "The Chetnik or Serb soldier who, while raping, believes he is creating 'little Chetniks' or 'Serb soldier-heroes' is, in fact, mistaken according to every relevant identity context."[41] And, "[o]ne of the most tragic psychological results of this policy is that the victims, if they survive, often do so believing the Serb illogic. Quite in spite of themselves, they may finally, at some level, begin to subscribe to the very reasoning that erases their cultural identity."[42]

In focusing on the rational "illogic," Allen misses the point. The babies, of course, were no more genetically Serb than Bosnian-Herzegovinian; nor were those whose mothers kept them at all likely to become culturally Serbian. Probably, the Serb perpetrators never believed the illogic themselves. It does not matter in the slightest whether the Serbs believed they were creating "little Chetniks"; what matters is whether they convinced the *victims* that they would *bear* "little Chetniks." Rape is so destructive to a person's self-identity that the perpetrator is actually engaged in reforming the victim's self-identity according to his own agenda. Thus, the "most tragic psychological result" that Allen says the victims may, "quite in spite of themselves . . . finally, at some level, begin [to believe],"[43] was precisely the purpose of the Serb policy. What Allen speaks of as a tragic side-effect of Serb delusions, was in actuality the main objective. The Serbs knew that through the psychological trauma of repeated rape and forced impregnation they could mold their victims' self-understanding such that they would believe they could never again give birth to non-Serb children, that they would be the last of their race. That is genocidal intent.

DEFINING RAPE

In addition to recognizing for the first time both the physical and the psychological relevance of rape to the crime of genocide, *Akayesu* also provided the first definition of "rape" in the context of international

40. See *The Situation of Human Rights*, *supra* note 39, *Annex II* ¶ 41, for a report of a woman who was told during rape that she would bear a Serb child.

41. ALLEN, *supra* note 39, at 96.

42. *Id.* at 98.

43. *Id.*

criminal proceedings. The definition was remarkably simple and broad. "The Chamber consider[ed] that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts."[44] As a consequence, the Court defined rape simply as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[45] It similarly defined "sexual violence" as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[46] Two things are notable here. First, the refusal to name body parts or specific actions. This leaves courts wide latitude in determining what actions constitute "invasions of a sexual nature." Second, that which distinguishes permissible sexual intercourse from rape is "circumstances which are coercive."

The ICTY cases further defined "rape" but tended towards greater specificity and shifted the focus from coercive circumstances to absence of voluntariness. It is unnecessary here to go into the specifics of what constitutes "rape" under the case law of the ICTY. Let it suffice to say that three months after the ICTR decided *Akayesu,* the ICTY felt further specification of the actus reus of the crime was required by the principle of *nullum crimen sine lege stricta.*[47] The result was a more "mechanical description" of the actus reus, which the Court in *Akayesu* had intentionally avoided.[48] The ICTY initially followed *Akayesu* by requiring "coercion or force or threat of force."[49] But the Trial Chamber in *Prosecutor v. Kunarac* decided that this did not adequately reflect the definition of rape in international law.[50] It found, rather, that the major national legal systems of the world are united around the common basic principle of the victim's lack of consent. The Trial Chamber, therefore, broadened the actus reus by treating rape as a violation of sexual autonomy, which might be *evidenced* by force or coercion, rather than as a product of force or coercion.[51] This was an important step in the direction of making rape more easily proved,[52] and it was affirmed by the Appeals Chamber.[53]

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44. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 597 (Sept. 2, 1998).

45. *Id.* ¶ 598.

46. *Id.*

47. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 177 (Dec. 10, 1998).

48. The elements of rape determined by the ICTY are first set forth in *Furundzija*, Case No. IT-95-17/1-T, ¶ 185.

49. *See id.* ¶ 185.

50. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 438 (Feb. 22, 2001) (Tr. Chamber).

51. *Id.* ¶¶ 440, 457–60.

52. *See* Ellis, *supra* note 18, at 229.

53. Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 127–33 (June 12, 2002) (App. Chamber).

THE RAPE OF ARMENIA

The body of conventional and customary international law on rape and genocide discussed above obviously cannot, with the exception of the Fourth Hague Convention of 1907, have applied in 1915 to the Armenian Genocide. What follows is a modern interpretation of an "ancient" event—an exercise in historical interpretation. What if the Armenian Genocide were happening today? It cannot seriously be doubted that the Armenians underwent genocide between 1915 and 1917. The question to be answered here is whether the documented *rapes* of Armenians in Turkey were of such a character as to classify *them* as genocide. To focus attention here on the qualitative character and significance of the rapes, whether they constitute genocide, I will pass over a number of issues that an international tribunal would otherwise have to address.[54]

THE FACTS

We are fortunate to have a significant number of first- and second-hand reports of the Armenian Genocide. We have, for example, the autobiographical account of Henry Morgenthau, American Ambassador to Turkey from 1913 to 1916, published in 1918 when the events were still fresh in his mind.[55] We also have Ambassador Morgenthau's correspondence with Washington while he was stationed in Turkey, reports from American consuls stationed in the Ottoman Empire, and eyewitness reports communicated to Ambassador Morgenthau.[56] Further, there exist a large number of first- and second-hand accounts from various sources collected in 1916 by the English Viscount Bryce expressly for the purpose of creating an historical record.[57] Taken together, we have quite sufficient evidence upon which to construct some idea of the character of rape within the context of the Armenian Genocide. Before setting forth the evidence, it will be helpful to review events preceding the genocide.

In the decades preceding 1915, Turkish Armenians faced persecutions and massacres in Turkey. The year 1894 saw the beginning of a series of massacres of Turkish Armenians under the order of Sultan Abdul Hamit. In response to an Armenian "uprising," which was really only the refusal of some Armenians from Sassoun to pay double taxes, the Sultan ordered the

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54. For example, where the primary sources say or imply that rape occurred, I will assume that it did.

55. HENRY MORGENTHAU, AMBASSADOR MORGENTHAU'S STORY (Doubleday, Page, & Company 1926) (1918).

56. See the five volume collection *United States Official Documents on the Armenian Genocide* (Ara Sarafian ed., Armenian Review 1993).

57. VISCOUNT BRYCE, THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE (A.J. Toynbee ed., Hodder and Stoughton 1916) [*hereinafter* THE TREATMENT OF ARMENIANS].

massacre of Sassounian Armenians.[58] Reporting the massacre, the British Consul at Van recorded that "a number of young men were bound hand and foot . . . and were burnt alive"; and, "many other disgusting barbarities are said to have been committed, such as ripping open pregnant women, [and] tearing children to pieces by main force."[59] And further, "some sixty young women and girls were driven into a church, where the soldiers were ordered to do as they liked with them and afterwards kill them, which order was carried out."[60] It would be legitimate to inquire whether these massacres were not merely precursors to genocide, but genocide itself. Either way, it is important to note the way in which gender played a role in the violence, for the evidence is that the later genocide of 1915–1917 was similarly conducted in gender-specific ways.

The Sultan was deposed in 1908, and a new regime came to power, the Ittihadists, or Young Turks. It was under their authority and due to their policy of creating an ethnically homogeneous Ottoman Empire that the (latest) Armenian Genocide of 1915 was carried out.[61]

Gender-specific violence was characteristic of the Armenian Genocide.[62] The Young Turk plan was systematically to remove and to kill all Armenian men who could possibly put up a fight and then to dispose of the women: "[T]hroughout the Turkish Empire a systematic attempt was made to kill all able-bodied men, not only for the purpose of removing all males who might propagate a new generation of Armenians, but for the purpose of rendering the weaker part of the population an easy prey."[63] The Turks first disarmed the Armenian soldiers in the Turkish army and transformed them into chain-gangs. Those Armenian soldiers that did not perish from hard labor were murdered. Then more young Armenian men were drafted into the Army and similarly executed.[64] Those men who had not been drafted into the Army and disposed of there by the time the

58. For this and accounts of subsequent massacres of Armenians under Abdul Hamit, see VAHAKN N. DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE: 113 ff. (Berghahn Books 1997) (1995).

59. These quotations are reproduced in DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE, *supra* note 58, at 117.

60. *Id.*

61. On the Young Turk policy of ethnic homogenization, see DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE, *supra* note 58, at 179–181; see also Katharine Derderian, *Common Fate, Different Experience: Gender-Specific Aspects of the Armenian Genocide, 1915–1917*, 19 HOLOCAUST AND GENOCIDE STUD. 1, 2 (Spring 2005).

62. Derderian, *supra* note 61, at 3.

63. MORGENTHAU, *supra* note 55, at 304.

64. On the murder of Armenian soldiers, see BRYCE, *supra* note 57, at 83–84. The abduction and murder of Armenian men prior to the deportation and rape of the women is closely paralleled by events in Bosnia-Herzegovina. In the late 1980s, young Bosnian-Herzegovinian men who were called into military service so frequently met with "accidental" death that Bosnian-Herzegovinian mothers held a demonstration against the Belgrade government, requesting that their sons not be drafted. ALLEN, *supra* note 39, at 51.

deportations began were simply rounded up, removed from their families, and murdered.[65] As Ambassador Morgenthau put it, "Before Armenia could be slaughtered, Armenia must be made defenseless."[66]

After interviewing 103 survivors of the Armenian Genocide, Donald and Lorna Miller concluded that the men had it easier than the women.[67] With quick death came a quick end to suffering. The women endured much more. Not only were they forced to march for months over mountain and through valley from the interior of the Empire to its desert fringe, but they were raped and otherwise tortured from beginning to end.

Prior to the forced deportations, Turkish gendarmes searched Armenian homes for weapons. According to Morgenthau, "There are cases on record in which women accused of concealing weapons were stripped naked and whipped . . . , and these beatings were even inflicted on women who were with child. Violations so commonly accompanied these searches that Armenian women and girls, on the approach of the gendarmes, would flee . . . ."[68] A German eyewitness of atrocities at Harpout wrote: "They have had their eye-brows plucked out, their breasts cut off, their nails torn off . . . ."[69] A certain Roupen of Sassoun reported the following on November 6, 1915: "The leading Armenians of the town [of Moush] . . . were subjected to revolting tortures. . . . The female relatives of the victims who came to the rescue were outraged in public before the very eyes of their mutilated husbands and brothers."[70]

Once on the deportation routes, the women were subjected to further abuse at the hands of their accompanying gendarmes, as well as from the local Turks and Kurds through whose lands they passed. Morgenthau reports that gendarmes would notify the Kurdish populations in advance of the Armenian deportees' arrival:

> Rushing up to the young girls, [the Kurds] would lift their veils and carry the pretty ones off to the hills. . . . They would steal their clothing, and sometimes even leave both men and women in a state of complete nudity. . . . Such as escaped these attacks in the open would find new terrors awaiting them in the Moslem villages. Here

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65. MORGENTHAU, *supra* note 55, at 311.

66. *Id.* at 302.

67. Donald E. Miller & Lorna Touryan Miller, *Women and Children of the Armenian Genocide*, *in* THE ARMENIAN GENOCIDE: HISTORY, POLITICS, ETHICS 152, 153 (Richard G. Hovannisian ed., St. Martin's Press 1992).

68. MORGENTHAU, *supra* note 55, at 305.

69. Moush: Statement by a German Eye-Witness of Occurrences at Moush; Communicated by the American Committee for Armenian and Syrian Relief, *in* THE TREATMENT OF ARMENIANS, *supra* note 57, at 90.

70. Bitlis, Moush and Sassoun: Record of an Interview with Roupen, of Sassoun, by Mr. A.S. Safrastian; Dated Tiflis, 6th November, 1915, *in* THE TREATMENT OF ARMENIANS, *supra* note 57, at 85.

> the Turkish roughs would fall upon the women, leaving them sometimes dead from their experiences or sometimes ravingly insane.[71]

Morgenthau's narrative is confirmed by report upon report from other sources. In a letter dated August 16, 1915, an Armenian refugee first confirms the extermination of the men from one group of deportees, and then writes this: "Three-quarters of the young women and girls were abducted; the remainder were forced to lie with the gendarmes who conducted them. Thousands died under these outrages, and the survivors have stories to tell of refinements of outrage so disgusting that they pollute one's ears."[72] Similarly, an Armenian woman deported from Baibourt reported the following:

> [T]hey separated the men, one by one, and shot them all within six or seven days—every male above fifteen years old. . . . The brigands took all the good-looking women and carried them off on their horses. . . . We were not allowed to sleep at night in the villages, but lay down outside. Under cover of the night indescribable deeds were committed by the gendarmes, brigands and villagers.[73]

A German eyewitness declares that in Mezré Armenian women and girls were forced to staff a public brothel for the Turks.[74] A deported woman from Moush reported that during her deportation Kurdish guards "[v]ery often . . . violated eight or ten-year-old [Armenian] girls, and as a consequence many would be unable to walk, and were shot."[75]

A German news account dated October/November 1915 reported: "The male corpses are in many cases hideously mutilated (sexual organs cut off, and so on), the female corpses are ripped open."[76]

THE LAW

In modern international law the elements of the crime of genocide are:

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71. MORGENTHAU, *supra* note 55, at 316.

72. Letter, Dated 3rd/16th August, 1915, Conveyed Beyond the Ottoman Frontier by an Armenian Refugee from Cilicia in the Sole of her Shoe, *in* THE TREATMENT OF ARMENIANS, *supra* note 57, at 20, ¶¶ 2–3.

73. Baibourt: Narrative of an Armenian Lady Deported in the Third Convoy; Communicated by the American Committee for Armenian and Syrian Relief, *in* THE TREATMENT OF ARMENIANS, *supra* note 57, at 242.

74. Moush: Statement by a German Eye-Witness, *supra* note 69, at 91.

75. Moush District: Narrative of a Deported Woman, Related by Her to Mr. Vartkes of Moush, Recorded by Him on the 25th July, 1915, and Published Subsequently in the Armenian Journal "Van-Tosp," *reprinted in* THE TREATMENT OF ARMENIANS, *supra* note 57, at 92.

76. Information Regarding Events in Armenia, Published in the "Sonnenaufgang" (Organ of the "German League for the Promotion of Christian Charitable Work in the East"), October, 1915; and in the "Allgemeine Missions-Zeitschrift," November, 1915, *reprinted in* THE TREATMENT OF ARMENIANS, *supra* note 57, at 26.

(1) intent to destroy, (2) a national, ethnical, racial, or religious group, as such, (3) by committing acts listed in the Genocide Convention, Article 2(a)–(e).

Genocide is a crime of special intent. The prosecution must demonstrate that the defendant had clear intent to destroy a group; that is, that he knew or should have known that the acts he was committing would destroy a group. This special intent may be deduced from the context in which the acts occurred.[77] Evidence of other culpable acts of the same or different character as the act in question systematically directed against the group may show special intent; so may evidence of deliberately targeting persons on account of their group membership and to the exclusion of members of other groups. The scale of the atrocities is another indicator of special intent. Of course, if there is evidence of a master plan or policy of extermination, that is very helpful as well.

In the case of the Armenian Genocide, the Young Turk regime had an explicit policy of exterminating the Armenians under the cloak of deportation. Ambassador Morgenthau wrote: "When the Turkish authorities gave the orders for these deportations, they were merely giving the death warrant to a whole race; they understood this well, and, in their conversations with me, they made no particular attempt to conceal the fact."[78]

The deportations, murders, and rapes were systematically directed at the Armenians. Although the Turks were on uneasy terms with the Kurds, they enlisted their assistance by calling them down upon the defenseless deportation groups. The Turks might have targeted the Kurds as well as the Armenians, but they did not.

The scale of rape and sexual violence against Armenians is similarly indicative of intent to destroy. All of the primary sources referenced above include repeated references to the sexual violation of women, children, and men. The sources indicate that deportees could expect to be abducted into forced marriages or sexual slavery, and that even if they were spared that fate, they would still be stripped naked and repeatedly raped all along the deportation route. Victims and witnesses alike testified that rape and sexual violence were nearly universal. Considering the totality of the circumstances, one must conclude that the Young Turk regime had the requisite special intent to destroy the Armenians.

The second element may be dispensed with briefly. In 1915, the Armenians were a distinct ethnic and religious group within Turkey. They

77. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 497–499 (Sept. 2, 1998).

78. MORGENTHAU, *supra* note 55, at 309. Dadrian also concludes the Ittihadists were implementing an express policy of extermination and provides further primary-source evidence to substantiate his conclusions. DADRIAN, *supra* note 58, at 207–09, 219–26.

had been inhabitants of the Anatolian plateau since the first millennium B.C. and officially became a Christian nation in the fourth century A.D. The Turks, on the other hand, were relative newcomers to Asia Minor as compared with the Armenians; and the Turks were Muslim. The ICTR defined an ethnic group as one whose members share a common language or culture.[79] The Armenians had a linguistic, artistic, and cultural history that was distinct from that of the Turks.[80] Thus, religiously and ethnically, the Armenians were a distinct "group" in Turkey, and the express policy of the Ittihadists was to eliminate them as such.

The critical question relates to the third element, whether *rape* was used by the Turks as a means of accomplishing their intended destruction of the Armenians. The *Akayesu* Court held that rape could qualify as genocide under the Genocide Convention by "causing serious bodily or mental harm to members of the group,"[81] or by "imposing measures intended to prevent births within the group."[82] The evidence shows that rape was present on a very large scale during the Armenian Genocide, that it was systematically directed against the Armenians, and that it occurred within the context of an intentional effort to destroy the Armenian *gens*. There are recurrent themes in the evidentiary record. An Armenian's gender determined how he or she was treated. Men were tortured and mutilated (often sexually), then shot or drowned, in short order. Some women experienced the same—those whose breasts were cut off, for example. But more frequently, the women were raped. The rapes were violent—"refinements of outrage so disgusting that they pollute one's ears"—and many women died from the "outrages" alone. Young girls were raped, and they often died as a consequence. Pretty women and children were abducted. Those who were not abducted were humiliated by having their clothing stolen so that they walked naked. The women who did not die and were not abducted were repeatedly raped. It remains here only to explain how rape effected the destruction of Armenia.

Rape wounds the body and the soul, not only of the victim but also of the victim's community. The bipartite nature of rape makes it an especially effective tool for genocide. On the physical level, the evidence is that the Turks and Kurds raped so violently and selected victims of such young ages that the result was often deadly. Forced pregnancies of the sort seen in Bosnia-Herzegovina did not occur in Turkey, but forced assimilations did. Many women and children who were abducted were forced into marriage

79. *Akayesu*, Case No. ICTR-96-4-T, ¶ 513.

80. For a brief introduction to the Armenian people sufficient to identify them as a "group" within the meaning of the Genocide Convention, see Rouben Paul Adalian, *The Armenian Genocide*, *in* CENTURY OF GENOCIDE: CRITICAL ESSAYS AND EYEWITNESS ACCOUNTS 53, 60–62 (Samuel Totten, William S. Parsons & Israel W. Charny eds., 2d ed. Garland 1995).

81. Genocide Convention, *supra* note 2, art. 2(b).

82. *Id.* at art. 2(d); *see also Akayesu*, Case No. ICTR-96-4-T.

and compelled to convert to Islam.[83] As the *Akayesu* Court noted, in a patriarchal society, men are the bearers of ethnicity; once the men are gone and the women are assimilated and bear children to those who raped them, the ethnic group has been destroyed.[84] Their Armenian heritage, and that of their children, vanishes. Violent sexual assaults on women and children can prevent the victims from procreating, whether through physical or emotional trauma. Such assaults, abductions, and forced marriages were direct attacks on the Armenians' reproductive capacity.[85]

On the mental and emotional level, rape was calculated to dehumanize the Armenians, to strip them of any sense of power, control, or self-determination, and to alter their self-identity. Many of the accounts report that the Armenians were treated as animals. Women and children were raped publicly, often in front of family. One writer on the subject demonstrates that rapes were one of the means by which the Turkish authorities could dehumanize the Armenians in the eyes of Turkish citizens, which was necessary for carrying out the genocide.[86] True though that is, it is essential also to note that rape dehumanizes the victims in the victims' own eyes. Rape strips an individual of any sense of power and self-determination, and in so doing it divests the victim of that which is quintessentially human: choice. The raped person perceives herself to be subhuman.[87] And, when members of a group are selected randomly and raped publicly, the entire group experiences the same transformation. By means of rape, the Turks and Kurds convinced the Armenian population that they were nothing more than animals. Few things could be so devastating to the existence of a group. They were destroying the Armenians by stripping them of their humanity.

The Ittihadists are guilty of genocide by rape, because with intent to destroy the Armenian people, they used rape to cause individual Armenians serious bodily and mental harm and to undermine that people's ability to procreate.

EPILOGUE

In 2001, the International Commission on Intervention and State Sovereignty published a report entitled *The Responsibility to Protect*. The Commission convened in order to address "the question of when, if ever, it is appropriate for states to take coercive—and in particular military—

83. *See* Derderian, *supra* note 61, at 2, 4.

84. *Akayesu*, Case No. ICTR-96-4-T, ¶ 507.

85. *See* Derderian, *supra* note 61, at 9–10.

86. *Id.* at 8.

87. "Many survivors reported to us that they lost all sense of their dignity as human beings during the deportations." Miller, *supra* note 67, at 165.

action, against another state for the purpose of protecting people at risk in that other state."[88] The genocides of the 1990s demanded an answer to this question that would be sensitive to moral imperatives as well as to the customary international legal principle of state sovereignty as expressed in Article 2(1) of the UN Charter. State sovereignty, stressed the Commission, implies a state's responsibility to protect the "dignity and basic rights" of its own nationals.[89] The Commission stressed that human rights are best protected when states use their sovereign power to uphold the rule of law through their national legal systems.[90] When a state fails to protect its own people, or even deliberately transgresses against them—as was the case in the Armenian Genocide—then international intervention in the domestic affairs of sovereign states may be justified. The Commission denominated this "emerging guiding principle" of customary international law as "the responsibility to protect."[91] That responsibility is best fulfilled through preventative and non-military measures designed to encourage wayward states to enforce the rule of law for the protection of their citizens. But in "extreme and exceptional cases" such as "when all order within a state has broken down or when civil conflict and repression are so violent that civilians are threatened with massacre, genocide or ethnic cleansing on a large scale," then military intervention may be warranted.[92] The Commission's report resurrects just war theory: If there is a *just cause* (namely, "large scale loss of life" or "large scale ethnic cleansing"),[93] then states may intervene militarily, provided that they intervene with the *right intention*, as a *last resort*, with *proportional means* of attack and a *reasonable prospect* of success.[94] But critically, military intervention must be *authorized*,[95] and today, above all, that means authorization from the Security Council acting under Chapter VII of the UN Charter.[96]

The Commission stressed that "[t]here must be no more Rwandas";[97] "[w]e cannot be content with reports and declarations. We must be prepared to act."[98] That was written in 2001. In 2003 conflict broke out in Darfur, Sudan, that was quickly recognized as a humanitarian crisis of gravest proportions. Incidences of rape are extremely high. Unfortunately, for six

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88. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT vii (International Development Research Centre 2001).
89. *Id.* ¶ 1.35.
90. *Id.* ¶ 2.20.
91. *Id.* ¶ 2.24.
92. *Id.* ¶¶ 4.10, 4.13.
93. *Id.* ¶ 4.19.
94. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, ¶¶ 4.10–19.
95. *Id.* ¶ 4.16.
96. *Id.* ¶¶ 6.2–12.
97. *Id.* ¶ 8.7.
98. *Id.* ¶ 8.34.

years the UN has proven more effective at reporting and declaring than at stopping the atrocities. While the African Union deployed peacekeeping troops to the region in 2004, the Security Council did not authorize a UN peacekeeping force until the middle of 2007, four years after the crisis began.[99] Considering that one million Armenians were dead in just two years, the Security Council seems a little slow to act. Moreover, one might fault it for failing to act decisively. While sexual violence against children continues apace in Sudan, the Security Council "*[r]equests* the Secretary-General to submit a report by May 2010 on the implementation of its resolutions and presidential statements on children and armed conflict."[100] Perhaps the report will console those children who were raped and killed six years ago.

How would the world respond, if the Armenian Genocide were happening again today? If history is an indicator, the world would look first to the UN Security Council for decisive action. The Council would commission teams of experts to observe the genocide, as well as reports from the Secretary-General on the ongoing status of the genocide. And once all remaining Armenians had been raped and murdered, the perpetrators would be tried by an ad hoc tribunal (or by the ICC) to ensure that the sufferings of the victims would not go unrequited. But at least the tribunal would have the opportunity to further develop the international jurisprudence on genocidal rape.

99. *See* UN News Centre, *Security Council Authorizes Hybrid UN-African Union Operation in Darfur* (31 July 2007), http://www.un.org/apps/news/story.asp?NewsID=23379&Cr=sudan&Cr1 (last visited March 25, 2010).

100. U.N. Doc. S.C. Res. 1882, ¶ 19, U.N. Doc. S/RES/1882 (June 5, 2009).