The Definition of Rape and Its Characterization as an Act of Genocide – A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia

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Abstract: Despite the clear prohibition of rape by international law, no conventional or other international instrument defines this international crime or explains its relation to the international crime of genocide. This article reviews the recent precedent-setting judgments of the international criminal tribunals for the Former Yugoslavia and Rwanda which have sought to define rape in international law using different approaches. It also analyses the recent Akayesu Judgment of the Rwanda Tribunal. This is the first decision of an international tribunal to consider the question of whether rape can constitute genocide.

1. INTRODUCTION

> [w]itness KK also recalled seeing women and girls selected and taken away to the cultural centre at the bureau communal by Interahamwes who said they were going to "sleep with" these women and girls. Witness KK testified regarding an incident in which the Accused told the Interahamwe to undress a young girl named Chantal, whom he knew to be a gymnast, so that she could do gymnastics naked. The Accused told Chantal, who said she was Hutu, that she must be a Tutsi because he knew her father to be a Tutsi. As Chantal was forced to march around naked in front of many people, Witness KK testified that the Accused was laughing and happy with this. Afterwards, she said he told the Interahamwes to take her away and said "you should first of all make sure that you sleep with this girl." (*Ngo kandi nababwiye ko muzajya mubanza mukirwanaho mukarongora abo bakobwa.)* Witness KK also testified regarding the rape of Tutsi women married to Hutu men. She described, after leaving the bureau communal, encountering on the road a man and woman who had been killed. She said the woman, whom she knew to be a Tutsi married to a Hutu, was "not exactly dead" and still in agony. She described the Interahamwes forcing a piece of wood into the woman's sexual organs while she was still breathing, before she died. In most cases, Witness KK said that Tutsi women married to Hutu men "were left alone because it was said that these women deliver Hutu children." She said that there

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12 Leiden Journal of International Law 479-490 (1999)

> were Hutu men who married Tutsi women to save them, but that these women were sought, taken away forcibly and killed.[1]

This testimony was given to Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR) in the first case before that tribunal or the International Criminal Tribunal for the former Yugoslavia (ICTY) to deal with the issue of whether rape can constitute genocide, *Prosecutor* v. *Jean-Paul Akayesu*. There is a plethora of material published on this issue, viewing it from a number of different theoretical perspectives. However, this paper is specifically focused upon analytical review of the recent judgments of the International Criminal Tribunals for the former Yugoslavia and Rwanda, in order to identify the definition of rape in international law and then to consider the context in which rape may constitute genocide.

This review is useful, not only from the perspective of international humanitarian law, but also from the perspective of the status of the offence of rape and its prohibition as an act of genocide, at general customary international law. Such conclusions may be drawn from this jurisprudence on the basis that the norms enunciated with respect to genocide in the decisions to be discussed, represent customary law. Indeed the Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808,[2] which constitutes the *travaux préparatoires* of the ICTY Statute, mandates the tribunal to apply, as its subject matter jurisdiction, rules of international humanitarian law that are "beyond any doubt part of customary law".[3] It is thus axiomatic that the interpretation given by the ICTY to Article 4 of its Statute, which provides jurisdiction over the crime of genocide, corresponds to custom. Further a similar report prepared by the Secretary-General for the ICTR, also provides the ICTR with subject matter jurisdiction over clear customary prohibitions including, *inter alia*, genocide, prohibited by Article 2 of the ICTR statute.[4]

Accordingly, this paper will begin with an extensive discussion of the definition of rape (Section 2). It shall then continue with a discussion of rape in light of the requisite elements of the crime of genocide at international law as discussed in the *Akayesu* Judgment (Section 3). This will be followed by some conclusions as to the current state of the law in this area (Section 4).

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1. Prosecutor *v.* Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998, para. 429 (Akayesu Judgment).
2. Report of the Secretary-General on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia of 3 May 1993, UN Doc. S/25704 (1993) (Report of the Secretary-General on the ICTY).
3. *Id.*, para. 34. For the text of the ICTY Statute, see *id.*, reproduced *in* 32 ILM 1159 (1993).
4. Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955 (1994) of 13 February 1995, UN Doc. S/1995/134, paras. 11-12. The ICTR Statute is found annex to Security Council Resolution 955 of 8 November 1994, UN Doc. S/RES/955, Ann. (1994).

2. DEFINITION OF RAPE

There can be no question that rape is a crime prohibited, both expressly and implicitly, by international law. Furthermore, on the basis of its clear customary international law status as a crime against humanity,[5] it is explicitly punishable under Article 5(g) of the Statute of the ICTY and Article 3(g) of the Statute of the ICTR, provided of course that it meets the other requirements of this offence. Despite this clear prohibition, neither these statutes nor any conventional or other international instrument contains a definition of this international crime.

The *Akayesu* Judgment was the first judicial decision of an international criminal tribunal to propose an international law definition for rape. This was derived in the context of the consideration of rape as a crime against humanity pursuant to Article 3(g) of the Statute of the ICTR. The Trial Chamber conceded that:

> [w]hile rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.[6]

Notwithstanding this observation, the Trial Chamber explicitly rejected an approach that involved a mechanical description of the constituent acts of rape. Instead it proposed a definition which focused on a conceptual framework of this crime of violence, analogising its approach to that taken in the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[7] for the definition of torture. It explained its approach thus:

> [t]he Chamber considers 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. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes

5. *See* the Report of the Secretary-General on the ICTY, *supra* note 2, para. 47, where he makes reference to the origins of crimes against humanity in the Charter and Judgment of the Nurnberg Tribunal as well as Control Council Law No. 10.
6. Akayesu Judgement, *supra* note 1, para. 596.
7. 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Annex to General Assembly Resolution 39/46, UN Doc. A/39/51 (1984).

> rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.[8]

The next judgment to address this issue followed two months later and was handed down by Trial Chamber II of the ICTY in the case, *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*.[9] In that case Trial Chamber II of the ICTY considered the meaning of rape in the course of deciding upon the issue of whether rape can constitute torture, punishable as a grave breach under Article 2(b) of the Statute of the ICTY and as a violation of the laws or customs of war, punishable under Article 3 of the Statute of the ICTY and recognised by Article 3(1)(a) common to the four Geneva Conventions of 1949.[10] In its general discussion on the law of torture, during which it answered these questions in the affirmative, the Trial Chamber agreed with the approach and the definition of rape posited in the *Akayesu* Judgment.[11] The Tribunal subsequently applied this test to the facts and found, during its discussion of the relevant counts of the indictment charged against the third named defendant that acts of vaginal and anal penetration by the penis under coercive circumstances, clearly constituted rape.[12] In addition, the Trial Chamber indicated that acts of fellatio, that is the insertion of a penis into a mouth, could constitute rape.[13]

Less than one month later, a differently constituted Trial Chamber II of the ICTY rendered its judgment in the case *Prosecutor* v. *Anto Furundžija*.[14] In that case it fell to the Trial Chamber to consider, *inter alia*, whether the accused was guilty of outrages upon personal dignity including rape, punishable by Article 3 of the ICTY Statute. It found the accused guilty of this offence on the basis that he aided and abetted in the crimes, including rape, which were committed by the principal perpetrator.[15] In its reasoning the Trial Chamber considered the definition of rape. It commenced by stating that no definition could be found in international law but drew the inference, from the fact that there is a specific prohibition on rape and a general prohibition on other forms of indecent assault in international law, that rape is the most serious manifestation of sexual assault at

8. Akayesu Judgment, *supra* note 1, paras. 597-598.
9. Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Judgment, Case No. IT-96-21-T, T. Ch. II, 16 November 1998 (Čelebići Judgment).
10. 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (1950); 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 74 UNTS 85 (1950); 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (1950); and 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950).
11. *Čelebići* Judgment, *supra* note 9, paras. 478-479.
12. *Id.*, paras. 940 and 962.
13. *Id.*, para. 1066.
14. Prosecutor *v.* Anto Furundžija, Judgment, Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998 (Furundžija Judgment).
15. *Id.*, paras. 274-275.

international law. [16] It noted the approach and reasoning of the *Akayesu* Judgment, as upheld in the *Čelebići* Judgment but proceeded to adopt a different approach and thus, a different definition of rape at international law. The Trial Chamber explained this different approach thus:

> no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitgrundsatz*, also referred to by the maxim "*nullum crimen sine lege stricta*"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.
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> Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since "international trials exhibit a number of features that differentiate them from national criminal proceedings", account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.[17]

This approach indicates that when there is no definition for an offence in international criminal law, such a definition may be derived from the principles that form the basic common denominators of that offence in major legal systems. These are gleaned from national laws and subject to two *caveats* that seek to ensure that the mechanical transposition of a definition from any one legal system is avoided. However the Trial Chamber expressly precluded the characterisation of this approach as a resort to general principles of international criminal law. Rather, it is justified as a method of complying with a general principle of criminal law, being specificity or *nullem crimen sine lege*.

The Trial Chamber utilised this approach to identify a trend in the national legislation of number of states, of broadening the definition of rape so that it embraces acts that were previously classified as comparatively less serious of-

16. *Id.*, para. 175. The Trial Chamber relied upon Art. 27 of the Fourth Geneva Convention, *supra* note 10, Art. 76(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, of 8 June 1977, 16 ILM (1977), at 1391 (Additional Protocol I), and Art. 4(2)(e) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 16 ILM (1977), at 1442 (Additional Protocol II), for this proposition.

17. *Id.*, paras. 177-178.

fences of sexual or indecent assault. Thus this shows that the stigma of rape now attaches to a growing category of sexual offences, provided they meet a number of requirements, the most important of which is forced physical penetration.[18] After an examination of national laws of rape the Trial Chamber concluded that, in spite of inevitable discrepancies most civil and common law jurisdictions consider rape to be the "forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus."[19] It then identified a major discrepancy in the criminalisation of forced oral penetration: whereas some states treat it as sexual assault, others treat it as rape.

The Trial Chamber stated that the approach to take in order to deal with this discrepancy was to seek to establish a solution by resort to the general principles of international criminal law, and if this was not of assistance, to general principles of international law.[20] Thus, it held that forced oral penetration should be classified as rape on the basis that such penetration "constitutes a most humiliating and degrading attack upon human dignity" that breaches the general principle of international humanitarian law of respect for human dignity.[21] Furthermore, the notion that this finding constituted a breach of the general principle of *nullem crimen sine lege*, was emphatically and soundly rejected.[22] Thus, the Trial Chamber concluded that:

> the following may be accepted as 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.
>
> As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.[23]

18. *Id.*, para. 179.
19. *Id.*, para. 181.
20. *Id.*, para. 182.
21. *Id.*, para. 183.
22. *Id.*, para. 184.
23. *Id.*, paras. 185-186.

In its legal findings based on the facts of the case, the Trial Chamber applied these principles to find that acts of penetration by the penis of the mouth, vagina and anus constituted rape.[24]

Significantly, the Trial Chamber stated in the *Furundžija* Judgment that, "any form of captivity vitiates consent".[25] This recognises the obvious, that is, the inherently violent nature of much behaviour during armed conflict. In the *Čelebići* Judgment, a finding was made in a similar vein. In the context of a discussion of the purposive requirements of torture *vis-à-vis* rape and sexual assault, the Trial Chamber held that "during armed conflicts, the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behaviour."[26] These findings are consistent with Rule 96 of the Rules of Procedure and Evidence of the ICTY,[27] which deals with evidence in cases of sexual assault. The plain meaning of this Rule indicates that consent is viewed as a limited defence to be raised by the accused only if he can show the absence of actual, threatened or feared violence, duress, detention or psychological oppression against the victim or a third person. The clear import of this provision is that each of the aforementioned acts and circumstances exclude the possibility of consent.

3. RAPE AS GENOCIDE

The heinous crime of genocide is punishable under Article 4 of the Statute of the ICTY and under article 2 of the Statute of the ICTR. The provisions of these Statutes are identical to Articles 2 and 3 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[28] There can be no question that the prohibition expressed in this convention and imported into the statutes of the international criminal tribunals constitutes customary international law. Indeed this was acknowledged in the Report of the Secretary General on the ICTY, where he stated that:

24. *Id.*, para. 271.
25. *Id.*
26. Čelebići Judgment, *supra* note 9, para. 471.
27. Rule 96 of the Rules of Procedure and Evidence of the ICTY, UN Doc. IT/32, Rev. 13 (1998), states: "[i]n cases of sexual assault: (ii) consent shall not be allowed as a defence if the victim (a) has been subjected or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible".
28. Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260 (III) of 9 December 1948, reproduced *in* 78 UNTS 1021.

> [t]he Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951.[29]

In the *Akayesu* Judgment the Trial Chamber found that in order for a crime of genocide to have been committed, it is necessary that two requirements be met. First, one of the listed acts in article 2(2) of the ICTR Statute must have been committed.[30] Second, the prohibited act must have been specifically targeted on a national, ethnical, racial, or religious group with the special intent or *dolus specialis*, necessary for genocide to take place,[31] that is, to destroy, in whole or in part, one of the aforementioned groups. In this regard the Trial Chamber made the salient and fundamental point that "[c]ontrary to popular belief, the crime of genocide does not imply the actual extermination of a group in its entirety".[32] To impose such a requirement would lead to a patently unjust situation where only the perpetrators who succeeded in the partial or total destruction of a group could be subject to successful prosecution.

Having made these preliminary observations, it must be acknowledged that, with regard to the first requirement of genocide, rape is not explicitly enumerated as one of the specific acts that may constitute this international crime. However, this does not preclude it constituting such an act. In the *Furundžija* Judgment the court opined that rape may amount to an act of genocide under Article 4 of the ICTY Statute if the requisite elements of the offence of genocide are met.[33] Further, this did not preclude that very finding being made in the *Akayesu* Judgment, which shall be explored in greater detail below. This analysis will proceed with a consideration of rape, in so far as it may constitute any of the acts listed in Article 4(2) of the ICTY Statute and the corresponding Article 2(2) of the ICTR Statute and then it will consider the intent requirement for the crime of genocide.

The first expressed category of constituent acts of genocide is killing members of a group. In the specific context of this discussion, attention should be drawn to a factual finding made in the *Akayesu* Judgment, which stated the following, on the basis of the substantial testimonies brought before it:

> in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed. A victim testified that Tutsi women caught could be taken away by peasants and men with the promise that they would be collected later to be executed. Following an act of gang rape, a witness heard Akayesu say "tomorrow they

29. Report of the Secretary General on the ICTY, *supra* note 2, para. 45. This was subsequently affirmed in the Akayesu Judgment, *supra* note 1, para. 495.
30. The corresponding provision in the Statute of the ICTY, *supra* note 3, is Art. 4(2).
31. Akayesu Judgment, *supra* note 1, para. 499.
32. *Id.*, para. 497.
33. Furundžija Judgment, *supra* note 14, para. 172.

> will be killed" and they were actually killed. In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.[34]

Thus, the Trial Chamber recognised that rape was an integral component in a pattern of behaviour directed at Tutsi women and designed to ensure maximum suffering before they were killed. Accordingly, this form of violence preceded death and could be characterised as one of its mediums.

The second category of the constituent acts of genocide is causing serious bodily or mental harm to members of the group. In the *Akayesu* Judgment, the Trial Chamber found that causing serious bodily or mental harm does not necessarily mean that the harm is permanent and irremediable.[35] Further, it was held that acts of mental or physical torture, inhumane or degrading treatment and persecution were included in the acts that would fall under this heading.[36] In this judgment, rape was found to fall within this category and thus constitute an act of genocide.[37] The Trial Chamber stated that "rape and sexual violence certainly constitute the infliction of serious bodily and mental harm on the victims and are even [...] one of the worst ways to inflict harm."[38]

This conclusion is supported by the findings made in the *Čelebići* Judgment. These findings were made in the context of considering whether rape causes the requisite level of 'severe' suffering required for the offence of torture at customary international law. The Trial Chamber found:

> the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity [...] Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and longlasting.[39]

This was based, in part, on decisions of a similar nature regarding the mental and physical pain and suffering resulting from rape, by the Inter-American Commission on Human Rights and the European Court of Human Rights. In the case of *Raquel Martí de Mejía* v. *Perú*,[40] the Inter-American Commission on Human Rights confirmed that rape causes physical and mental suffering. In particular the commission stated that rape causes psychological trauma that results

34. Akayesu Judgment, *supra* note 1, para. 733.
35. *Id.*, para. 502.
36. *Id.*, para. 504.
37. *Id.*, paras. 706-707.
38. *Id.*, para. 731.
39. Čelebići Judgment, *supra* note 9, para. 495.
40. Raquel Martí de Mejía *v.* Perú, Report No. 5/96, Case No. 10.970, 1 March 1996, Annual Report of the Inter-American Commission on Human Rights 157.

from the victims having been humiliated and victimised, and from suffering the condemnation of the members of their community if they report what has been done to them.[41] In its consideration of the suffering caused by rape in the case of *Aydin* v. *Turkey*, the European Court of Human Rights stated that "rape leaves deep psychological scars on the victim which do not respond to the passage of time as other forms of physical and mental violence."[42] Thus, on the basis of the foregoing, it may be concluded that acts of rape clearly fall within this category of the constituent acts of genocide.

The third express category of acts which may constitute genocide are those which deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part. In the *Akayesu* Judgment the Trial Chamber stated that this should be construed to mean "methods of destruction by which the perpetrator does not immediately kill the member of a group, but which ultimately, seek their physical destruction."[43] Examples of such conditions are subjecting a group of people to a subsistence diet, systematic expulsion from their homes, and the reduction of essential medical services below a minimum requirement.[44] The fourth express category of acts which may constitute genocide are those which impose measures intended to prevent births within a group. It was held in the *Akayesu* Judgment that these should be construed as:

> sexual mutilation, the practice of sterilisation, 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 with in a group is the case where, during rape, a woman of the said group is deliberately impregnated by 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.[45]

The Trial Chamber acknowledged that the measures to prevent births within a group may be of a psychological nature, so that rape may constitute such a measure when the victim subsequently refuses to procreate.[46] The fact that rape may fall under this category is undisputed, however it should be noted that for this to be the case, the rape must be shown to have had specified effect beyond the pain and suffering of the victim, which may present problems of proof.

In relation to the fifth express category of the constituent acts of genocide, that is the transfer of children to another group, the *Akayesu* Judgment comments mainly upon the meaning of the term 'group'. However, it could be inferred from the findings of the preceding category that, if a woman from a patri-

41. *Id.*, at 186.
42. Aydin v. Turkey, Judgment of 25 September 1997, 25 EHRR 251, para. 83.
43. Akayesu Judgment, *supra* note 1, para. 506.
44. *Id.*
45. *Id.*, para. 507.
46. *Id.*, para. 508.

lineal society is raped by a man from outside her group, becomes pregnant and bears the child, that child could then belong to the group to which the man belongs. Thus, this could constitute a transfer of children of one group to another.

Finally, if the aforementioned categories of acts are to constitute genocide they must be directed at an individual or individuals because they are member of a specific group, thus reflecting the fact that:

> the victim of the act is [...] a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.[47]

The final matter to be considered in the context of this paper is the issue of the intent to commit genocide. On this question the *Akayesu* Judgment, found that:

> [o]n the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.[48]

Thus, intent may inferred from the circumstances and patterns in which genocidal acts are committed. This is ultimately a question of fact to be decided of the basis of evidence presented in each case.

4. CONCLUSION

In conclusion, the current state of jurisprudence from the ICTR and the ICTY evidences a difference in approach to the definition of rape. Notwithstanding this difference, it would seem that the broad, albeit more mechanical definition posited in the *Furundžija* Judgment does not differ in its practical application from the conceptual definition born in the *Akayesu* Judgment and followed and applied in the *Čelebići* Judgment. Whether one definition should be preferred over another will only be settled definitively when this issue arises and is settled by the Appeals Chamber of the international criminal tribunals. Ultimately, both

47. *Id.*, para. 521
48. *Id.*, para. 523.

approaches succeed in providing a method that allows for a comprehensive characterisation of the crime of rape. Both of the definitions contain two basic elements, that is, penetration of a sexual nature which is against the will of the victim. This is the essence of the offence of rape at international law. On this issue of rape as genocide, the *Akayesu* Judgment, underscored a forceful yet obvious point – rape and sexual violence "constitute genocide in the same way as any other act as long as they were committed with the specific intent."[49] The Trial Chamber forcefully concluded its discussion of the issue of rape as genocide, as will this paper, thus:

> [i]n light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole [...] The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them [...] This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi group – destruction of the spirit, of the will to live, and of life itself.[50]

49. *Id.*, para. 731.
50. *Id.*, paras. 731-732.