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## ABSTRACT

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This article identifies and analyses some of the theoretical implications of rape being subsumed within the international crime of genocide and argues that such an analysis is essential for creating a clearer framework to address rape. Genocide is defined as a violation committed against particular groups. In contrast, rape is conceptualised as a violation of an individual's sexual autonomy. As such, can rape understood as a violation of an individual's sexual autonomy be compatible with rape being subsumed within the category of a group violation such as genocide? A key conclusion of this article is that if conceptual space can be created within the crime of genocide to include both the individual and the group, then rape (when categorised as genocide) can operate both as a violation against the group and as a violation against the individual. However, the space allotted to each of the individual and the group can never be equal; the group will always need to occupy the majority of the space, because the central motivation for viewing genocide as a crime is the survival of human groups. When rape is subsumed within genocide, which is conceived, placed and treated as a crime against enumerated groups, its dynamic changes. Rape is no longer simply a violation of an individual. Rape becomes part of a notion developed to protect the group.

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# RAPE CHARACTERISED AS GENOCIDE

Daniela de Vito, Aisha Gill  
and Damien Short

## 1. Introduction

How rape<sup>1</sup> has been conceptualised and treated by various institutions and entities within international human rights and humanitarian law presents both inconsistencies and, in recent times, innovative conclusions. With respect to inconsistency, when rape is mentioned explicitly within the context of international humanitarian law, it tends to be associated with a woman's "honour" and not as a crime of violence<sup>2</sup>. As a result, an emphasis is placed on the protection of women and not on the prohibition of rape. This emphasis on honour and protection obscures the violence and criminality of rape within international law<sup>3</sup>. As long as there is no single authoritative provision for defining rape within regional and United Nations (UN) human rights instruments, it will not be possible to point to an overarching definition of rape that can be utilised within the context of international humanitarian law. However, in 1998, the Trial Chamber for the International Criminal Tribunal for Rwanda (ICTR) included within its Judgement in the case of the Prosecutor v. Jean-Paul Akayesu an attempt to define rape within international law<sup>4</sup>. Highly innovative, since this was the first time that an international criminal tribunal had formulated a definition of rape, this definition has been used as a starting point for subsequent international criminal tribunal reflections on how rape can be categorised. In contrast to how rape has been understood, especially within the parameters of international humanitarian law, there is a series of international crimes such as torture. International crimes have been conceptualised and treated as crimes of violence and in turn their prohibition within international law is considered paramount.<sup>5</sup> Furthermore, beyond rape being subsumed under the categories of such international crime as torture, genocide,

*Notes to this text start on page 49.*

the grave breaches provisions of the Geneva Conventions (1949), or crimes against humanity, rape currently does not stand on its own as an enumerated international crime.<sup>6</sup> Rape is prohibited under international law, but is not designated specifically as an international crime.

As such, this article identifies and analyses some of the theoretical implications of rape being subsumed within the international crime of genocide and argues that such an analysis is essential for creating a clearer framework to address rape. Rape categorised as genocide is a recent occurrence within international law (EBOE-OSUJI, 2007; SHARLACH, 2000). Genocide is defined as a violation committed against particular groups. Is the supposition that rape is defined as a violation of an individual's sexual autonomy compatible with rape being subsumed under the category of a *group* violation, e.g. genocide?<sup>7</sup> In addressing this question, we will take into account the current concept of human rights, with its focus on the individual, and also the fact that the concept of human rights leaves room, albeit limited and at times controversial, for recognition of the group. The article concludes that if conceptual space can be created within the crime of genocide to include both the individual and the group, then rape (when categorised as genocide) can operate both as a violation against the group and as a violation against the individual. However, the space allotted to each of the individual and the group can never be equal; the group will always need to occupy the majority of the space, because the central motivation for viewing genocide as a crime is the survival of human groups. When rape is subsumed within genocide, which is conceived, placed and treated as a crime against enumerated groups, its dynamic changes. Rape is no longer simply a violation of an individual. Rape becomes part of a notion developed to protect the group. Hence, there is a place for both the individual victim of genocide and the individual victim of rape as genocide. However, as with the current concept of human rights, this space is unequal and not always comfortable. Crucially, even with innovative jurisprudence such as the ICTR case<sup>8</sup> and literature on the interplay between the individual and the group within the context of human rights, there is a need to assess this complex relationship between rape, which affects the individual, and rape as genocide, which is placed within the group dynamic.

## 2. Feminist Theory of Rape

The feminist theory of rape has mainly evolved from the radical feminist position that views it as an act motivated by a need to dominate others and has little or nothing to do with sexual desire – the theory that “all rape is an exercise in power” is still accepted by many radical feminist scholars today (BROWNMILLER, 1975, p. 256). In her book *Against Our Will: Men, Women and Rape*, Brownmiller argues that rape is a historically pervasive, yet largely ignored, mechanism of control upheld by patriarchal institutions and social relations that reinforce male dominance and female subjugation. Brownmiller also examines the history and various functions of rape in war, arguing that acts of dominance and subjugation reflect and

reproduce broader patriarchal social and gender arrangements. Her seminal work has provided a framework that anchors feminist socio-cultural, social-psychological and psychoanalytical studies of rape. For instance, socio-cultural feminists have analysed the connections between processes of socialisation and forms of violence against women, drawing the conclusion that rape is a by-product of patriarchal culture and socialisation that predisposes men toward violence, while encouraging them to view women as sexual objects (SORENSEN; WHITE 1992).

The work of radical feminists has unfortunately given rise to what Mardorossian (2002, pp. 743-786) calls the “backlash theoretical approach”, the proponents of which are so-called “conservative” feminists who downplay the severity of rape and endorse arguments about the biological imperative. At the same time, Giles and Hyndman (2004, p. 15) have criticised the radical feminist position that defines rape as an individually executed act which neglects collective rape and ignores the socio-political aims of all forms of sexual violence against women, including rape in war. Researchers have only recently considered the role of power with respect to the phenomenon of rape in war, arguing that it:

1. affirms constructions of women as male property
2. demasculinises conquered male enemies
3. is a form of misogynist male bonding that strengthens the solidarity needed for battle
4. is a component of the military socialisation that preconditions soldiers to dehumanise the enemy
5. is a strategic weapon of war used to carry out ethnic cleansing and genocide (for this point, see GREEN, 2004; THOMAS, 2007; COPELON, 1995).

While this strategic approach is popular amongst social scientists, human rights activists and international organisations working against violence against women, however, the arguments of Brownmiller – and, more recently, Copelon (1995) – continue to be significant in the feminist understanding of rape in war.

### 3. Rape and International Law

Research on the history and theory of rape during armed conflict has established that, despite the prevalence of rape over the centuries, effective legal prohibitions against it have only recently emerged, and that prosecution is still rare. The concept of “rape as a war crime” was first addressed to a significant degree in the early 1990s, after the war in Bosnia, when human-rights violations were reported, including the use of Serb-based concentration camps, ethnic cleansing, and the systematic rape of Muslim women<sup>9</sup>. The international community responded by demanding that the UN Security Council create an *ad hoc* tribunal to prosecute war crimes, on the grounds that unabated atrocities constituted a threat to international peace. The Council adopted Resolution 808/827, which led to the establishment of the

International Criminal Tribunal for the former Yugoslavia, although it did not specify the jurisdiction or criminal Statute of the proposed tribunal (MEZNARIC, 1994). This task was left to the UN Secretary General, who lobbied a number of governments and international human rights organisations to submit proposals for a draft statute, which led to the enabling statute that rape can be a war crime. This created an opportunity for legal scholars to shape the key arguments within international law prohibiting the types of rape that were occurring in Bosnia, which in turn provided the tribunal with the moral and legal justification to prosecute rape as a war crime. The Tribunal also ruled that rape could be constituted as a crime against humanity if found to be committed in a widespread or systematic manner based on political, social or religious grounds and aimed at a civilian population. More importantly, these developments situated the committing of rape during armed conflict firmly within the broader discussions about the moral and ethical obligations to hold individuals and nations accountable for the crimes they commit against humanity, making its definition as a social problem even more pressing (ASKIN, 1997).

In 1998, the Trial Chamber for the International Criminal Tribunal for Rwanda (ICTR) delivered an innovative judgement in the case of the Prosecutor *v. Jean-Paul Akayesu*.<sup>10</sup> Jean-Paul Akayesu was a local official (*bourgemestre*) when the genocide against the Tutsi group in Rwanda began. He was convicted of being a key instigator of the massacres in his area, and was the first person in history to be tried and found guilty by an international court of aiding and abetting acts of rape as a method of genocide. In its judgement, the Trial Chamber argued that women were raped because they were members of the Tutsi ethnic group. Because genocide was deemed by the Trial Chamber to have occurred in Rwanda during 1994, rape in relation to this case constituted genocide.

#### 4. Aspects of Genocide

The formal appearance and definition of genocide, under international law, began with the work of one individual, the Polish lawyer Raphael Lemkin. His efforts and influence, during and after the Second World War, contributed greatly to the emergence of the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948)<sup>11</sup>.

As the Genocide Convention (1948) outlines:

##### *Article II*

*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:*

- (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.*

A number of areas of international law, and even general theoretical traditions, have influenced the deliberation and the creation of a definition of the crime of genocide. Lemkin focussed on the life of the group and, in particular, on national groups.

According to Lemkin (1947, p. 146), genocide could be understood as “[...] the criminal intent to destroy or to cripple permanently a human group. The acts are directed against groups, as such, and individuals are selected for destruction only because they belong to these groups.”

Lemkin makes it clear that genocide involves both groups and individuals (because groups cannot exist without individual members). However, individuals are targeted due to their membership of a particular group. The implications of this for rape categorised as genocide will be explored later.

In 1946, the newly formed UN General Assembly passed resolution (96-I), which stated that “[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings [...]”.

At that juncture, and within the UN, influences from three types of law were being interwoven to produce the concept of genocide: international criminal law (for individual criminal responsibility), human rights law, and humanitarian law (SCHABAS, 2000, p. 5). From international human rights law, a critical connection emerges. The right to life, outlined in the Universal Declaration of Human Rights (UDHR, 1948) and in the International Covenant on Civil and Political Rights (ICCPR, 1966), is a human right accorded to individuals. The right to life is not an absolute right, since under certain circumstances, such as in times of war, it may be suspended. In addition, capital punishment is technically not prohibited under international human rights law; however, its eventual cessation is encouraged by human rights organisations. In contrast to the above, although the right to life is imprinted within the Genocide Convention (1948), it is the right to life of human *groups* that is in fact protected. In particular, it is the right of these human groups to exist (the right to existence) that should be protected (SCHABAS, 2000, p. 6). Furthermore, the prohibition against genocide is pivotal since it is a crime “[...] directed against the entire international community rather than the individual.” However, genocide has also been described by William A. Schabas (2000, p. 14) as “[...] a violent crime against the person.” It is this two-pronged interplay, a violation against the group and a violation against the individual, which makes genocide and rape as genocide, such complex concepts.

In simple terms, “groups consist of individuals” (SCHABAS, 2000, p. 106). The term “group” or “groups” is used in several UN instruments. For instance, the UDHR mentions the family as a “fundamental group unit of society” and that education will “[...] promote understanding, tolerance and friendship among all nations, racial or religious groups” (GHANDHI, 2000, pp. 21-25). In Article 30, the UDHR speaks of “any State, group or person”, which means that a group consists of more than one individual (SCHABAS, 2000, p. 106). Other instruments, such

as the ICCPR and the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD, 1966), speak of “peoples” having the right to self-determination and of “racial or ethnic groups” respectively (GHANDHI, 2000, pp. 56-64). In the ICERD, Article 14 addresses the right of petition for individuals or for groups of individuals who have suffered racial discrimination.

A more formal understanding, within the framework of international law, has been proposed by Lerner (2003, p. 84). Critically, what emerges from his proposal is that groups (which consist of individuals) that are protected under international law possess a permanent unifying factor, such as race or ethnicity. It may be more difficult to place religious groups within Lerner’s understanding of a “group”, because some may argue that religious beliefs can change. The Genocide Convention (1948), including the reference to religious groups, was framed with the notion of focussing on the “permanence” of groups, thereby excluding other groups<sup>12</sup>. However, Lerner’s wording does allow for some flexibility in interpretation since he includes the words “permanent factors that are, as a rule, beyond the control of members.”

Furthermore and crucially for this discussion, but specifically with reference to minority rights “[...] the right extends to “persons belonging to such minorities,” and not the minority as a group” (BOWRING, 1999, pp. 3-4). According to this definition, it is the individual who is the holder of rights, but only insofar as she or he is the member of a minority. To elaborate, this understanding of individuals with rights and as perhaps being part of a minority group, can relate to genocide as follows. The groups outlined in the Genocide Convention (1948), national, ethnic, racial or religious, are not necessarily minorities. Such groups may be in the minority, or may constitute the majority in a State, or may lack power within the State. There are no provisions for minorities within the Convention. Genocide is an international crime that covers actions against national, ethnic, racial or religious groups. Individuals are the particular victims of genocide, as a consequence of their membership of the group in question. The relevance of this to the subsuming of rape within genocide is clear. This may contradict the UN’s vision with reference to this crime. Specifically, in its 1946 Resolution, a distinction was made between the right to life of human groups and of individuals. In turn, Kuper’s (1981, p. 53) work in understanding what constitutes genocide is characteristic of more recent literature that emphasises the group. Kuper argued that genocide “[...] is a crime against a ‘collectivity’, it implies an identifiable group as victim.” However, as will be argued shortly, any understanding of genocide must allow the possibility of examining not only what happens to the group as a whole, but also to individual victims of genocide within the group. This overall conclusion may, or may not, seem to follow the ICTR Judgement in the Jean-Paul Akayesu case. In the Akayesu Judgement<sup>13</sup>, genocide was understood to involve an act (taken from the list of five which are enumerated in the Genocide Convention (1948) that is committed “[...] with the specific intent to destroy, in whole or in part, a particular group targeted as such”.

## 5. Rape and Genocide: Some Theoretical Implications

Rape is one of the most destructive weapons of armed conflict. This is due, in part, to its capacity to demoralise a conquered group. Rape, or the threat of rape, can lead to population displacement, causing people to flee countries to avoid the sexual violence that military invasion can bring. Rape also generates shame and trauma, which can prevent marriages from occurring, bring about divorce, compel women to abandon or kill any children that are the products of rape, divide families (LENTIN, 1997) and destroy the very foundations upon which human culture is based and maintained. Nor are such crimes confined to sexual offences: other forms of violence include feticide if the victim is pregnant, which can also result in death. Askin succinctly states: “while male civilians are killed, female civilians are typically raped, then killed. In torturous interrogation, males are savagely beaten. Females are savagely beaten and raped” (ASKIN, 1997, p. 13).

Rape during war also serves as a form of social control that can suppress efforts to mobilise resistance among a conquered group. In such cases, rape is often committed in front of relatives and family members; the victims are abused, killed, and left on public display as a reminder to others to submit to and comply with invasion policies. It is evident that women are targeted in war because of their gender, because they are part of a particular racial/ethnic group or because they are perceived by the enemy as political conspirators or enemy combatants. Within this context, it is clear that rape in war acts as a vehicle for deep-seated hatreds: racism, classism, and xenophobia are expressed towards the enemy group and actualised through the mass abuse of its women<sup>14</sup>. As Grayzel (1999, p. 245) insightfully observes, in war the female body becomes the symbolic battleground upon which age-old cultural and geopolitical differences are acted out, and where new forms of hatred are implanted that fuel a desire for revenge in the future. The psychological, social, cultural, ethical and medical consequences of rape in war are devastating. Yet rape in war continues without any serious form of redress under international humanitarian law (ASKIN; KOENIG, 1999).

It was only after the devastating violations committed in the former Yugoslavia that effective connections were made between genocide, rape and ethnic cleansing. Brownmiller (1975, p. 49) nevertheless notes that during World War II Germans and Japanese committed rape to achieve the “total humiliation and destruction of inferior peoples and the establishment of their own master race”. The Nazis also employed additional forms of gender and sexual violence, such as medical sterilisation, feticide, and femicide, with the intent to destroy so-called “inferior groups” by controlling or manipulating women’s reproductive abilities. To be sure, given this intent to destroy the group’s social power, the derivative term “femicide” is ultimately defined as the *gender-dimension of genocide* (SHAW, 2006, p. 69). However, rape as a crime, or as a violation of human rights, is conceptualised as an act committed against the *individual*<sup>15</sup>. In contrast, genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (1948) includes a series of acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups” (GHANDI, 2000, p. 19). In other



words, genocide is ultimately a denial of the right to life of certain human *groups*.

The critical focus of genocide, understood as an international crime, is the protection of entire human groups. Often referred to as the most serious of international crimes, genocide is influenced by the “right to live” of individuals. However, it is the “right to existence” of human groups and not of individuals which is the concern. This formulation of genocide *seems* to contrast with the overall current concept of human rights with its emphasis on the individual. The Convention on the Prevention and Punishment of the Crime of Genocide (1948) lists the following groups that could be targeted for genocide – national, ethnical, racial, or religious. Despite this built-in mechanism for the protection of certain human groups within genocide, an interesting interplay does emerge. That is, genocide is most definitely a violation against the group as a whole. Yet, acts of genocide are in turn committed against individuals within these groups. It is individual members of said groups who are killed, are harmed, are raped, etc. It is these individual stories, along with what has happened to the group as a whole, that for instance are told before international criminal tribunals. This interplay, between space for groups and space for the individual within genocide, is what will be taken and assessed from the real life international criminal tribunal cases. In contrast, and as developed from the Enlightenment period with the advent of natural rights and to the post World War II establishment of human rights, certain features of these types of “rights” continue to affect how these are conceived and to a certain degree implemented. One critical feature in how the current concept of human rights has emerged pertains to an emphasis placed on the rights and the importance of the individual. The current concept of human rights is one that reflects an ongoing and, in reality, an imperfect relationship – how the State treats individuals within, and at times without its borders. One aspect that has influenced this rise in the status of the individual has been the political theory of liberalism.

The growing role for the individual and the development of rights attached to the individual, along with an examination of what role the individual should have within the State (or public realm) and even in private matters such as in the family, have been issues taken up by a myriad of thinkers formally or informally associated with liberalism. From Thomas Hobbes’ and John Locke’s works on certain and limited natural rights for the individual to the current United Nations, regional, and national human rights instruments, echoes of liberal influences are evident. The UDHR (1948), emphasises the individual and his/her rights. Articles pertaining to everyone having the right to life, not to be subjected to slavery, to vote, etc. are framed within the needs and the importance of the individual, regardless of – in theory of course – one’s standing or role in the State. However, as with liberal political theory, the current concept of human rights does make limited room for “the group.” Various international human rights instruments recognise the right of peoples to self-determination. It is not the individuals within a group of “peoples” that have this right but in fact the peoples as a whole. Although the machinations of this right are still in the process of being worked through under international law and its application has thus far been limited to situations whereby

peoples have been living in situations of colonialism, this right does demonstrate some accommodation for the group within the current concept of human rights. Furthermore, Article 16 of the UDHR (1948) relates to the family.

Minority rights, which shall be discussed subsequently, travel the schism between rights of the group as a whole and much more frequently (especially within international human rights law) as the rights of individuals within the group. This tension, as found within liberalism and within the current concept of human rights, of determining if the emphasis should solely be on the rights of individuals or if the concept of human rights also has room for the group will form the basis for understanding the implications of when rape is considered on its own (a violation against the individual) and when it is considered as genocide (a violation against the group). It is the proposal of this article that accommodation is indeed possible, albeit limited and imperfect, for rape to be considered as both a crime against the individual and as a crime against the group.

One way to approach the question posed in the introduction is to consider that in some situations it is more beneficial to subsume rape within the international crime of genocide. Genocide is often characterised as the most heinous of all human rights violations<sup>16</sup>. Its long history (pre-1940s and during more recent events such as in Rwanda)<sup>17</sup>, its devastating impact on groups and societies, contribute to this conclusion. It could be argued that the result of subsuming rape under the category of genocide is to elevate rape above other international crimes and human rights violations. It might be that such an approach will be helpful to counter the problematic status that rape has, in that it is absent from much of international human rights law and, as noted above, is distorted within international humanitarian law. In addition, some women who have been raped during genocidal events may deem that an association between rape and genocide is of greater consequence than to focus solely on rape as the violation of an individual's sexual autonomy. It may be that the need to ensure a record of this association, for instance, that Tutsi women were raped because they were part of the Tutsi ethnic group, is more important than treating the violations as acts committed solely against individuals. The shift of definition from sexual crime to genocide helps repair the social bonds that rape, especially public rape, destroys. This definition draws the men and family members who are forced to witness the rapes back together with the women since all are victims. It also removes the stigma of lost honour which affixes to rape in many cultures. Finally, "genocidal rape" helps remove the shame from victims, and focuses the responsibility solely on the perpetrators. One reason why the individual victim of rape and of rape as genocide needs a voice when determining whether or not rape should be associated with genocide rather than solely as a violation against sexual autonomy relates to the harm caused by rape and specifically rape committed in *public*. To borrow a term used in an article on the genocide in Rwanda by Llezlie L. Green, rapes that happen in public result in a "dual harm"<sup>18</sup>. As Christine Chinkin (1994, p. 1-17) argues: "In other words, rape in public not only harms the individual victim but also the family or the wider community who is witness".

For the individual victim of rape in public, the following harms may be

*amplified* – shame, social exclusion, physical and psychological harm<sup>19</sup>. Thus, the individual who is raped in public suffers harms linked to the rape(s)<sup>20</sup>. They are also harmed in that the public aspect of the rapes may exacerbate the expectations placed on women within respective societies and negatively alter how an individual victim/survivor is perceived. As a survivor of rape during the genocide in Rwanda explains: “[...] after rape, you don’t have value in the community”<sup>21</sup>.

By contrast, some have criticised emphasising the importance of placing rape within the crime of genocide, on the grounds that the effect may be to lessen the importance of other types of rape. As Copelon (1995, p. 67) states “[b]y treating genocidal rape differently, one is in effect saying that all these terrible abuses of women can go forward without comparable sanction.” Clare McGlynn (2008, p. 79) has argued that using terms such as “genocidal rape” takes the focus away from victims and emphasises the “[...] status or motivation of the perpetrator.” Although this caveat is an important consideration, depending on the circumstances, it is crucial for rape to be considered as genocide for the sake of the victims and/or to reflect more precisely the context of a particular genocide. In other words, acknowledging that genocide has taken place and that rape was used as one “method” to perpetrate genocide is important not only within the context of international law but also in terms of presenting a more complete understanding of particular events. Linking rape and genocide may not occur every time, but this may be necessary when relevant.

It is critical to examine the dichotomy between individual human rights and the suggestion of group rights. For *if* rape as genocide is conceptualised as a violation against an individual who is part of a group, and not as a violation exclusively committed against the group as a whole and without considering the individual, then the implications of formulating this crime within the accepted understanding of the current concept of human rights must be assessed. This requires a brief overview of the current concept of human rights, with its emphasis on the individual and its acknowledgement of the “group”, and an introduction to the debate of whether human rights are applicable to groups as a whole, rather than solely to individual members of a group. Thus, the next section will address minority and group rights, to bring out a clearer understanding of the challenges that still exist within the current concept of human rights regarding the individual and the group. The purpose will be to understand how the individual and the individual as part of a group is currently conceptualised and treated within the context of international law, and to determine whether compatibility between the individual and the group exists within differently constructed violations such as rape and rape characterised as genocide<sup>22</sup>.

## 6. The Current Concept of Human Rights and the Suggestion of Group Rights

It was not until the rise of Nazism and the Second World War that the current concept of human rights emerged. Before this, during the seventeenth and eighteenth centuries in Western Europe, the notion of natural rights was proposed. Thinkers

such as Thomas Hobbes (MACPHERSON, 1982) and John Locke (LASLETT, 1967) wrote about limited natural rights for individuals, such as the right to self-preservation and the right to life, liberty and property. The idea of rights was later invoked by movements to abolish slavery, support trade unions, and advance minority rights. After the end of World War II, the newly formed United Nations set about articulating the idea of human rights. This process can be found *inter alia* in the UN Charter (1945) and in the UDHR. The current concept of human rights addresses the rights and freedoms of the individual. As Donnelly (1996, p. 12) states, theoretically, human rights exist outside the modern State because they are not conferred upon human beings by the State. Individuals, by the mere fact that they are human beings, already exist with certain rights. It is a separate process that entrenches these rights into law. Yet, the individual can, to varying degrees, also have a place, a role, and duties, and receive benefits within his or her respective community. Indeed, the individual has a role within larger social and political frameworks, such as the community or the State. The current concept of human rights acknowledges the “group” under certain circumstances. Article 16(1) of the UDHR mentions “family”, and in the Preamble to the ICCPR, “peoples” are said to have the right to self-determination (FREEMAN, 2002, p. 75).

International law<sup>23</sup> and liberal theory in general, have had a difficult time in accepting that human rights could apply to groups. Liberal theory has traditionally focused primarily on the relation between the *individual* and the state. From Hobbes and Locke to Rawls (1999), liberal theorists have been concerned with exploring the individual-state relationship and its inherent problems. Arguably, the most crucial premises of liberal thinking are first, that the *individual* is regarded as the most fundamental moral agent, and second, that all individuals are morally *equal*. Individual rights and the rule of the majority are the bedrock of liberal democratic nation-states. Yet, majority rule implies the existence of *subordinate minorities*, which liberal-democratic theory deals with as sets of “outvoted individuals” (FREEMAN, 1995, p. 25). The legitimation of their situation is based on the guarantee of their individual rights, which provide them with the opportunity to become a member of the majority on occasion. On the face of it, this system of majority rule does not obviously lead to a minority problem. However, it is arguable that the creation of modern nation-states has been partly achieved with the mastery and attempted assimilation<sup>24</sup> of native or minority communities that has resulted in the formation of *permanent* minorities whose interests are *persistently* neglected or “*misrecognised*” by the majority (TAYLOR, 1995, p. 225). The state apparatus and the dominant majority may be, in effect, a permanent bar to the recognition of certain minority interests.

Yet, it would be wrong to assert that liberal democracy has favoured individual concerns *over* collective issues, as it has merely granted the individual distinguished normative standing within the collectivity that is the nation state. The explicit irregularity within liberal theory is the collectives that are persistently unrepresented or, as Taylor (1995) puts it, “*misrecognised*” by their liberal-democratic states. To this end, there now appears to be broad agreement among liberal rights theorists

that an individual is likely to suffer if his/her culture or ethnic group is neglected, disparaged, discriminated against or misrecognised by wider society. As Taylor (1995) observes, social recognition is central to an individual's identity and well-being, and misrecognition can seriously damage both.

The case for recognising and protecting a minority via collective or so-called "group" rights stems from the failure of the prevailing liberal doctrine to deal with the problem of persistently disadvantaged individuals as members of a *collective*. In overlooking sources of discrimination like gender or ethnic grouping, the liberal individualism is found wanting. Kymlicka (1997) has argued that for anti-discrimination policies to be effective, they require the appreciation that individuals are often discriminated against by the wider society, not merely as individuals but as members of a cultural group. Moreover, the well being of their members may require that their culture be protected to a certain extent from the wider society, as it may be hostile to the traditional values and practices of their communities.

However, Donnelly (1996, pp. 149-150) insists that while there may be a good case for collective rights, they should not be considered collective human rights. Donnelly's objection to the notion of collective human rights is rooted in an individualistic view of human rights, which he suggests were developed solely to protect individuals. The collective dimension to this viewpoint is that there are some individual human rights that can be exercised collectively. This position reflects the dominant approach within international law (CASALS, 2006, p. 44; Ingram, 2000, p. 242). For example, Article 27 of the ICCPR outlines the rights of individuals as part of a listed minority group(s) – "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities [...]".

This article, however, does not set out rights for the minority group as a whole (BOWRING, 1999, p. 14). Even in a more recent UN initiative, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), the emphasis is on "persons" belonging to such groups (GHANDHI, 2000, p. 132-134). In other words, as currently framed, "[...] minority rights are individual rights" (BOWRING, 1999, p. 14). However, Bowring (1999, p. 16) argues that international human rights law must move beyond this narrow interpretation and that it should recognise group and minority rights as such. Indeed, as Lyons and Mayall (2003, p. 6) suggest, "the question is whether the existing regime can expand to include group rights or whether a new set of obligations needs to be added. One approach is to develop group rights as a branch of human rights. Another possibility is to retain human rights with its focus on the individual as rights bearer (CASALS, 2006, p. 37) but to create alongside it, a new category of group rights that are separate from, but influenced by, the current human rights regime<sup>25</sup>. Perhaps the key to development on these issues is the recognition that there is an individualistic justification for group rights. Indeed, as Kymlicka and Taylor observe, an individual is likely to suffer if his/her culture is persistently disadvantaged or misrecognised. The key contribution that Kymlicka's thesis can offer towards understanding the implications of genocide and of rape as genocide is the connection between the individual and group rights: a theme that

is hinted at within the international legislation on genocide. Kymlicka (1997, p. 34) acknowledges that “group-differentiated rights” may seem counter to efforts to emphasise the individual, in that his theory focuses on the group. Yet, Kymlicka argues that individual rights and group-differentiated rights can be compatible.<sup>26</sup> Addressing both the individual and group elements of the issues, Kymlicka (1997, p. 47) points out:

*Just as certain individual rights flow from each individual’s interest in personal liberty, so certain community rights flow from each community’s interest in self-preservation. These community rights must then be weighed against the rights of the individuals who compose the community.*

Hence, according to Kymlicka (1997), the preservation of the group which is deemed critical can operate alongside the rights and needs of individual members of the community or group. There may be conflict, for example, if groups impose restrictions on their members, but Kymlicka (1997, p. 35) differentiates between *internal* (“claims of a group against its own members”) and *external* (“claims of a group against the larger society”) protections, both of which have limitations, such as falling within human rights or balancing opportunities, between groups. Kymlicka’s theory of minority rights is helpful in clarifying the crime of genocide, which aims at destroying, in whole or in part, a national, ethnical, racial or religious group. In turn, it is individual members of the groups who are the victims of harmful action. The two components of Kymlicka’s vision, the group and the individual within the group, can co-exist within this formulation. This does not exclude the current concept of human rights with its emphasis on the individual and his/her human rights. This part of Kymlicka’s approach, contrary to Donnelly’s fears, does not completely subsume the category of group rights within human rights, thereby negating a place for the individual. Rather, an area of accommodation is created whereby both the group and the individual within the group are protected and in turn acknowledged and can play an active role.

## 7. Rape categorised as Genocide

By incorporating certain elements from Kymlicka’s work, one can bring together the notion of rape as a crime against the individual, and the notion of genocide as a crime against the group.

In the International Criminal Tribunal for the former Yugoslavia Judgement<sup>27</sup>, the Trial Chamber determined that rape could be understood as “a serious violation of sexual autonomy.” In its overview of several common and civil law jurisdictions in relation to definitions of rape, the Trial Chamber concluded that the main principle linking these systems “[...] is that serious violations of sexual autonomy are to be penalised.” In turn, “sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant” (KUNARAC et al, 2001, at 441; MACKINNON, 2006, p. 950). As with the

international crime of torture, this conclusion emphasises that rape should be conceptualised as a crime committed against the individual. As such, rape is an act perpetrated against the individual, and it specifically violates the sexual components of the individual.<sup>28</sup> As Mackinnon (2006) observes within the context of consent definitions of rape, “this crime (rape) basically occurs in individual psychic space”.

One understanding of sexual autonomy has been offered by Schulhofer (1998, p. 111) and consists of three components:

*The first two are mental – an internal capacity to make reasonably mature and rational choices, and an external freedom from impermissible pressures and constraints. The third dimension is equally important. The core concept of the person [...] the bodily integrity of the individual.*

Although this definition of sexual autonomy crucially includes both mental and physical aspects, the mention of making choices is problematic. A similar link can be made with theories of human rights, according to which if individuals are to have human rights, they must have the capacity to claim them.<sup>29</sup> In his examination of sexual autonomy, Schulhofer (1998, p. 104) goes on to add that the determination of whether or not a violation of sexual autonomy constitutes rape can be linked to cultural factors or social conditions.

In contrast, the International Criminal Tribunal for Rwanda in its pivotal Judgement (Prosecutor v. Jean-Paul Akayesu 1998) conceptualises rape under certain circumstances as genocide for the first time in international law. The women who were raped during the genocide of 1994 were, according to the Trial Chamber, targeted for rape because they were members of the Tutsi ethnic group.

The rapes were therefore considered as genocide within this context since, in the words of the Chamber, “[...] the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women [...] and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole”<sup>30</sup>.

The Chamber added, “[t]hese rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities”<sup>31</sup>.

One way in which the rapes contributed to the destruction of the Tutsi group, was that many of the Tutsi women and girls who were raped were killed afterwards or died from their injuries (BANKS, 2005, pp. 9-10). Another critical point regarding how the rapes were categorised as genocide relates to the fact that Tutsi women were considered as “sexual objects” and as the Trial Chamber in the Akayesu case observed “[...] 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” (ASKIN, 1997, p. 1010). The rapes of Tutsi women, within this context, could be placed “[...] under the legal definition of genocide because they represent the enemy’s intent to destroy” (SHARLACH, 2000, p. 93). In addition, when properly categorised as genocide, rape can be understood as a “particularly effective tool of genocide”<sup>32</sup> and a way to inflict serious bodily or mental harm on a group<sup>33</sup>.

Some of the after effects of the rapes that took place within the context of genocide in Rwanda included survivors becoming socially outcast and excluded (SHARLACH, 2000, p. 91). Hence, an additional layer of complexity emerges, linked to cultural opinions and sensitivities. As noted in the introduction, this article has identified and analysed theoretical implications emanating from juridical decisions (Kunarac and Akayesu) which associate rape as a violation committed against the individual and rape within the context of a group crime respectively. As such, it was necessary to incorporate the selected international criminal tribunal judgements not to assert compatibility between the two conceptions of rape but in order to understand what can occur to rape when it is subsumed within an established international crime. It is the theoretical implications of these juridical decisions and not the legal assertions that have influenced this article.

If both cases (Kunarac<sup>34</sup> and Akayesu) are considered together, does the innovative link between rape and genocide as presented in the Akayesu case result in rape losing its status as a violation of autonomy? Upon closer examination of the Akayesu Trial Chamber comments quoted above, it would appear that the judgment in this case allows for compatibility within genocide between the individual and the group. Yes, the Trial Chamber focuses on the fact that individual victims were targeted due to their membership in the Tutsi ethnic group. However, the Trial Chamber also acknowledges that both the Tutsi group and the individual victims of rape were targeted for genocide. Recalling the words of the Chamber: “[...] and specifically contributing to *their* destruction and to the destruction of the *Tutsi group as a whole*.”

Therefore, in this particular case, the crime of rape categorised as genocide is conceived of as both an act committed against an individual (Tutsi women) and an act committed against the group (Tutsi ethnic group). As such, rape characterised as genocide has retained its status as a violation against an individual’s autonomy, but also as a violation against the group as a whole.

Using this particular Judgement by the ICTR Trial Chamber as an example, it is our assertion that an area of accommodation can exist whereby the group (Tutsi ethnic group) and the individual (individual Tutsi) are acknowledged with the aim of hopefully protecting both in the future. However, although the judgment in this case projects the group and the individual as compatible with respect to genocide, it should be emphasised that the Trial Chamber insisted that the women who were raped were victims because they were Tutsi. The attachment to the group is not completely removed, despite the fact that the Chamber has also acknowledged space for the individual. This approach may further deny the “individuality”<sup>35</sup> of the victims since they have been placed by the Trial Chamber within the category of Tutsi women and not within the general category of “women”. It could be argued that the notion of “women” also denies the individuality of victims because it could be considered as another group category. As we have argued, the accommodation created for the individual within the group centred international crime of genocide is not perfect and can be uncomfortable. The construct of the Genocide Convention (1948), which the ICTR Trial Chamber must follow, would explain the restriction of focusing only on the Tutsi ethnic group.



Legal scholars therefore regard Akayesu as monumental for four reasons: (i) it provided a clear and progressive definition of rape where none had existed before in instruments of international law; (ii) it was the first case that involved prosecution of rape as a component of genocide; (iii) it contributed to a growing dialogue about sexual violence in war and discourse about its role in preventing future abuses of women in conflict zones; and (iv) most importantly, it moved certain instances of rape toward inclusion within a category of crimes (genocide, torture, war crimes, crimes against humanity) that have *jus cogens* status and are prosecutable on the basis of universal jurisdiction. In short, crimes that have reached *jus cogens status* “do not need a nexus of war and do not require ratification of a treaty” for prosecution (ASKIN, 1997, p. 106).

## 8. Conclusion

This article has determined that recent innovative international jurisprudence decisions in relation to rape have important theoretical implications for how rape is conceptualised and treated within international law. The article focused on one such case (Prosecutor v. Jean-Paul Akayesu, 1998), whereby rape (conventionally understood as a violation committed against an individual) was subsumed within the established international crime of genocide. In this article, we have identified and addressed the potential problems and inconsistencies that arise when an act traditionally defined as a violation of individual rights, is redefined as a crime against a group. These implications are both theoretical and practical, insofar as conceptualising rape as a sexual violation of an individual woman, or as a crime of war (e.g. an instrument of “ethnic cleansing”), or as genocide has substantial effects both on how the crime is experienced by its victims and on how its perpetrators are punished. The paper clearly presented that when rape is subsumed into the group crime of genocide, its dynamic changes since rape no longer functions solely as a violation committed against the individual. We have argued that the view of rape as a violation of an individual’s sexual autonomy (Prosecutor v. Kunarac et al. 2001), and of rape as a crime of genocide may exist within the same parameters. As with the concept of human rights, given its origins in individualistic liberal political theory, the relationship between the individual and the group is problematic – often unequal and uncomfortable - but ultimately not incompatible.

## REFERENCES

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- ASKIN, Kelly Dawn. **War Crimes Against Women: Prosecution in International War Crimes Tribunals**. The Hague: Martinus Nijhoff, 1997.
- ; KOENIG, Doreen. **Women and International Human Rights Law: A Reference Guide**. London: Transnational Publishers, 1999.
- ARCHARD, David. The Wrong of Rape. *The Philosophical Quarterly*, v. 57, n. 228, p. 374-393, 2007.
- BANKS, Angela M. **Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes**. The Hague: Women's Initiatives for Gender Justice, 2005.
- BROWNMILLER, Susan. **Against Our Will: Men, Women and Rape**. London: Penguin, 1975.
- BOWRING, Bill; FOTTRELL, Dredre (ed.). **Minority and Group Rights in the New Millennium**. The Hague: Martinus Nijhoff Publishers, 1999.
- CARD, Claudia. **The Atrocity Paradigm: A Theory of Evil**. Oxford: Oxford University Press, 2002.
- CASALS, Neus Torbisco. **Group Rights as Human Rights**. UK: Springer, 2006.
- COHEN, Roger. Ethnic Cleansing. In: Gutmand, R.; Rieff, D. (ed.). **Crimes of War: What the Public Should Know**. United Nations Final Report, 1999.
- COPELON, Rhonda. Women and War Crimes. *St. John's Law Review*, v. 69, p. 61-68, 1995.
- . Surfacing Gender: Reengraving the Crimes against Women in Humanitarian Law. In: Dombrowski, N. (ed.). **Women and War in the Twentieth Century**. New York and London: Garland Publishing, 1999.
- DONNELLY, Jack. **Human Rights in Theory and Practice**. London: Cornell University Press, 1996.
- . International Human Rights in the 21st Century. In: Lyons, Gene M.; Mayall, James (ed.). **Protecting the Rights of Groups**. Oxford: Rowman & Littlefield Publishers, 2003.
- EBOE-OSUJI, Chile. Rape as Genocide: Some Questions Arising. *Journal of Genocide Research*, v. 9, n. 2, p. 251-273, 2007.
- FABRI, Mary R.; PSY, D. **A Clinical Perspective of the Role of Gender in the Torture Experience**. Chicago Torture Conference, mar. 4-7 1999. Available at: <<http://humanities.uchicago.edu/cis/torture/abstracts/maryfabri.html>>. Last access on: 31 Mar. 1999).
- FEIN, Helen. Genocide and gender: the uses of women and group destiny. *Journal of Genocide Research*, v. 1, n. 1, pp. 43-63, 1999.

- FREEMAN, Michael. Are There Collective Human Rights?. *Political Studies*, v. 43, n. 1, 1995.
- . **Human Rights: An Interdisciplinary Approach**. Cambridge: Polity, 2002.
- . **Blackstone's International Human Rights Documents**. 2 ed. London: Blackstone Press Limited, 2000.
- GILES, Wenona; HYNDMAN, Jennifer. **Sites of Violence: Gender and Conflicts Zones**, Berkeley: University of California Press, 2004.
- GRAYZEL, Susan. **Women's Identities at War: Gender, Motherhood and Politics in Britain and France during First World War**. Chapel Hill: University of Carolina Press, 1999.
- GREEN, Jennifer. Uncovering Collective Rape: A Comparative Study of Political Sexual Violence. *International Journal of Sociology*, v. 34, pp. 97-116, 2004.
- GREEN, Llezlie L. Sexual Violence and Genocide Against Tutsi Women. *Columbia Human Rights Law Review*, [n.v.], p. 733-776, Summer 2002. [Section 2. Effects of Sexual Violence].
- HUMAN RIGHTS WATCH. **Foca Confronts its Past**. Available at: <<http://hrw.org/english/docs/2004/10/15/bosher9514.htm>>. Accessed on: 18 apr. 2007.
- HOBBS, Thomas. **Leviathan**. London: Penguin Classics, 1982. [Introduced by CB Macpherson].
- INGRAM, David. **Group Rights: Reconciling Equality and Difference**. KS: University Press of Kansas, 2000.
- INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA [ICTR]. **Prosecutor v. Jean-Paul Akayesu**. Case No. ICTR-96-4-T. 2 sep. 1998.
- INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA [ICTY]. **Prosecutor v. Dragoljub Kunarac (et al)**. IT-96-23-T & IT-96-23/1-T. Judgement. 22 feb. 2001.
- International Covenant on Civil and Political Rights [ICCPR]**. 1966.
- International Convention for the Elimination of All Forms of Racial Discrimination**. New York, 21 dec. 1965.
- JACKSON-PREECE, Jennifer. International Human Rights in the 21st Century. In: Lyons, Gene M.; Mayall, James (ed.). **Protecting the Rights of Groups**. Oxford: Rowman & Littlefield Publishers, 2003.
- JONES, Adam. Gendercide and genocide. *Journal of Genocide Research*, v. 2, i. 2, pp. 185-211, 2000.
- KUO, Peggy. Prosecuting Crimes of Sexual Violence in an International Tribunal. *JIL*, v. 34, p. 305, 2002.
- KUPER, Leo. **Genocide**. London: Penguin Books, 1981.

- KYMLICKA, Will. **Multicultural Citizenship: A Liberal Theory of Minority Rights**. Oxford: Clarendon Press, 1997.
- LEMKIN, Raphael. **Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposals for Redress**. Washington, D.C.: Carnegie Endowment for International Peace, 1944.
- . Genocide as a Crime Under International Law. *American Journal of International Law*, v. 44, pp. 145-151, 1947.
- LENTIN, Ronit (ed.). **Gender and Catastrophe**. London: Zed Books, 1997.
- LERNER, Natan. **The UN Convention on the Elimination of all Forms of Racial Discrimination**. Boston: Kluwer Law International, 2003.
- LOCKE, John. **Two Treatises on Government**. Cambridge: Cambridge University Press, 1967. [edited by Peter Laslett]
- LYONS, Gene M.; MAYALL, James (ed.). **International Human Rights in the 21st Century: Protecting the Rights of Groups**. Oxford: Rowman & Littlefield Publishers, 2003.
- MACKINNON, Catherine A. Defining Rape Internationally: A Comment on Akayesu. *Columbia Journal of Transnational Law*, v. 44, pp. 940-958, 2006.
- MARDORISSIAN, Carine. Toward a New Feminist Theory of Rape. *Signs*, v. 27, i. 3, pp. 743-786, 2002.
- MEZMARIC, Silva. Gender as an Ethno-Marker: Rape, War, and Identity Politics in the Former Yugoslavia. In: MOGHADAM, Valentine M. (ed.). **Identity Politics and Women: Cultural Reassertions and Feminisms in International Perspective**. Boulder, CO: Westview Press, 1994.
- MCGLYNN, Clare. Rape as “Torture”? Catherine MacKinnon and Questions of Feminist Strategy. *Feminist Legal Studies*, v. 16, p. 71-85, 2008.
- MUKAMAN, Donatilla; COLLINS, Anthony. Rape Survivors of the Rwandan Genocide. *Critical Psychology*, v. 17, pp. 140-164, 2006.
- RATNER, Steven R.; ABRAMS, Jason S. **Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy**. 2 ed. Oxford: Oxford University Press, 2006.
- RAWLS, John. **A Theory of Justice**, Revised Edition. UK: Belknap Press, 1999.
- ROBERTS, Adam; GUELF, Richard. **Documents on the Laws of War**. 3 ed. Oxford: Oxford University Press, 2000.
- SCHABAS, William A. **Genocide in International Law**. Cambridge: Cambridge University Press, 2000.
- SCHULHOFER, Stephen J. **Unwanted Sex: The Culture of Intimidation and the failure of Law**. London: Harvard University Press, 1998.

- SHARLACH, Lisa. Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda. *New Political Science*, v. 22, n. 1, pp. 89-102, 2000.
- SHAW, Martin. *What is Genocide?* Cambridge: Polity, 2006.
- SORENSEN, Susan; White, Jacquelyn. Adult Sexual Assault: Overview of Research. *Journal of Social Issues*, v. 48, n. 1, pp. 1-8, 1992.
- TAYLOR, Charles. *Philosophical Arguments*. Cambridge Massachusetts: Harvard University Press, 1995.
- THOMAS, Katie. Sexual Violence: Weapon of War. *Forced Migration Review*, n. 27, pp. 15-17, jan. 2007.
- UNITED NATIONS [UN]. *Fifth Report on State Responsibility* by Mr. G. Arangjio-Ruiz, Special Rapporteur' Yearbook of the International Law Commission II (1). A/CN.4/453 and Add. 1-3.
- . *Charter of the United Nations*. San Francisco, 26 June 1945.
- . *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949.
- . *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*. Geneva, 12 August 1949.
- . *Convention (III) relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949.
- . *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949.
- . *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. 1984.
- . *Convention on the Prevention and Punishment of the Crime of Genocide*. 1948.
- . General Assembly. *Resolution 96(I)*. 11 dec. 1946.
- . Security Council. *Resolution 808* (1993).
- . ————. *Resolution 827* (1993).
- . *Universal Declaration of Human Rights [UDHR]*. 10 dec. 1948.

## NOTES

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1. Since this article is grounded within recent developments in international human rights and humanitarian law in relation to rape, the author acknowledges earlier definitions and a cultural perspective found in national definitions of rape, but does not address these extensively. For more on these issues, such as the emphasis on either consent or coercion, please refer to: Catherine A. Mackinnon (2006, p. 940-958).
2. Copelon has argued that where rape is mentioned in the Geneva Convention (1949) it is conceptualised as an "attack against honour", rather than depicted as a crime of violence. She argues that this is problematic, because it marginalises the seriousness as well the violent nature of rape under international humanitarian law. She urges that rape should be viewed as a form of torture, in order to remove the ambiguity that is the legacy of sexism (COPELON, 1999, p. 337).
3. For instance, *Article 24* from the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War states: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." (ROBERTS; GUELFF, 2000, p. 310). See also, Vetlesen (2005, p. 212-213).
4. Prosecutor v. Jean-Paul Akayesu (1998) provided a clear and progressive definition of rape where none had existed before in instruments of international law. The case also established that rape could be tried as a component of genocide if committed with the intent to destroy a targeted group. In its findings, the Trial Chamber defined rape as "[...] a physical invasion of a sexual nature, committed on a person under circumstances which are coercive". The Chamber also stated: "[...] 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. This approach is more useful in international law." (ICTR, Prosecutor v. Jean-Paul Akayesu, 1998, 138).
5. See Articles 1, 2, 4 and 5 from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984). See also P.R. Ghandhi (2000, p. 109).
6. This point is crucial since, for instance, rape must be attached to an established international crime if it is to be prosecuted under the Statutes of current international criminal tribunals (ICTY and ICTR) and the recently established International Criminal Court.
7. The Trial Chamber from the International Criminal Tribunal for the former Yugoslavia (ICTY) argued that rape constitutes a violation of an individual's sexual autonomy. More on this subsequently (ICTY, Prosecutor v. Dragoljub Kunarac, 2001, 208).
8. ICTR, Prosecutor v. Jean-Paul Akayesu, 1998.
9. Foca (South Eastern Bosnia and Herzegovina, now renamed Srebrenica), was the site of one of the most heinous crimes against civilians; the women were subjected to a brutal regime of gang rape, torture and enslavement by Bosnian Serb soldiers, policemen and members of paramilitary groups after the takeover of the city in April 1992 (HUMAN RIGHTS WATCH, 2002).
10. ICTR, Prosecutor v. Jean-Paul Akayesu 1998, p. 165-166.
11. Raphael Lemkin's seminal work where the term "genocide" appears is (1944).
12. There was, and continues to be, concern with the Genocide Convention's limited enumeration of groups that can be targeted. The exclusion of "political" groups is one such example. There have also been calls to consider the category of "female" as a group that can suffer genocide. For more on these issues, please see Lisa Sharlach (2000).
13. ICTR, Prosecutor v. Jean-Paul Akayesu 1998, 731.
14. The punitive aspects of rape during war can also be interpreted as an attempt to demasculinise defending soldiers and ultimately subjugate "the enemy".
15. In a rape-case trial, it is the prosecutor who faces the defendant. It is also the individual victim's story that is considered. Furthermore, and if appropriate, it is the individual victim who testifies before the court.
16. For instance, the opening sections of the Convention on Prevention and Punishment of Genocide (1948) reads: "that at all periods of history genocide has inflicted great losses on humanity; and that, in order to liberate mankind from such an odious scourge, international co-operation is required:" (GHANDI, 2000, p. 19).
17. The notion of genocide, within this article, has not been confined solely to the Twentieth Century.
18. Green uses this term "dual harm" in connection to "physical mutilation and violence". (GREEN, 2002, p. 733-776). This list of harms also relates to rape that does not take place in public or during times of armed conflict. It is the possibility of an amplification of harm, due to rapes occurring in public, which may develop. In relation to rape and harm, see also Archard (2007, p. 374-393), Fein (1999, p. 43-63) and Jones (2000, p. 185-211).

19. This list is taken from Green (2002). See also Mary R. Fabri (1999).
20. For instance, during the genocide in Rwanda many women were gang raped (GREEN, 2002).
21. As the stories of other survivors demonstrates: "Fatuma thought that because of the rape the respect from the members of her community was lost. The participants emphasised the fact that their public rape was the ultimate act of humiliation. Furaha reported: 'The chief militia who caught me said that everyone who wanted to see how sexually sweet Tutsi women are, could have a taste.'" (Mukamana; Collins, 2006, p. 150).
22. The aim of this section is not to outline or to resolve all the various positions within human rights discourse related to "who is the bearer of rights – the individual; the individual as a member of a group; or the group as a whole?" The position adopted in this article is that human rights are individual rights but that the group, based on factors such as race, ethnicity, and gender, also plays an important role.
23. As Jack Donnelly, in reference to minority rights, observes: "I am not, let me repeat, challenging the idea of minority rights as they are already established in the major international human rights instruments (i.e. as individual rights that provide special protections to members of minority groups)." (DONNELLY, 2003, p. 37).
24. "Assimilation" is a term used to describe the process by which an outsider, immigrant, or subordinate group (e.g. the Australian Aborigines) becomes indistinguishably integrated into the dominant host or settler society.
25. This possibility has been articulated in relation to certain minority groups (JACKSON-PREECE, 2003, p. 68). In general, the line of inquiry can be understood as attempts to "[...] distinguish between, on the one hand, rights that depend on an individual's belonging to a group or community, and, on the other, individual rights common to all human beings." (CASALS, 2006, p. 57).
26. This part of Kymlicka's argument relates to minority language rights, in that a right is attached to an individual member of a group and to the group as a whole. In Canada, as his example follows, the right of to use French in courts is one exercised by individuals. The right may be aimed at the entire francophone group, but it is exercised by individual. Other rights in Canada, such as fishing/hunting rights for indigenous peoples, are accorded to groups (KYMICKA, 1997, p. 45-46). Kymlicka (1997, p. 46) also insists that French Canadians are a national minority, thereby ensuring they can be accorded group-differentiated rights. Although language and cultural rights are not directly linked to rape and to rape as genocide, it is the essence of Kymlicka's thesis which attempts to bridge the individual and group schism that is relevant for this article.
27. ICTY. Prosecutor v. Dragoljub Kunarac (et al), 2001.
28. As Catherine A. Mackinnon (2006, p. 941) states: "Force abrogates autonomy just as denial of self-determination is coercive."
29. For more on this topic, please see Peter Jones (1994, p. 67-71).
30. ICTR, Prosecutor v. Jean-Paul Akayesu, 1998, p. 165-166.  
It should be noted that, in the Akayesu Judgement, rape and other sexual violence within the parameters of genocide was "[...] defined by whatever causes serious bodily or mental harm." This is because of the way in which the Genocide Convention (1948) has been formulated. Catherine A. Mackinnon, p. 941.
31. ICTR, Prosecutor v. Jean-Paul Akayesu, 1998, 731.
32. This reference relates to "The devastation that follows rape makes it a particularly effective tool of genocide because it destroys the morale of a woman, her family, and perhaps her entire community." (SHARLACH, 2000, p. 91).
33. ICTR, Prosecutor v. Jean-Paul Akayesu, 1998, 731.
34. Prosecutors were according to Kuo (2002, p. 5) "ready to come out and say rape on its own can be a war crime [...] even a single act of rape could be a crime against humanity if it occurred in the context of widespread or systematic attack". As a result, Foca became the first Tribunal case that dealt solely with war crimes of a sexual nature (KUO, 2002, p. 305).
35. The inspiration for the term "individuality", in conjunction with genocide, comes from Leo Kuper's phrase: "As a crime against a collectivity, it (genocide) sets aside the whole question of individual responsibility; it is a denial of." (KUPER, 1981, p. 86).

## RESUMO

O presente artigo identifica e analisa algumas das implicações teóricas ao tipificar o estupro como crime internacional de genocídio, bem como sustenta que tal análise seja essencial para a criação de marcos mais claros para tratar da questão do estupro. Genocídio é definido como violação perpetrada contra grupos específicos. Em contrapartida, o estupro é conceitualizado como um crime contra a autonomia sexual de um indivíduo. Sendo assim, a definição do estupro como uma violação à liberdade sexual individual seria incompatível com a definição deste como uma violação contra todo um grupo, à semelhança do genocídio? A principal conclusão a que se chega neste artigo é que, se for possível estabelecer uma concepção abrangente de genocídio – capaz de englobar tanto a esfera individual, quanto coletiva - o estupro (quando tipificado como genocídio) pode ser compreendido como violação cometida tanto contra o indivíduo, quanto contra o grupo. Entretanto, estas duas esferas – individual e coletiva – nunca poderão ocupar o mesmo patamar, uma vez que a proteção de grupos humanos constitui a própria fundamentação da criminalização do genocídio. Ao relacionar o estupro à idéia de genocídio, concebido, situado e tratado como crime contra inúmeros grupos, seu cerne muda. Neste sentido, estupro não poderá mais ser compreendido como simples violação a um indivíduo – antes, torna-se parte de uma concepção desenvolvida para a proteção do grupo.

## PALAVRAS-CHAVE

Estupro – Genocídio – Violação contra grupos específicos – Autonomia sexual do indivíduo.

## RESUMEN

Este artículo identifica y analiza algunas de las implicancias teóricas de subsumir el delito de violación en el crimen de genocidio y sostiene que este análisis es esencial para la creación de un marco más claro a fin de hacer frente a tal delito. El genocidio se define como una violación cometida en contra de determinados grupos. En cambio, el delito de violación es concebido como un atentado contra la autonomía sexual de una persona. Como tal, ¿puede el delito de violación, entendido como un ataque a la autonomía sexual de un individuo, ser compatible con el delito de violación subsumido dentro de la categoría de violaciones de derechos que afectan a un grupo como el genocidio? Una conclusión clave de este artículo es que si, dentro del espacio conceptual puede considerarse al delito de genocidio incluyendo tanto al individuo como al grupo, entonces, el delito de violación (tipificado como genocidio), puede funcionar tanto como una violación contra el grupo y como una contra el individuo. Sin embargo, el espacio asignado al individuo y al grupo nunca puede ser igual. El grupo siempre necesita ocupar la mayoría del espacio ya que la motivación central para considerar al genocidio como un crimen es la supervivencia de los grupos humanos. Cuando el delito de violación es subsumido en el de genocidio, el cual está concebido como un crimen contra determinados grupos, su dinámica cambia. El delito de violación ya no es simplemente la afectación a una persona sino que deviene como parte de un concepto desarrollado para proteger al grupo.

## PALABRAS CLAVE

Violación – Genocidio – Violación Colectiva – Autonomía Sexual del Individuo.