

Licit War Trophies As A Means Of Preserving Art and Culture in Times of War

By Kevin H. Govern

Abstract

In the conduct of military operations throughout history, soldiers serving overseas have returned home with souvenirs and relics to remember their tours. Many war-related items on display in museums were brought over by individual service members.

As international humanitarian law has developed norms towards this practice, State practice established the rule that “parties to conflict may seize military equipment belonging to an adverse party as war booty as a norm of customary international law applicable in international armed conflicts.”¹

Different operations and areas of responsibility will have different rules on prohibited activity regarding souvenirs. Aside from U.S. legal restrictions, there may be domestic ministry / department of defense, command, and combined or joint task force regulations and orders proscribing certain activities and allowing others.²

This paper will examine these issues and more with respect to the history of prescriptions and proscriptions on objects that may be seized in occupied territory during time of war, even though technically they may not be captured or found on the battlefield.³ Prohibitions of sexual assault and rape during war, during combat, in rape camps, and forced prostitution and sexual slavery as some of the most insidious forms of asymmetric warfare. Through a combination of circumstances, especially arising as a result of the collapse of effective governance and policing mechanisms within some contemporary ailed or failing states, rape as an act of terror has been allowed to thrive in certain situations. Most recently, non-state actors in failed or failing states such as the Eastern Democratic Republic of Congo and in ISIS-dominated territories of the Middle East have employed rape as a form of sexual terrorism, to include ISIS promulgating a theology of rape, to including issuing a rape handbook, to torture and destroy the Yazidi Kurdish people of Iraq.

To date, the response of the international community to these acts of terror has been rather haphazard, and domestic prosecution becoming increasingly ineffective or unlikely. However, there are other options open to both individual States and the international community. As both a normative as well as descriptive example of applying *lex lata* while developing *lex ferenda*, I will cite how the International Criminal Tribunal for Rwanda (ICTR) accepted that acts of sexual violence can be qualified as acts of genocide, and that the International Criminal Tribunal for the Former Yugoslavia (ICTY) has become the first forum to issue rulings with respect to rape as a form of ethnic cleansing. Still, there is no permanent tribunal to deal with genocide regardless of geographic boundaries. The movement towards creating an International Piracy Tribunal to deal with that other *jus cogens* challenge could be a model alternative to expanding

¹ International Committee of the Red Cross, Customary IHL, Rules, Chapter 16, Rule 49, 2017 < https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter16_rule49>

² Kevin Govern, USASOC Deputy SJA interview quotes in Randy Randolph, War Trophies Can Be Illegal – And Dangerous, Army News Service, Oct. 18, 2002 < <https://www.veteransadvantage.com/va/vetnews/war-trophies-can-be-illegal-and-dangerous>>

³ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land (“Hague Convention IV”), Article 53, 1907

the International Criminal Court's (ICC's) jurisdiction by creating an International Genocide Tribunal.

It is important for soldiers to realize that with few exceptions, taking or retaining individual souvenirs or trophies is prohibited in Afghanistan under Combined Joint Task Force-180 guidelines, Govern said.

"This prohibition does not include the lawful acquisition of souvenirs that can be legally imported into the United States," Govern said.

Soldiers should be careful when bringing personally acquired items back home because that property may have use for military intelligence or study, Govern said.

Private or public property may be seized during exercises or operations only on order of the commander, when based on military necessity, he said.

"Property that has been taken during specific operations should be collected, processed, secured, and stored for later return to the lawful owner," Govern said.

Soldiers are not allowed to bring weapons, munitions, or military articles of equipment back to the United States if those items were not officially issued, Govern said. Shipping weapons outside of the Central Command area as personal property is a punishable Uniform Code of Military Justice offense.

"There is a very narrow waiver of this prohibition," Govern said. "Antique firearms and replicas legally obtained in Afghanistan manufactured in or before 1898 are allowed."

Govern said that service members interested in purchasing an antique firearm and importing it into the United States should obtain a copy of the partial waiver under general order 1A, dated June 25 from their servicing judge advocate.

Staff Sgt. Brett Hutchings, 35th Signal Brigade network controller, followed general order 1A when he purchased an 1856 musketoon rifle in Afghanistan and had it shipped home. The antique weapon was used by the British in their war with Afghanistan in the late 19th century.

"Certain antique weapons are hard to find in this part of the world," Hutchings said. "When I found this one, I followed general order number 1A by contacting the provost marshal to get the proper documentation. I contacted the judge advocate general, filled out a sworn statement, and had the inspector general sign off on it. If I got stopped on the way back with this weapon, I knew I had documentation to let other people know I met the requirements."

"Whatever reason someone is bringing something back, all they have to do is follow the rules

to the letter," Hutchings said. "Don't try to interpret the rules yourself. Follow the regulations as they're set up and nobody should have a problem."

Danger May Be Lurking

Fayetteville's Airborne and Special Operations Museum Historian, Dr. John Duvall, said that although current regulations regarding what soldiers may bring back are very strict, it hasn't always been as difficult for individual soldiers to bring war trophies home.

"During World War II and Vietnam, soldiers could bring semi-automatic weapons back. We've received a number of weapons from individuals, including explosives," Duvall said.

Duvall encourages current and retired soldiers to bring weapons to museums. He said that explosive items and old rifles sitting in storage can be very dangerous.

"Any weapon from any war should be turned in or disposed of properly," Duvall said. "We all like a souvenir to show our involvement in a conflict, but what better place to turn these items in than a museum? Having something associated with the battles our soldiers fought is important, it helps tell the story of what these soldiers did. These things really should be brought back through the proper channels."

Govern stressed that anyone violating Central Command or general order 1A guidelines will be punished under the UCMJ.

Soldiers with questions regarding what can be brought back to the United States from their individual areas of responsibility should contact a servicing judge advocate, military police customs office or the post office.

This paper will examine these issues and more with respect to the history of prohibitions of sexual assault and rape during war, during combat, in rape camps, and forced prostitution and sexual slavery as some of the most insidious forms of asymmetric warfare. Through a combination of circumstances, especially arising as a result of the collapse of effective governance and policing mechanisms within some contemporary ailed or failing states, rape as an act of terror has been allowed to thrive in certain situations. Most recently, non-state actors in failed or failing states such as the Eastern Democratic Republic of Congo and in ISIS-dominated territories of the Middle East have employed rape as a form of sexual terrorism, to include ISIS promulgating a theology of rape, to including issuing a rape handbook, to torture and destroy the Yazidi Kurdish people of Iraq.

To date, the response of the international community to these acts of terror has been rather haphazard, and domestic prosecution becoming increasingly ineffective or unlikely. However, there are other options open to both individual States and the international As both a normative as well as descriptive example of applying *lex lata* while developing *lex ferenda*, I will cite how the International Criminal Tribunal for Rwanda (ICTR) accepted that acts of sexual

violence can be qualified as acts of genocide, and that the International Criminal Tribunal for the Former Yugoslavia (ICTY) has become the first forum to issue rulings with respect to rape as a form of ethnic cleansing. Still, there is no permanent tribunal to deal with genocide regardless of geographic boundaries. The movement towards creating an International Piracy Tribunal to deal with that other *jus cogens* challenge could be a model alternative to expanding the International Criminal Court's (ICC's) jurisdiction by creating an International Genocide Tribunal.

Executive Summary

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."

-Parker v. Levy (1974)⁴

Rape and Sexual Assault Throughout The Ages In Conflict

All warfare since the inception of civilized communities have involved rules which limit the violence inflicted upon the enemy; when combatants differ in culture, each side will observe its own set of rules.⁵ As Thomas Abler has reflected, the failure of some practices of war to cross cultural boundaries allows each side to classify enemy behavior as barbaric.⁶ In the pre-modern era of the Roman Empire, Cicero's *De officiis* (*On Moral Duties*) urged soldiers to observe rules that separated "men" from "brutes," and that the rights of war must be strictly observed.⁷ Nevertheless, where certain persons were considered "property" (e.g., slaves, women, captives), rape was considered property crime committed against the man who owned the person raped.⁸ Ancient Greeks considered women "legitimate booty, useful as wives, concubines, slave labor, or battle-camp trophy."⁹ In Medieval Europe, chivalric rules forbidding rape did not apply in times of siege, and often applied only to Christians;¹⁰ by contrast Islamic jurisprudence sanctioned execution for rape, regardless of the religion or political convictions of the perpetrator.¹¹

⁴ Parker v. Levy, 4187 U.S. 733, 743 (1974) (citations omitted) (*cited with authority in* Evan J. Wallach, *Pray Fire First Gentlemen of France: Has 21st Century Chivalry Been Subsumed By Humanitarian Law?*, Harvard National Security Journal, Vol. 3, 431, <http://harvardnsj.org/wp-content/uploads/2012/01/Vol-3-Wallach.pdf>).

⁵ Thomas S. Abler, *Scalping, Torture, Cannibalism and Rape: An Ethnohistorical Analysis of Conflicting Cultural Values in War*, *Anthropologica*, Vol. 34, No. 1 (1992), at 3, http://www.jstor.org/stable/25605630?seq=1#page_scan_tab_contents.

⁶ *Id.*, at 3.

⁷ See, e.g., Cicero, *De officiis*. (Walter Miller, transl. Loeb Classical Edition; Latin/English parallel text). Harvard University Press, 1913, <https://archive.org/details/deofficiiswithen00ciceuoft>.

⁸ Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (1997), at 28.

⁹ *Id.*, at 21.

¹⁰ Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (1998), at 56, 59, 72, cited with authority in Abler, *supra* note 2, at 450.

¹¹ Khaled Abou El Fadl, *Commentary: Terrorism is at Odds With Islamic Tradition*, LA Times, August 22, 2001, <http://articles.latimes.com/2001/aug/22/local/me-36804>.

Modern European jurisprudence regarding conflict in warfare drew inspiration from the Roman times with respect to *rapere* (pillage), but went further under Grotius to espouse that acts of rape “do not contribute to safety or to punishment, and should consequently not go unpunished in war any more than in peace,” at least among the “better [nations]” since the time of Roman and Greek conquest onward.¹² Vattel took the concept further with respect to non-combatant status of men and women and their immunity from the ravages of war.¹³ By the 18th Century, the Prussian-American Treaty of Amity and Commerce provided that “... all women & children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fishermen unarmed and inhabiting unfortified towns, villages or places, & in general all others whose occupations are for the common subsistence & benefit of mankind, shall be allowed to continue their respective employments, & shall not be molested in their persons...by the armed force of the enemy” in time of war.¹⁴ Perhaps the first modern code of warfare to prohibit rape in conflict was the Lieber Code of 1863, wherein “all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense [such that a] soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.”¹⁵

In more modern times, “[w]hile common Article 3 of the Geneva Conventions does not explicitly mention rape or other forms of sexual violence, it prohibits “violence to life and person” including cruel treatment and torture and “outrages upon personal dignity.”¹⁶ Additional Protocols I and II provide as fundamental guarantees for persons *hors de combat* and civilians the prohibition of “outrages upon personal dignity;” in particular, Article 75 of Additional Protocol I specifies that this prohibition covers in particular “humiliating and degrading treatment, enforced prostitution and any form of indecent assault”, while Article 4 of Additional Protocol II specifies “rape” within such prohibitions. The Fourth Geneva Convention and Additional Protocol I require protection for women and children against rape, enforced prostitution or any other form of indecent assault.¹⁷

The International Committee of the Red Cross (ICRC) has digested other customary IHL regarding rape, stating that:

Rape, enforced prostitution and any form of indecent assault are war crimes under the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for

¹² Hugo Grotius, Book 3, Chapter 4, *The Law of War and Peace* (1625), at XIX, <http://lonang.com/library/reference/grotius-law-war-and-peace/gro-304/>

¹³ Askin, *supra* note 5, at 30-31.

¹⁴ Article 23, *Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America*; September 10, 1785, http://avalon.law.yale.edu/18th_century/prus1785.asp

¹⁵ Lieber Code, Article 44 (1863), http://avalon.law.yale.edu/19th_century/lieber.asp, *cited with authority in* Rule 93, *Rape and Other Forms of Sexual Violence, Customary IHL*, International Committee of the Red Cross (2016), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93#Fn_56_1.

¹⁶ Customary IHL, *id.*

¹⁷ Additional Protocol I, Article 75(21), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470?OpenDocument>, and Additional Protocol II, Article 4(2), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument>, *cited with authority in* Customary IHL, *id.*

Sierra Leone. The expressions “outrages upon personal dignity” and “any form of indecent assault” refer to any form of sexual violence. Under the Statute of the International Criminal Court, “committing rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilization, or any other form of sexual violence” also constituting a grave breach of the Geneva Conventions or also constituting a serious violation of common Article 3 of the Geneva Conventions constitutes a war crime in international and non-international armed conflicts respectively. Furthermore, “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” constitutes a crime against humanity under the Statute of the International Criminal Court and “rape” constitutes a crime against humanity under the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda.¹⁸

Rape and forced prostitution as a military campaign objective from 1937 onward when the Japanese Imperial Army marched into Nanking, China, with estimates of 20-80,000 women gang raped by Japanese soldiers.¹⁹ Later in the 20th Century, state-backed Pakistani troops employed rape as a “very strategic attack” by state-backed Pakistani troops to weaken the integrity of the opposing ethnic group during the fight for Bangladesh's independence in 1971.²⁰

A report by Medecins Sans Frontieres says it first came across rape as a weapon in the Yugoslav Civil War in Bosnia during the 1990, with “systematic rape was used as part of the strategy of ethnic cleansing.”²¹ In Amnesty International’s *Lives Blown Apart*, the 21st Century ongoing conflicts in Colombia, Iraq, Sudan, Chechnya, Nepal and Afghanistan tragically include the use of rape, and the mutilation and killing women and girls in order to impose “punitive codes of conduct on entire towns and villages”, to strengthen control.²² Amnesty International also claimed the pro-government Janjaweed militias in Sudan's Darfur region of using mass rape in order to punish, humiliate and control non-Arab groups.²³

Contemporary Non-State Actors and Sexual Terrorism: Eastern Democratic Republic of Congo and Islamic State – Dominated Territories

¹⁸ *Id.* For an excellent examination of the notion of certain overriding principles of international law existing to form “a *bod of jus cogens*,” See I. Brownlie, *Principles of Public International Law* (5th Edition, 1998), at 515 et seq. Specific to genocide as a *ius cogens* norm, see, e.g., Manuel J. Ventura, *The Prevention of Genocide as a Jus Cogens Norm? A Formula for Lawful Humanitarian Intervention* (August 1, 2014). Charles C. Jalloh and Olufemi Elias (eds), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (Boston/Leiden, Martinus Nijhoff Publishers, 2015), pp. 289-351, <https://ssrn.com/abstract=2496009>.

¹⁹ See, e.g., Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (1997).

²⁰ Laura Smith-Spark, *How did rape become a weapon of war?*, BBC.co.uk, December 8, 2004, <http://news.bbc.co.uk/2/hi/4078677.stm>.

²¹ Medecins Sans Frontieres, *Rape as a weapon of war*, 5 march 2004, <http://www.msf.org/article/rape-weapon-war>, cited with authority in Spark, *id.*

²² Amnesty International, *Lives blown apart – Crimes against women in times of conflict* (2004), cited with authority in Spark, *id.*

²³ Amnesty International, *Annual Report – South Sudan 2015/2016* (2016), <https://www.amnesty.org/en/countries/africa/south-sudan/report-south-sudan/>

While most nations have criminalized rape and sexual assault under domestic laws, failing and failed nations engaged in civil war or widespread unrest often have little to no enforcement of such laws, or IHL. In particular, two instances stand out as non-exclusive examples of especially egregious examples of sexual terrorism engaged in by non-state actors over the past twenty years.

The U.S. Agency for International Development (USAID) found that rape and associated violence against civilian women, men, girls and boys were widely engaged in by “virtually all of the armies, militias and gangs implicated in the conflicts, including local bands and police forces” during the multiple regional and civil wars that plagued the eastern provinces of the Democratic Republic of Congo (DRC) from 1991 onward.²⁴ These acts of “random and systematic attacks of sexual terrorism and pillaging” took place notwithstanding concrete improvements in security provided by UN peacekeepers (MONUC) and the presence of humanitarian and development organizations.²⁵

The so-called Islamic State of Iraq and the Levant, *ad-Dawlah al-Islāmiyah fī 'l-‘Irāq wa-sh-Shām*, also known as the Islamic State, ISIL, ISIS, and *Daesh*, is a radical Sunni Islamist militant group that has seized large swaths of territory in eastern Syria and across western and northern Iraq since 2014.²⁶ Rukmini Callimachi has categorized ISIS actions as a “Theology of Rape;” “[c]laiming the Quran’s support, [ISIS] codifies sex slavery in conquered regions of Iraq and Syria and uses the practice as a recruiting tool.”²⁷ In particular, “[t]he systematic rape of women and girls from the Yazidi religious minority has become deeply enmeshed in the organization and the radical theology of [ISIS] in the year since the group announced it was reviving slavery as an institution.”²⁸ As an official pronouncement of this non-governmental terror group, ISIS stated its justification for the enslavement of women, to include rape, such that “[o]ne should remember that enslaving the families of the *kuffar* – the infidels – and taking their women as concubines is a firmly established aspect of the *Shariah*, or Islamic law.”²⁹

Domestic Impunity, International Inadequacy In Prosecution

In addition to the previously discussed IHL prohibiting rape and sexual violence in combat, customary international human rights law (IHRL) proscribes torture, cruel, inhuman and degrading treatment or punishment, even if enforcement is inconsistent at best, or ineffectual at worst.

²⁴ USAID/DCHA Assessment Report – Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo, January 9-16, 2004, http://pdf.usaid.gov/pdf_docs/pnadk346.pdf.

²⁵ *Id.*

²⁶ See, e.g., BBC News, What is ‘Islamic State’?, [bbc.com](http://www.bbc.com/news/world-middle-east-29052144), 2 December 2015, <http://www.bbc.com/news/world-middle-east-29052144>.

²⁷ Rukmini Callimachi, ISIS Enshrines a Theology of Rape, *New York Times*, August 14, 2014, http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?_r=0.

²⁸ *Id.*

²⁹ Salma Abdelaziz, ISIS states its justification for the enslavement of women, [cnn.com](http://www.cnn.com/2014/10/12/world/meast/isis-justification-slavery/index.html), October 13, 2014, <http://www.cnn.com/2014/10/12/world/meast/isis-justification-slavery/index.html>. See also United Nation’s Human Rights Council, “They Came to Destroy’: ISIS Crimes Against the Yazidis.” U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016), http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf.

Both the European Court of Human Rights and the Inter-American Commission on Human Rights have, in their case-law, found instances of rape of detainees to amount to torture.³⁰ The ICRC also cited the following as other examples of IHRL prohibiting sexual violence:

The European Court of Human Rights has also found the strip-searching of a male prisoner in the presence of a female prison officer to be degrading treatment. The Committee on the Elimination of Discrimination Against Women stated in a General Recommendation that discrimination includes gender-based violence. There is also an increasing number of treaties and other international instruments which state that trafficking in women and children for the purpose of prostitution is a criminal offence, as well as an increased recognition of the need to punish all persons responsible for sexual violence. The prohibition of using sexual violence as an official punishment is clear; not only is such a punishment not officially provided for by States, but also any confirmed reports of such an incident have either been denied or the relevant persons prosecuted.³¹

The Path Already Taken – Limited Jurisdiction International Tribunals Adjudicating Genocide

Various tribunals have been established in the 20th and 21st Centuries with geographic boundaries with respect to violations of IHL and IHRL. What follows is a non-exclusive examination of two such tribunals, with special focus on their ground-breaking prosecutions of genocide, to include acts of sexual violence.³²

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, more commonly referred to as the International Criminal Tribunal for the former Yugoslavia or ICTY, is a body of the United Nations established to prosecute serious crimes committed during the Yugoslav Wars, and to try their perpetrators. The tribunal is an ad hoc court which is located in The Hague, Netherlands.³³ It has jurisdiction over four clusters of crimes committed on the territory of the former Yugoslavia since 1991: grave breaches of the

³⁰ See, e.g., European Court of Human Rights, *Aydin v. Turkey*; Inter-American Commission on Human Rights, Case 10.970 (Peru), cited with authority in Customary IHL, *supra* note 12.

³¹ *Id.*

³² For instance, The Extraordinary Chambers in the Courts of Cambodia (ECCC), commonly known as the Cambodia Tribunal or Khmer Rouge Tribunal, is a court established to try the most senior responsible members of the Communist party of Kampuchea (CPK, also known as the Khmer Rouge, for alleged violations of international law and serious crimes perpetrated during the Cambodian genocide. See Extraordinary Chambers in the Courts of Cambodia Website, eccc.gov.kh, 2006-2015, <https://eccc.gov.kh/en>. Rape during the Khmer Rouge domination, and subsequent period of civil war, “is commonly viewed as a rare occurrence which was unrelated to the context of conflict.” See also Gender Based Violence (GBV) under the Khmer Rouge Information Platform, Rape during the Khmer Rouge, accessed October 23, 2016, <http://gbvkr.org/gender-based-violence-under-khmer-rouge/facts-and-figures/rape-during-the-khmer-rouge/>.

³³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), <http://hrlibrary.umn.edu/icty/statute.html>.

Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity.³⁴

For the first time in history, an international tribunal - the International Criminal Tribunal for Rwanda (ICTR) - delivered verdicts against persons responsible for committing genocide stemming from the “100 bloody days from April to July 1994 [when b]etween eight-hundred thousand to one million Tutsi and moderate Hutu were massacred by Hutu extremists – a rate of killing four times greater than that at the height of the Nazi Holocaust.”³⁵ The ICTR was also the first international tribunal to interpret the definition of genocide set forth in the Convention on Genocide. Under the 1948 UN Convention on Genocide, “the intent to destroy, in whole or part, a national, ethnical, racial, or religious group” could include murder, inflicting living conditions designed to eliminate a group, preventing births, or transferring children from one group to another.³⁶ .

In the *Akayesu* case the ICTR for the first time accepted that acts of sexual violence can be qualified as acts of genocide. Akayesu, the mayor of Taba, was convicted of genocide because of “aiding, abetting, ordering, or encouraging, and sometimes witnessing, more than two dozen rapes and other sexual assaults at the bureau communal where, by dint of his authority, he could have prevented them.”³⁷ According to the ICTR, sexual violence can be constitutive of genocide by being acts causing serious bodily and mental harm, by imposing conditions calculated to bring about physical destruction (rape victims are often expelled from the community so that its connectedness is weakened and ultimately destroyed), by preventing births (for instance, sexual mutilation, sterilization and forced birth control, but also through rape because of its physical and psychological consequences) and by forcibly transferring children from one group to another group (such as forced pregnancy through rape).³⁸

In August 2001, Radislav Krstic becomes the first person to be convicted of genocide and sentenced to 46 years imprisonment.³⁹ In its summary of the Sentencing Judgment of Trial Chamber I, read out by Presiding Judge Almiro Rodriguez, the court exhorted to recall how “[t]he witnesses described to the Trial Chamber the prevailing atmosphere of terror, the rapes

³⁴ *Id.*

³⁵ UN Mechanism for International Criminal Tribunals, *The ICTR Remembers – 20th Anniversary of the Rwandan Genocide*, 2014, <http://www.unmict.org/specials/ictr-remembers/index.html?q=ictr-remembers/index.html>.

³⁶ Article 2, Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) of the United Nations General Assembly on 9 December 1948, <http://www.hrweb.org/legal/genocide.html>.

³⁷ ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, September 1998, <https://casebook.icrc.org/casebook/doc/case-study/ictr-akayesu-case-study.htm>.

³⁸ Genocide Watch, *Rape as an Act of Genocide*, 20 April 2012, <http://www.genocidewatch.org/rapeasgenocide.html>, *citing with authority id.*

³⁹ Press Release, UN International Criminal Tribunal for the former Yugoslavia, *Radislav Krstic becomes the First person to be Convicted of Genocide at the ICTY and is Sentenced to 46 years Imprisonment*, 2 August 2001, <http://www.icty.org/en/press/radislav-krstic-becomes-first-person-be-convicted-genocide-icty-and-sentenced-46-years>.

and murders and the mistreatment so pervasive that some of the refugees committed suicide or attempted to do so.”⁴⁰

The Way Ahead – An International Genocide Tribunal Based on An International Piracy Tribunal?

Littoral nations, and those with substantial commerce transiting international waterways, have called for new venues or possibilities for prosecuting piracy and maritime terrorism, including an international tribunal or domestic courts.⁴¹ Even the *de facto* Somali government has been supportive of piracy cases to be handled by an international tribunal, while being critical of the U.S. in particular for exercising jurisdiction over suspected Somali pirates.⁴² One such tribunal which could be a model for genocide prosecutions could be The International Tribunal for the Law of the Sea, an independent judicial body established by the United Nations Convention on the Law of the Sea (UNCLOS), and the tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over any dispute concerning the interpretation of application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.⁴³

Public International Law expert Eugene Kontorovich has noted how:

Britain is pioneering the latter solution. In December 2008, Britain signed a memorandum of understanding with Kenya formalizing the arrangement whereby captured pirates will be turned over for trial, and handed the first group of captured pirates for prosecution. The United States was the first to experiment with this arrangement, rendering a group of pirates to the Kenyan government in a carefully controlled test case in 2006. While those pirates were convicted and the trial went off without major complications, it did not turn into a regular procedure. Great Britain and other patrolling nations are also discussing the possibility of other nearby states hosting piracy prosecutions.⁴⁴

In April of 2010, in informal consultations, Russia sponsored a new Security Council Resolution on Piracy of Somalia, circulating among member states;⁴⁵ the resulting Security Council Resolution 1918, adopted unanimously on April 27, 2010 called on countries to

⁴⁰ *Id.*

⁴¹ See, e.g., Eugene Kontorovich, International Legal Responses to Piracy of the Coast of Somalia, American Society of International Law, February 6, 2009, <https://asil.org/insights/volume/13/issue/2/international-legal-responses-piracy-coast-somalia>

⁴² Somalia Criticizes US for putting pirate on trial, BBC News, May 19, 2010, <http://www.bbc.co.uk/news/10126248>, cited with authority in Kevin H. Govern, National Solutions to An International Scourge: Prosecuting Piracy Domestically As A Viable Alternative to International Tribunals, 19 U. Miami Int'l & Comp. L. Rev. 1 (2011), 32, <http://repository.law.miami.edu/cgi/viewcontent.cgi?article=1007&context=umiclr>.

⁴³ Govern, *id.*, at 30.

⁴⁴ Kontorovich, *supra* note 38.

⁴⁵ Security Council report, Update report No. 3; Somalia; Piracy, 20 April 2010, <http://www.securitycouncilreport.org/update-report/lookup-c-gIKWLeMTIsG-b-5950153.php>

criminalize piracy within their national laws but leaving the door open with respect to a regional tribunal or an international tribunal to that end.⁴⁶

My goal in further researching and writing on this topic will be to analogize the movement towards creating an International Piracy Tribunal to deal with that other *jus cogens*⁴⁷ challenge as becoming a model alternative to expanding the International Criminal Court's (ICC's) jurisdiction by creating an International Genocide Tribunal.

⁴⁶ United Nations Security Council Resolution 1919 (2010), Adopted by the Security Council at its 6301st meeting, on 27 April 2010, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/331/39/PDF/N1033139.pdf?OpenElement>.

⁴⁷ Ventura, *supra* note 15. Of special note with regards to these prosecutions, and exemplary scholarship regarding same, *see, e.g.*, Shayna Rogers, Sexual Violence or Rape as a Constituent Act of Genocide: Lessons from the Ad Hoc Tribunals and a Prescription for the International Criminal Court, 48 Geo. Wash. Int'l L. Rev. 265 (2016), <https://www.law.upenn.edu/live/files/5926-articlepdf>; and see Patricia Sellers, The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation, Guidance Document, Office of the United Nations High Commissioner for Human Rights (October 28, 2009), http://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf.