

# RAPE AND FORCED PREGNANCY AS GENOCIDE BEFORE THE BANGLADESH TRIBUNAL

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## I. INTRODUCTION

Rape as an act of genocide is a recent and controversial topic in international law. When genocide first emerged as an international crime in response to the atrocities committed by the Nazis during World War II, sexual violence was not part of the discourse. In 1948, when the Genocide Convention was established to define and codify the crime of genocide, rape was still viewed as an inevitable byproduct of war<sup>1</sup> rather than a deliberate strategy. It was not until 1998 in the landmark case of the International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*,<sup>2</sup> when rape was successfully prosecuted as an act of genocide. In the wake of *Akayesu*, the international legal community is beginning to recognize genocidal rape as a distinct crime.

During the 1971 Liberation War, in which Bangladesh seceded from Pakistan,<sup>3</sup> it is estimated that between 200,000 and 400,000 women were raped,<sup>4</sup> and thousands became pregnant as a result.<sup>5</sup> Four decades later, Bangladesh's International Criminal Tribunal (the "Tribunal") began to charge individuals for crimes committed during the Liberation war.<sup>6</sup> The Tribunal has yet to establish a prosecutorial plan for sexual crimes, opening up debate

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1. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 85-86 (1975) (stating that the "mass rape of Bangladesh" was not a unique occurrence as other examples of war experienced a comparable frequency of rape).

2. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), available at <http://www.un.org/ict/english/judgements/akayesu.html>. The International Criminal Tribunal for Rwanda (ICTR) was created in the wake of the 1994 civil war between Hutus and Tutsis. *Id.* ¶¶ 112-29. In 1998, the ICTR held Jean Paul Akayesu guilty for committing genocidal rape during the 1994 civil war in Rwanda. *Id.* ¶ 734.

3. See *infra* text accompanying notes 10-15.

4. Lisa Sharlach, *Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda*, 22 *NEW POL. SCI.* 89, 94 (2000).

5. BROWNMILLER, *supra* note 1, at 84.

6. *Bangladesh Charges Four with War Crimes from 1971*, MONSTERS AND CRITICS.COM (July 26, 2010, 1:51 PM), [http://www.monstersandcritics.com/news/southasia/news/article\\_1573290.php/Bangladesh-charges-four-with-war-crimes-from-1971](http://www.monstersandcritics.com/news/southasia/news/article_1573290.php/Bangladesh-charges-four-with-war-crimes-from-1971).

about how to categorize such acts. A strong argument can be made that the rapes committed against Bengali women and girls in 1971 constitute genocide. Though the prosecution of rape as genocide faces various obstacles, those obstacles could be overcome, and the requirements for genocidal rape could be satisfied. Moreover, some sources suggest that there is also a case for the prosecution of “forced pregnancy”<sup>7</sup>—i.e., committing rape with the explicit intent of impregnating the victim and then detaining the pregnant victim until she can no longer obtain an abortion<sup>8</sup>—as genocide in Bangladesh. To date, there has never been a prosecution of genocidal forced pregnancy in international criminal law, although it was recently codified as a crime against humanity in the Rome Statute of the International Criminal Court.<sup>9</sup> Unlike rape, the prosecution of forced pregnancy as genocide is unlikely in Bangladesh: for both theoretical and practical reasons, the Tribunal may not be able to prove that the Pakistani army used forced pregnancy to “destroy” the target group.

This Comment addresses the possibility for the prosecution of rape and forced pregnancy as genocide in Bangladesh. Section II discusses the 1971 Liberation War, in which Bangladesh fought for its independence from Pakistan. This Section describes the sexual violence committed against Bengali women and girls during the Liberation War and the Bengali government’s subsequent response. Section III discusses the theoretical arguments for rape and forced pregnancy as genocide and explains how these acts constitute genocide under the Genocide Convention. Section IV discusses the possibilities for and obstacles to the prosecution of rape as genocide in Bangladesh: establishing genocidal intent, defining rape and sexual violence, and gathering evidence. Finally, Section V addresses the prosecution of forced pregnancy of Bengali women and the various obstacles that may prevent a successful prosecution.

## II. 1971 LIBERATION WAR

After partition from India in the 1940s, the country of Pakistan was divided into two parts: West (now Pakistan) and East (now Bangladesh).<sup>10</sup> Beginning in the 1940s and lasting for three decades, deep-seated tensions existed between the country’s opposing parts.<sup>11</sup> East Pakistan was unhappy with its lack of economic and political power and felt that the West was

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7. See *infra* text accompanying notes 102-04.

8. Jonathan M.H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 MICH. J. RACE & L. 503, 523 (2003) [hereinafter *Sexual Violence as Genocide*].

9. Rome Statute of the International Criminal Court art. 7(1)(g), July 17, 1998, 2187 U.N.T.S. 5, available at [http://untreaty.un.org/cod/icc/statute/english/rome\\_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf) [hereinafter Rome Statute].

10. Suzannah Linton, *Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation*, 21 CRIM. L.F. 191, 192-93 (2010).

11. *Id.*

making a concerted effort to prevent the East from advancing.<sup>12</sup> The East's discontent stemmed from numerous issues, including a lack of East Pakistanis in civil service, military, and government positions, and the West's refusal to adopt Bengali as a national language of Pakistan.<sup>13</sup> On the other side, West Pakistanis looked down upon East Pakistanis ("Bengalis") as religiously and racially inferior and viewed them as suspect for not "sharing the west's perception of the threat from India."<sup>14</sup> Tension between the East and the West escalated, eventually resulting in the 1971 Liberation War.<sup>15</sup>

Bangladesh's liberation from Pakistan came at a great "human and material cost."<sup>16</sup> It is estimated that three million Bengalis died and ten million fled to India during the armed conflict.<sup>17</sup> The amount of sexual violence that occurred is equally jarring: sources approximate that between 200,000 and 400,000 women and girls were raped, allegedly resulting in approximately 25,000 pregnancies.<sup>18</sup> Rape was extremely widespread, victimizing both young and elderly, wealthy and poor.<sup>19</sup> It was suggested that the prevalence of rape and murder targeting women and children indicated that the West Pakistani army was "carrying out a calculated policy of terror amounting to genocide against the whole Bengali population."<sup>20</sup>

The Liberation War's sexual assault victims were greatly ostracized and shunned by their families and communities.<sup>21</sup> Bengali women who endured sexual assault "not only had to cope with their physical injuries and trauma,

12. RICHARD SISSON & LEO E. ROSE, *WAR AND SECESSION: PAKISTAN, INDIA, AND THE CREATION OF BANGLADESH* 8 (1990).

13. *See id.* at 8-9 (discussing examples of East Pakistani discontent, such as failed attempts to devise a constitution, displacement of elected civilian and military Bengali leaders from government who did not have similar views as dominant elite West Pakistanis, and Bengali not being accepted as one of the national languages of Pakistan).

14. *See id.* ("[West Pakistanis] perceived the Bengalis as latter-day Muslim converts and still corrupted by Hindu practices, unlike descendants of the founders of Islam and conquerors like themselves . . .").

15. Linton, *supra* note 10, at 193 (referring to "skirmishes" and "serious attacks" following Sheikh Mujibur's March 7, 1971 speech, which is compared to Abraham Lincoln's Gettysburg address).

16. *Id.* at 194.

17. *Id.*

18. *Id.* at 194; *see also* Sharlach, *supra* note 4, at 94 (stating that Pakistani soldiers raped between 200,000 and 400,000 Bangladeshi women and girls).

19. *See* BROWNMILLER, *supra* note 1, at 82-83 (describing a rape account of a poor Bengali girl and a wealthy widow, and noting the age range of victims from eight to seventy-five).

20. Sharlach, *supra* note 4, at 95 (quoting *The Terrible Blood Bath of Tikka Khan*, *NEWSWEEK*, June 28, 1971, at 43, 44, *reprinted in* *BANGLADESH: GENOCIDE AND THE WORLD PRESS* 155, 158 (FazlulQuaderQuaderi ed., 1972)).

21. *See* Nayanika Mookherjee, *'Remembering to Forget': Public Secrecy and Memory of Sexual Violence in the Bangladesh War of 1971*, 12 *J. ROYAL ANTHROPOLOGICAL INST.* 433, 436 (2006) [hereinafter *Remembering to Forget*] (stating that the government's policy to prevent women from being socially ostracized was unsuccessful).

but [also] with a society hostile to violated women.”<sup>22</sup> The Bengali government attempted to diffuse this negative reaction by publicly referring to the victims as *birangonas*, or “war heroines.”<sup>23</sup> The Prime Minister of Bangladesh called *birangonas* his “daughters” and asked the nation to “welcome them back into the community and the family.”<sup>24</sup> However, his efforts proved futile in the context of traditional Bengali views of sexuality, privacy, and purity.<sup>25</sup> Rather than being venerated as war heroines or sympathized with as victims of extreme acts of sexual violence, *birangonas* were treated with scorn and disrespect.<sup>26</sup> Bengali men refused to marry *birangonas* because of the dishonor that accompanied rape in their culture,<sup>27</sup> and many *birangonas* either killed themselves or fled to West Pakistan.<sup>28</sup>

Though the government attempted to protect victims of sexual violence from shame and dishonor, it made no such attempt to address the roughly twenty-five thousand babies that were born as a result of rape during the war. The Prime Minister publicly stated that these “bastard babies” with Pakistani blood (and without fathers) were not welcome in Bangladesh and created a government policy that forced women to either obtain abortions or give their “war babies” up for adoption in other countries.<sup>29</sup> One explanation for the state’s reaction is that the children were a constant reminder of the attack on Bengali society and cultural purity, and the sexual violence committed against the Bengali women and girls represented a threat to Bengali “nationalist and masculine identity.”<sup>30</sup>

Not only were the victims of rape denied justice for the acts of violence they endured, but also nearly *all* the crimes of the Liberation War were left unaddressed. Though the Bangladesh Collaborators (Special Tribunals) Order 1972 (“1972 Collaborators Act”) was created with the hopes of trying those who “aided and abetted” the Pakistan armed forces, it was wrought with

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22. Sharlach, *supra* note 4, at 95.

23. *Remembering to Forget*, *supra* note 21, at 436; *see also* Bina D’Costa & Sara Hossain, *Redress for Sexual Violence Before the International Crimes Tribunal in Bangladesh: Lessons from History, and Hopes for the Future*, 21 CRIM. L.F. 331, 340-41 (2010) [hereinafter *Redress for Sexual Violence*].

24. BINA D’COSTA, *War Babies: The Question of National Honour*, in THE GENDERED CONSTRUCTION OF NATIONALISM: FROM PARTITION TO CREATION (Australian Nat’l Univ. 2006), available at [http://www.drishtipat.org/1971/docs/warbabies\\_bina.pdf](http://www.drishtipat.org/1971/docs/warbabies_bina.pdf) [hereinafter *War Babies*].

25. *Id.*

26. *Remembering to Forget*, *supra* note 21, at 439 (stating that, upon returning to their villages, rape victims were treated as “sinners who have consequently lost their positions as moral persons”).

27. Sharlach, *supra* note 4, at 95.

28. *Id.*

29. *War Babies*, *supra* note 24, at 3-5; *see also Redress for Sexual Violence*, *supra* note 23, at 344-45 (describing abortion and adoption programs by international organizations and institutions).

30. *War Babies*, *supra* note 24, at 7.

procedural and substantive flaws.<sup>31</sup> Accounts vary, but it appears that the tribunals were largely unsuccessful.<sup>32</sup> In November of 1973, the government declared a general amnesty for those awaiting trial, and President Ziaur Rahman repealed the 1972 Collaborators Act a few years later.<sup>33</sup>

In July of 1973, the Bengali government created the International Crimes (Tribunals) Act (“1973 Act”) to provide for the “detention, prosecution, and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law.”<sup>34</sup> Just as the trials were about to begin, opponents of the liberation movement assassinated Prime Minister Sheikh Mujibur Rahman and his family members.<sup>35</sup> The new regime halted the prosecutions and released all of the prisoners.<sup>36</sup> No mention was made of the prisoners’ status upon release; it remained uncertain whether their crimes were erased or whether they would be charged and prosecuted in the future.<sup>37</sup>

In March 2010, almost forty years after the enactment of the 1973 Act, the Bengali government announced the reestablishment of the war crimes tribunal for the prosecution of crimes committed during the Liberation War.<sup>38</sup>

### III. RAPE AND FORCED PREGNANCY AS GENOCIDE

The Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), which came into force in 1951,<sup>39</sup> is the leading body of international law governing genocide.<sup>40</sup> Its definition of genocide has been adopted in numerous international criminal statutes,<sup>41</sup>

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31. See Linton, *supra* note 10, at 205-06 (describing the long duration of trials and over 30,000 arrests).

32. See *id.* (“It seems that, at that time, the trials were regarded as problematic because of systemic flaws in the justice system, and also the difficulty of substantiating charges against the alleged collaborators.”).

33. *Id.* at 205.

34. International Crimes (Tribunals) Act, Act No. XIX of 1973 (Bangl.), available at [http://bdlaws.minlaw.gov.bd/print\\_sections\\_all.php?id=435](http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435) [hereinafter 1973 Act].

35. Linton, *supra* note 10, at 207.

36. *Id.*

37. *Redress for Sexual Violence*, *supra* note 23, at 336.

38. *Top BNP Leader May Be Arrested for Murder of Hindus in 1971*, IBN LIVE (Sept. 26, 2010, 11:09 PM), <http://ibnlive.in.com/generalnewsfeed/news/top-bnp-leader-may-be-arrested-for-murder-of-hindus-in/356289.html>.

39. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

40. William L. Hurlock, *The International Court of Justice: Effectively Providing a Long Overdue Remedy for Ending State-Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia)*, 12 AM. U. INT’L L. REV. 299, 302 (1997). The Genocide Convention was created immediately following World War II in response to the atrocities committed during World War II. *Id.*

41. See, e.g., Statute of the International Tribunal for Rwanda art. 2, Nov. 8, 1994, available at <http://www.un.org/ictt/statute.html> (citing verbatim the definition of genocide from the Genocide Convention); Updated Statute of the International Criminal Tribunal for

including the 1973 Act.<sup>42</sup> Rape and forced pregnancy are not explicitly listed as genocide under the Genocide Convention, but they may constitute the “destruction of a group,” both in theory and in practice.<sup>43</sup>

### A. The Genocide Convention

The act of genocide has existed throughout history, “ranging from the Armenian genocide to the Holocaust to the killing fields of Cambodia.”<sup>44</sup> The concept of genocide, however, is contemporary.<sup>45</sup> In response to the atrocities committed in World War II and in Armenia, jurist Raphael Lemkin coined the term “genocide” to describe the destruction of a nation or an ethnic group.<sup>46</sup> He defined genocide as both the “mass killings of all members of a nation” and the “coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the group themselves.”<sup>47</sup>

The Genocide Convention was the first major human rights instrument adopted by the United Nations, drafted in response to the atrocities committed by the Nazis during World War II.<sup>48</sup> On December 11, 1946, the General Assembly of the United Nations unanimously adopted Resolution 96(I) on the Crime of Genocide, determining that genocide was a matter of international concern.<sup>49</sup>

Article I of the Genocide Convention states: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.”<sup>50</sup> This Article establishes that genocide can occur with or without the presence of war and commits the parties to the Convention to undertake any action necessary to both prevent and punish the acts.<sup>51</sup> Article I is significant

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the Former Yugoslavia art. 4, Sept. 2009, *available at* [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) (same).

42. 1973 Act, *supra* note 34, art. 3(2)(c). The only difference between the Genocide Convention and the 1973 Act is that the 1973 Act includes “political groups” as one of the enumerated target groups of genocide. *Id.*

43. *See infra* text accompanying notes 53-54 (quoting the Genocide Convention’s definition of genocide and listing the examples of genocide provided in Article II of the Convention).

44. Jeffrey Morton, *International Law Weekend Proceedings: The International Legal Adjudication of the Crime of Genocide*, 7 ILSA J. INT’L & COMP. L. 329, 330-31 (2001).

45. *Id.* at 330.

46. Sherrie L. Russel-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT’L L. 350, 361 (2003).

47. *Id.* (quoting Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT’L L. 327, 336-37 (1995)).

48. *Id.* at 361.

49. MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 405 (2002).

50. Genocide Convention, *supra* note 39.

51. *See* Morton, *supra* note 44, at 337 (analyzing Article I of the Genocide Convention).

in that it reaches into the domestic realm of each state: while genocide committed by a state against its own citizens was considered morally reprehensible before the creation of the Genocide Convention, it was “generally recognized that a state is entitled to treat its own citizens at its discretion and that the manner in which it treats them is not a matter with which international law . . . concerns itself.”<sup>52</sup>

Article II of the Genocide Convention defines “genocide” as an act “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>53</sup> Acts that constitute genocide include:

- (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.<sup>54</sup>

Though rape is not one of Article II’s enumerated acts of genocide,<sup>55</sup> it may theoretically be committed with the intent to “destroy a group”<sup>56</sup> and may constitute each individual act of genocide enumerated in Article II.

### ***B. Rape as Genocide: Theory and Application***

Until recently, rape had never been explicitly linked to genocide. Wartime rape was first recognized in the Fourth Geneva Convention, which provides for civilian protection in time of war,<sup>57</sup> and in Protocols I and II<sup>58</sup> as an attack on a woman’s honor, reflecting the centuries-held belief that rape is merely a byproduct of war.<sup>59</sup> The most modern international criminal law, the Rome Statute of the International Criminal Court, identifies rape and other crimes of sexual assault as crimes against humanity.<sup>60</sup> However, following the conflict in Bosnia and Herzegovina in the early 1990s<sup>61</sup> and the Rwandan genocide in

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52. *Id.* at 338 (quoting LASSA OPPENHEIM & LAUTERPACHT HERSH, INTERNATIONAL LAW: VOLUME I (7th ed. 1948)).

53. Genocide Convention, *supra* note 39, art. II.

54. *Id.*

55. *Id.*

56. *Id.*

57. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

58. Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

59. *See* Healey, *supra* note 47, at 330 (“[R]ape has historically been viewed ‘as a byproduct of war’ rather than as a war crime.”).

60. *See* Rome Statute, *supra* note 9, art. 7(1)(g) (defining a “crime against humanity” as an act that is committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack).

61. In the early 1990s, the Bosnian Serbs assumed control over half the republic and

1994,<sup>62</sup> advocates began arguing that sexual violence may also constitute genocide.<sup>63</sup> Genocide is considered one of the most serious crimes,<sup>64</sup> and advocates maintain that wartime sexual violence violates not only the individual victims, but also the entire ethnicity to which the victims belong.<sup>65</sup> This Section examines the theoretical arguments for rape and forced pregnancy as genocide and the application of Article II of the Genocide Convention to sexual violence.

One of the strongest arguments supporting the proposition that rape and forced pregnancy constitute genocide is that rape and sexual violence are *tools* of genocide. Compared to isolated acts of wartime rape, which may occur at a high frequency but are not part of any specific strategy of war, genocidal rape is systematic and organized<sup>66</sup>—it is rape “under control.”<sup>67</sup> In terms of the requisite intent to “destroy a group,”<sup>68</sup> there are two ways to interpret the ‘rape as a tool of genocide’ theory. One interpretation suggests that the rapes themselves do not necessarily have to be genocidal; as long as the rapes are widespread, systematic, and used in a war of genocide, the specific intent “to destroy a group”<sup>69</sup> is assumed.<sup>70</sup> Another interpretation requires that the rapes themselves be committed with the explicit intent to destroy the target group.<sup>71</sup> Selection of this intent-based standard would have practical consequences for the prosecution of sexual violence as genocide because the latter interpretation requires a higher standard of proof, as discussed in Section IV *infra*.

The rape as a tool of genocide theory fits neatly under Article II of the Genocide Convention, encompassing a number of the enumerated acts.<sup>72</sup> Rape

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carried out a campaign of ethnic cleansing against Muslims and any non-Serbs. *Bosnia-Herzegovina Timeline*, BBC NEWS, [http://news.bbc.co.uk/2/hi/europe/country\\_profiles/1066981.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/1066981.stm) (last updated May 26, 2011).

62. Between April and June of 1994, an estimated 800,000 Rwandans were killed. *Rwanda: How the Genocide Happened*, BBC NEWS, <http://news.bbc.co.uk/2/hi/1288230.stm> (last updated Dec. 18, 2008).

63. See generally Karen Engle, *Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778 (2005) (discussing various viewpoints of the feminist debate over genocidal rape before the International Criminal Tribunal for the Former Yugoslavia).

64. *Sexual Violence as Genocide*, *supra* note 8, at 508.

65. Engle, *supra* note 63, at 785.

66. See Catharine MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 11-12 (1994) (differentiating between the use of rape to degrade opponents during war and genocidal rape committed to maintain political control); Engle, *supra* note 63, at 790 (describing genocidal rape as an organized attempt to destroy a group).

67. MacKinnon, *supra* note 66, at 11.

68. Genocide Convention, *supra* note 39, art. II.

69. *Id.*

70. Engle, *supra* note 63, at 791.

71. *Id.*

72. See Genocide Convention, *supra* note 39, art. II (listing examples of genocide).



may be used as a tool of genocide to cause the physical destruction of the target group, constituting “killing members of the group” under Article II(a), “causing serious . . . bodily harm” under Article II(b), and “inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” under Article II(c).<sup>73</sup>

Rape may be used to cause the physical destruction of a target group in various ways. Rape often precedes or is committed concurrently with murder.<sup>74</sup> For example, accounts of the “Rape of Nanking”—the sexual violence that occurred during the Japanese occupation of China’s capital city during World War II—suggest that it was customary for soldiers to rape a victim and then kill her by forcibly inserting a weapon into her vagina.<sup>75</sup> Rape can also be carried out in a manner that inflicts fatal injuries on the rape victim to ensure that she will die a slow and painful death.<sup>76</sup> During the Rwandan genocide, the Hutu army often murdered rape victims or inflicted what they believed to be mortal wounds on the victims to ensure a slow death.<sup>77</sup> Reports indicate that members of the Hutu army deliberately transmitted human immunodeficiency virus (HIV) to their rape victims as a way to cause pain, suffering, and a certain death for the Tutsi women and girls.<sup>78</sup> Whether rape immediately precedes murder, is used as a way to murder the victim, or is used to inflict fatal injuries on the victim so that she will die later, rape may serve as an effective tool to physically destroy a target group.

Both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have utilized the ‘rape as a tool of genocide’ theory. The ICTR, established in the wake of a 1994 massacre carried out by the Hutus against the Tutsis, was the first to hold that rape constitutes genocide.<sup>79</sup> Jean Paul Akayesu, mayor of a commune where much of the “ethnic cleansing”<sup>80</sup> of the Tutsi people took place,<sup>81</sup> was indicted for genocide in 1996.<sup>82</sup> At trial, numerous witnesses testified that mass rapes occurred under the watch and often under the

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73. *Id.*

74. See Sharlach, *supra* note 4, at 90 (providing general examples of soldiers using rape as a tactic to murder women and girls).

75. BROWNMILLER, *supra* note 1, at 59.

76. Sharlach, *supra* note 4, at 90.

77. *Id.* at 99.

78. *Id.*

79. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 734 (Sept. 2, 1998), available at <http://www.un.org/ict/english/judgements/akayesu.html> (holding that the sexual violence directed at Tutsi women was committed by Akayesu with the specific intent to destroy the Tutsi group).

80. See *supra* text accompanying notes 67-69.

81. See *generally Rwanda: How the Genocide Happened*, *supra* note 62 (stating that most of the 800,000 Rwandans killed between April and June of 1994 were Tutsis).

82. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 1.2.

command of Akayesu and that Tutsi women were specifically targeted as victims of rape.<sup>83</sup> In its holding, the ICTR established that the acts committed against the Tutsis were genocidal, and the Hutus acted with the intent to destroy the Tutsi people.<sup>84</sup> Acts of sexual violence, held the ICTR, constitute genocide “in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.”<sup>85</sup> Rape and sexual violence are *instruments* of genocide, and using sexual violence and rape as a means to inflict mental and physical harm on the victims<sup>86</sup> was an “integral part of the process of destruction” of the Tutsis.<sup>87</sup>

The ICTY has linked sexual violence and genocide in a similar way, finding that sexual violence may constitute one of the tools deployed in a genocidal war.<sup>88</sup> For example, in the 2004 indictment of Milosevic, the former president of the Federal Republic of Yugoslavia, the ICTY stated that sexual violence is only one of the many ways that a perpetrating group may inflict serious bodily and mental harm on its target, effectively causing the destruction of the target group.<sup>89</sup>

Rape can also be a tool of genocide by taking the perspective that women are symbols of honor and vessels of culture, and rape of a group’s women is not just an attack on the individual women, but also an attack on the *entire* culture.<sup>90</sup> Under this theory, rape is used to break down the integrity of a society or a people.<sup>91</sup> This subset of the ‘rape as a tool of genocide’ theory focuses primarily on the psychological effects that rape has on the victim and

83. See *id.* ¶ 732 (“[T]he rapes . . . [were] perpetrated against all Tutsi women and solely against them.”).

84. See Morton, *supra* note 44, at 346 (stating that the Trial Chamber referenced many facts showing the perpetrators’ intention was to cause the “disappearance of the Tutsi people”).

85. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 731. An expert witness testified that the Hutus “had the intention of completely wiping out the Tutsi from Rwanda so that – as they said on certain occasions – their children, later on, should not know what a Tutsi looked like, unless they referred to history books.” Morton, *supra* note 44, at 347.

86. See *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 731-33 (“[R]ape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and even . . . one of the worst ways [to] inflict harm.”).

87. Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 227 (2000) (quoting *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 731).

88. Engle, *supra* note 63, at 801 (discussing various forms of genocide employed in wartime situations).

89. Prosecutor v. Milosevic, Case No. IT-02-54-T, Amended Indictment, ¶ 32(c) (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2002); see also Engle, *supra* note 63, at 801 (discussing relationship between sexual violence and genocide in Milosevic indictment).

90. See Sharlach, *supra* note 4, at 94 (“When a woman’s honor is tarnished through rape, the ethnic group is also dishonored.”).

91. Katie Richey, Note, *Several Steps Sideways: International Legal Developments Concerning War Rape and the Human Rights of Women*, 17 TEX. J. WOMEN & L. 109, 122 (2007).

the group to which she belongs. Under Article II of the Genocide Convention, rape may constitute “causing serious . . . mental harm to members of the group.”<sup>92</sup> Rape victims often suffer shame and an internalized sense of guilt and are prone to psychological disorders such as depression, phobia, suicidal impulses, and severe psychosis.<sup>93</sup> The psychological impact of rape is not limited to the victim herself; violence directed toward a woman of a particular social group is used as a way to “humiliate her community.”<sup>94</sup> Rape may be viewed as a defeat of the community’s men, who were unable to protect the victims,<sup>95</sup> and as a “defiling” of the community as a whole.<sup>96</sup> Rape isolates victims, marking them as “spoiled” and unsuitable for traditional marriage and family life.<sup>97</sup> Rape destroys group solidarity and may have a chilling effect on the normative relations between a man and woman who might choose to procreate.<sup>98</sup>

Whether rape is used to cause physical or psychological destruction of the victim and the group to which she belongs, it may effectively be used as a tool of genocide.

### ***C. Forced Pregnancy as Genocide: Theory and Application***

Another form of sexual violence is forced pregnancy, whereby the perpetrator rapes a victim with the intent to impregnate her and then detains the victim beyond the point at which the pregnancy can be terminated.<sup>99</sup> Forced pregnancy became part of the international discussion after the civil war in Yugoslavia in the early 1990s. Serb and Bosnian-Serb soldiers reportedly raped victims with the intent that they become pregnant; the captors often then detained women to prevent them from obtaining abortions.<sup>100</sup> The Rome Statute of the International Criminal Court was the first to codify the act of forced pregnancy, designating it as a crime against humanity.<sup>101</sup>

To date, no international or domestic court has prosecuted forced

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92. Genocide Convention, *supra* note 39, art. II(b).

93. Adriana Kovalovska, Note & Comment, *Rape of Muslim Women in Wartime Bosnia*, 3 ILSA J. INT’L & COMP. L. 931, 935-36 (1997) (citing Lauren Fletcher et al., *Human Rights Violations Against Women*, 15 WHITTIER L. REV. 319, 321 (1994)).

94. Eileen Meier, *Prosecuting Sexual Violence Crimes During War and Conflict: New Possibilities for Progress*, 10 INT’L LEGAL THEORY 83, 87 (2004).

95. *Id.*

96. Kovalovska, *supra* note 93, at 935.

97. *Sexual Violence as Genocide*, *supra* note 8, at 509.

98. *Id.*

99. *Id.* at 512.

100. Sharlach, *supra* note 4, at 94 (citing *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, ¶¶ 1-109, U.N. Doc. S/1994/674 (May 27, 1994), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/1994/674](http://www.un.org/ga/search/view_doc.asp?symbol=S/1994/674)).

101. See Rome Statute, *supra* note 9, art. 7(1)(g).

pregnancy as genocide. In *Akayesu*, however, the ICTR recognized in dicta that reproductive motives and consequences of sexual violence may satisfy other constituent acts of genocide as provided by the Genocide Convention.<sup>102</sup> The ICTR stated that acts of sexual violence may constitute “measures intended to prevent births within the group” in a number of ways.<sup>103</sup> Though the ICTR’s mention of forced impregnation as genocide was significant, the prosecution for sexual violence as genocide was primarily focused on the physical and psychological harm to the victim, rather than the reproductive consequences of rape.<sup>104</sup>

Like rape, forced pregnancy may be used as a tool by a perpetrating group to cause the destruction of the target group. For instance, forced pregnancy fits neatly under Article II(d) of the Genocide Convention as “imposing measures intended to prevent births within the group.”<sup>105</sup> Though it may appear counterintuitive to argue that an act causing pregnancy could also “prevent births,” this result is possible when the perpetrator and victim are of two distinct groups.<sup>106</sup> First, when women are made forcibly pregnant, they are physically unable to carry babies of men of their own ethnic group—their wombs are literally “occupied.”<sup>107</sup> Second, the crime of forced pregnancy may include the confinement of the victim for a certain period of time to ensure that she carries her pregnancy to term.<sup>108</sup> Removing these important members of the target group (i.e., women of childbearing age) from functioning within their group effectively lowers the target group’s birthrate and constitutes an attempt to “prevent births within the group.”<sup>109</sup> By preventing births within the target group, perpetrators of forced pregnancy are “deliberately inflicting” on the target group conditions of life that will cause the destruction (i.e., weakening by de-population) of the target group. Accordingly, this constitutes genocide.

Forced pregnancy also constitutes a genocidal act to “prevent births” by inflicting such psychological and physical harm on the victims that they no longer have the will, desire, or physical ability to procreate.<sup>110</sup> Victims of forced pregnancy are often so traumatized and psychologically scarred by the rape and the pregnancy that they are “unable to have normal sexual or childbearing experiences with their own people.”<sup>111</sup> Additionally, forced pregnancy may cause the victim such serious bodily harm that she is

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102. Copelon, *supra* note 87, at 227-28.

103. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 507 (Sept. 2, 1998), available at <http://www.un.org/ict/english/judgements/akayesu.html>.

104. Copelon, *supra* note 87, at 228.

105. Genocide Convention, *supra* note 39, art. II(d).

106. *Sexual Violence as Genocide*, *supra* note 8, at 510-11.

107. Sharlach, *supra* note 4, at 93.

108. Engle, *supra* note 63, at 792.

109. *Sexual Violence as Genocide*, *supra* note 8, at 512.

110. *Id.* at 511.

111. Siobhan K. Fisher, Note, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 122 (1996).

physically unable to bear children in the future.<sup>112</sup> For example, girls who are forced to give birth at an early age may not be biologically mature enough to support a healthy pregnancy, or a woman may not be given sufficient medical assistance during childbirth and will suffer physical harm as a result.<sup>113</sup>

Forced pregnancy may also trigger Article II(e) of the Genocide Convention by “forcibly transferring children of the group to another group.”<sup>114</sup> In patrilineal societies, a child’s ethnicity is that of the father’s.<sup>115</sup> A victim made pregnant through rape will bear a child who has the ethnicity of the perpetrator of rape.<sup>116</sup> In order for forced pregnancy to be an effective strategy of ethnic cleansing, there must be a community/societal belief in the “genetic myth of race and ethnicity”<sup>117</sup>—that a child born of wartime rape belongs to the perpetrator’s ethnic group.<sup>118</sup> In Yugoslavia, for example, members of the Serbian army forcibly impregnated Muslim victims with the intent of “diluting” the Muslim population.<sup>119</sup> Children born as a result of the forced impregnation were rejected by the mothers’ ethnic group.<sup>120</sup> Since the children were considered by both Serbs and non-Serbs to carry the fathers’ genealogies, the Serbs essentially used forced pregnancy to transfer their own “children” to the Muslim group, increasing the Serbian population and destroying the Muslim population.<sup>121</sup>

#### IV. THE PROSECUTION OF RAPE AS GENOCIDE IN BANGLADESH

As the Tribunal begins to charge individuals with crimes committed during the Liberation War, it is unclear whether or how violence against women will be addressed.<sup>122</sup> While it is possible for the Tribunal’s prosecution to prove that the Liberation War rapes constitute genocide, there are a number of obstacles. First, the prosecution must establish that the Pakistani army and its collaborators acted with the intent to “destroy” the political opposition.<sup>123</sup> Second, the prosecution must prove that the rapes were genocidal, and the success of doing so is largely dependent on what type of evidentiary standard the Tribunal adopts. Third, the 1973 Act does not

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112. *Id.* at 123.

113. *Id.*

114. Genocide Convention, *supra* note 39, art. II(e).

115. *Sexual Violence as Genocide*, *supra* note 8, at 512-13.

116. *Id.*

117. *Id.* at 513 (indicating that forced pregnancy relies on the fact that the victims, their families, and their communities will accept the genetic myth of race and ethnicity).

118. *Id.* at 513-14.

119. *Id.* at 512.

120. *Sexual Violence as Genocide*, *supra* note 8, at 513.

121. *Id.* at 514.

122. Nilanjana S. Roy, *Bangladesh War’s Toll on Women Still Undiscussed*, N.Y. TIMES, Aug. 24, 2010, available at <http://www.nytimes.com/2010/08/25/world/asia/25iht-letter.html>.

123. See *infra* text accompanying notes 134-137.

provide a definition for rape and other acts of sexual violence; thus, the Tribunal must adopt a definition in order for the crimes to be charged. Finally, the gathering of evidence, direct or testimonial, may be difficult considering the amount of time that has passed since the crimes were committed and the sensitivity to crimes of sexual violence. Though it may prove a difficult undertaking, the prosecution could potentially overcome each of these obstacles and make a successful case for rape as genocide.

### ***A. International Crimes (Tribunals) Act of 1973***

The government of Bangladesh enacted the 1973 Act in order to prosecute crimes against humanity, war crimes, acts of genocide, and other violations of international law.<sup>124</sup> When it was adopted, the 1973 Act was considered progressive and remarkable.<sup>125</sup> Almost forty years later, however, the law is out-of-date and controversial.<sup>126</sup> In 2009, the Bangladesh Law Commission and Human Rights Watch made recommendations for changes to the law in order to meet “basic international standards.”<sup>127</sup> The government of Bangladesh made minor subsequent changes, but left aside the more substantial issues of “pressing concern.”<sup>128</sup> Though there are numerous problems with the 1973 Act as amended, only those relevant to the prosecution of crimes of sexual violence are addressed in this Section.

The personal jurisdiction of the 1973 Act is broad. It provides for the prosecution of anyone who has violated a crime enumerated in the statute, regardless of whether that person was in a position of power during the War. The 1973 Act states that the Tribunal has the power to “try and punish any individual or group of persons, or any member of any armed defence forces or auxiliary forces . . . who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes listed.”<sup>129</sup>

Though subtle, the final line of Article 3(1) is significant in the sense that it attempts to circumvent the problem of *nullum crimen sine lege*—the theory

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124. See *supra* text accompanying note 34.

125. Linton, *supra* note 10, at 208 n.9.

126. *Id.*

127. *Id.* The Human Rights Watch recommends that the Government of Bangladesh make the following changes to the 1973 Act: (1) amend the definitions of crimes to mirror those of the Rome Statute; (2) allow only civilian judges to preside over the Tribunal; (3) provide protections for the rights of the accused; (4) include a mandatory provision for free assistance of an interpreter during proceedings; (5) require protection of victims and witnesses appearing before court; (6) amend the rules of evidence and procedure to be consistent with international legal standards; and (7) abolish the death penalty. *Letter to Prime Minister Sheikh Hasina Re: International Crimes (Tribunals) Act*, HUMAN RIGHTS WATCH (July 8, 2009), available at <http://www.hrw.org/en/news/2009/07/08/letter-prime-minister-sheikh-hasina-re-international-crimes-tribunals-act> [hereinafter HUMAN RIGHTS WATCH].

128. Linton, *supra* note 10, at 210.

129. 1973 Act, *supra* note 34, art. 3(1).

that there is no punishable conduct if that conduct has not been laid down in law.<sup>130</sup> *Nullum crimen sine lege* becomes an issue with post-war tribunals established to prosecute crimes committed during the war because the laws written in the governing statutes were not in place when the crimes were committed. Article 3(1) of the 1973 Act circumvents this theory by allowing for the prosecution of any crime, even if it was committed *before* the 1973 Act was enacted.<sup>131</sup> However, it is now well established in international law that a person may be tried and punished for an act or omission which, “at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”<sup>132</sup> Thus, the acts that were committed in the 1971 Liberation War may be prosecuted through a statute that was created after the war ended if such acts were well established in international criminal law.<sup>133</sup> Whether it relies on the last line of Article 3(1) or not, the Tribunal theoretically may try any person for any crime committed before or after the 1973 Act was enacted.

The 1973 Act generally adopts its definition of genocide from the Genocide Convention. It defines genocide as acts committed “with the intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group.”<sup>134</sup> There are only two differences between the 1973 Act’s genocide provision and the Genocide Convention. First, the 1973 Act includes “political groups” as one of the groups that may be targeted as a strategy of genocide.<sup>135</sup> This was one of the groups deliberately excluded from the realm of the crime of genocide in the Genocide Convention.<sup>136</sup> Among other things, the drafters of the Genocide Convention believed that political groups were lacking “stable, permanent, and clear-cut characteristics” required to be included in the definition of genocide.<sup>137</sup> For whatever reason, the government of Bangladesh included political groups in its definition of genocide, and by doing so, provided a way to prosecute those Bengalis who collaborated with the Pakistani army for acts of genocide.

Second, the 1973 Act fails to include ancillary modes of perpetration of genocide.<sup>138</sup> Though other modes of responsibility for crimes are covered elsewhere in the statute, the failure to include them in the provision for genocide may make it difficult for the Tribunal to prosecute “direct and public

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130. Linton, *supra* note 10, at 209.

131. *Id.*

132. *Id.* at 213.

133. *Id.*

134. 1973 Act, *supra* note 34, art. 3(2)(c).

135. *Id.*

136. BOOT, *supra* note 49, at 405, 426.

137. *Id.*

138. See Genocide Convention, *supra* note 39, art. II (listing the acts of genocide that are punishable: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide).

incitement to commit genocide.”<sup>139</sup>

### ***B. Proving Genocidal Intent***

In order to prove that the rapes committed in 1971 were genocide, the prosecution must show that the Pakistani army and its collaborators acted with the intent to destroy the target group. This requirement can be met because there is sufficient evidence to prove that the Pakistani army carried out a plan of genocide in order to suppress the Bengali political opposition. Genocidal intent also requires that the perpetrators and targets of genocide be of different “groups.” Though the government of Bangladesh only plans to charge Bengali nationals in the upcoming trials, the “different group” requirement may still be met through the inclusion of “political groups” in the 1973 Act’s definition of genocide. Finally, the prosecution must prove that the rapes themselves were genocidal. The probability of success for this task depends on what standard the Tribunal chooses—whether the prosecution is required to prove that the sexual violence was committed with the express intent of destroying the target group, or whether such an intent can be assumed from the greater genocidal intent behind the Pakistani army’s general plan to stifle the political opposition.

#### **1. Providing Evidence of Genocide in 1971**

In order to find that genocide occurred during the Liberation War, the Tribunal must first establish the requisite specific intent—that the perpetrators acted with the intent to destroy, in whole or part, a particular target group.<sup>140</sup> There is much evidence to suggest that the Pakistani Army and its collaborators acted with the intent to destroy the Bengalis in 1971. After the war, in 1972, the International Commission of Jurists issued a report stating that there was strong evidence of international crimes committed during the war, including genocide.<sup>141</sup> Though the Commission refused to acknowledge that the particular acts of genocide were specifically directed against the Bengali people,<sup>142</sup> it did admit that there was a “strong prima facie case” for genocide with respect to the Hindu population.<sup>143</sup> Since 1972, another argument has been made: that the Pakistanis were carrying out a “calculated policy of terror amounting genocide against the whole Bengali population.”<sup>144</sup> Pakistani journalist Anthony Mascarenhas witnessed firsthand

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139. Linton, *supra* note 10, at 244.

140. 1973 Act, *supra* note 34, art. 3(2)(c); Genocide Convention, *supra* note 39, art. II.

141. Linton, *supra* note 10, at 201.

142. Katherine Iliopoulos, *Bangladesh: A Free and Fair War Crimes Tribunal?*, CRIMES OF WAR PROJECT (Aug. 26, 2010), <http://www.crimesofwar.org/commentary/bangladesh-a-free-and-fair-war-crimes-tribunal/>.

143. *Id.*

144. Sharlach, *supra* note 4, at 95 (citations omitted); *see also* Fayazuddin Ahmad, *Justice Delayed Justice Denied*, THE DAILY STAR (Jan. 8, 2011), <http://www.thedailystar.net/law/2011/01/02/index.htm> (discussing the need for justice



the atrocities committed in 1971 and recounts the Pakistani army's "campaign of genocide" in East Bengal in his book *The Rape of Bangladesh*.<sup>145</sup> According to Mascarenhas, the Pakistani army carried out a "cleansing process" of the military regime in order to stifle the Bengali liberation and maintain political control over the region.<sup>146</sup>

Though the Liberation War lasted only nine months, it can be divided into a number of phases, each marked by a different tactic of the Pakistani army.<sup>147</sup> What started out as an effort to "control" the Bengalis turned into a "brutal and premeditated genocidal campaign" led by the Pakistani government.<sup>148</sup> The majority of victims in the 1971 genocide were Bengali.<sup>149</sup> Though the Pakistani elite identified certain groups as their "special enemies"—students and intellectuals, Awami Leaguers<sup>150</sup> and their supporters, and Bengali members of the armed forces and the police—many members of these groups were able to hide, and therefore the majority of the victims were ordinary citizens.<sup>151</sup> Thus, there is sufficient evidence to establish that the Pakistani army and its collaborators adopted a strategy of genocide in order to quell the Bengali political opposition.

## 2. Establishing the "Different Groups" Requirement

The crime of genocide depends on the "groups" with which perpetrators and victims identify.<sup>152</sup> Since the perpetrating group must be acting with the intent to destroy, "in whole or in part," the target group,<sup>153</sup> it follows that the perpetrating group must be of a different identity than the target group.<sup>154</sup> Though both sides committed atrocities the 1971 war, the Pakistani army and

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in Bangladesh, and arguing for the Tribunal to take action).

145. ANTHONY MASCARENHAS, *THE RAPE OF BANGLA DESH* 116 (1971).

146. *Id.* at 117.

147. See generally Rounaq Jahan, *Genocide in Bangladesh*, in *CENTURY OF GENOCIDE: EYEWITNESS ACCOUNTS AND CRITICAL VIEWS* 291 (Samuel Totten & William S. Parsons eds., 1997) (describing the campaign of genocide that the Pakistani army and its collaborators carried out against the Bengali political opposition).

148. *Id.* at 298.

149. *Id.* at 299.

150. The Awami League is a political party in Bangladesh. See *62 Years of Struggle and Achievements*, BANGLADESH AWAMI LEAGUE, [http://www.abd.org/english/index.php?option=com\\_content&view=article&id=180&Itemid=87](http://www.abd.org/english/index.php?option=com_content&view=article&id=180&Itemid=87) (last visited Nov. 25, 2011) (summarizing the Awami League's history from the League's point of view).

151. Jahan, *supra* note 147, at 299.

152. See Alexandra A. Miller, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN ST. L. REV. 349, 360 (2003) (discussing the definition of genocide as applied to the International Criminal Tribunal for Rwanda).

153. Genocide Convention, *supra* note 39, art. II.

154. Miller, *supra* note 152, at 360.

its Bengali collaborators were the primary perpetrators of genocide.<sup>155</sup> The primary targets of genocide were Bengali military-men, Hindus, Awami Leaguers, students, and Bengali intellectuals, such as professors and teachers,<sup>156</sup> but thousands of civilians not part of any aforementioned groups also fell victim to the Pakistani army.<sup>157</sup>

If the Bangladesh Tribunal prosecutes the Pakistanis who committed acts of genocide during the 1971 Liberation War, the “different group” requirement will be satisfied. As with the Hutus and the Tutsis in Rwanda, the Pakistanis and Bengalis considered themselves to be distinct and separate racial groups.<sup>158</sup> In *Akayesu*, the ICTR held that the Genocide Convention was created to protect “an additional group, similar . . . in terms of its stability and permanence.”<sup>159</sup> Tutsis met the definition of “national groups”<sup>160</sup> in that they constituted a “collection of people, who [were] perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”<sup>161</sup> The same line of reasoning can be applied to the Pakistanis and Bengalis. Though both groups are primarily Muslim, the similarity ends there.<sup>162</sup> Pakistanis are physically different from Bengalis, being “taller, lighter-skinned and ‘rawboned,’ compared to the dark, small-boned Bengalis.”<sup>163</sup> The Pakistanis also considered the Bengalis to be racially inferior, a belief that incited the acts of genocide that occurred during the 1971 war.<sup>164</sup> According to the 1973 Act, the Tribunal has the power to try any person “irrespective of his nationality” who commits any of the enumerated crimes in the territory of Bangladesh.<sup>165</sup> If the Tribunal chose to prosecute members of the Pakistani army who committed such crimes, then the “different group” requirement of genocide will be sufficiently met.

However, Shafique Ahmed, the Bangladesh Minister of Law, Justice, and Parliamentary Affairs, stated at the July 30, 2009 Second International Conference on Genocide, Truth, and Justice in Dhaka that only Bengali nationals, and no Pakistanis, would be tried under the 1973 Act.<sup>166</sup> The

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155. Jahan, *supra* note 147, at 299.

156. MASCARENHAS, *supra* note 145, at 116-17; *62 Years of Struggle and Achievements*, *supra* note 150.

157. MASCARENHAS, *supra* note 145, at 118.

158. BROWNMILLER, *supra* note 1, at 80.

159. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 701 (Sept. 2, 1998), available at <http://www.un.org/ict/english/judgements/akayesu.html>; Miller, *supra* note 152, at 360.

160. *Id.* ¶ 512.

161. *Id.*

162. BROWNMILLER, *supra* note 1, at 80.

163. *Id.*

164. Sharlach, *supra* note 4, at 94.

165. 1973 Act, *supra* note 34, art. 3(1).

166. Linton, *supra* note 10, at 228. Based on Linton’s research, it is likely that Bengali freedom fighters, Bengali militias, and Bengali civilians who were either pro- or anti-Pakistan, committed crimes in the Bangladeshi war of independence. *Id.*

Bengali government offered no explanation for its decision, fueling criticism that the trials are “victor’s justice and the tribunal is a vehicle to persecute political opposition.”<sup>167</sup> This creates an obstacle for the Tribunal’s prosecution of genocide: from an ethnic perspective, Bengalis collaborating with the Pakistani army and Bengalis who were targets of genocide are of the same “group.”

This caveat does not, however, bar the Tribunal from prosecuting Bengali collaborators for crimes of genocide.<sup>168</sup> As mentioned, the 1973 Act’s definition of genocide includes acts intended to destroy *political* groups.<sup>169</sup> Though the 1973 Act has been criticized for including political groups as a protected class under the crime of genocide, the provision remains unchanged to date.<sup>170</sup> The addition of “political groups”<sup>171</sup> can, however, be used to the Tribunal’s favor in terms of establishing the “different group”<sup>172</sup> requirement for the prosecution of genocide. Many Bengalis sided with Pakistan during the war, allegedly identified victims for the Pakistani military, and may have assisted in killings.<sup>173</sup> Though the Bengali collaborators are of the same ethnic group as the Bengali victims of the 1971 war, by nature of their siding with the Pakistani army, they are of a different *political* group. The 1971 Liberation War was inherently political: the Pakistani army and its collaborators carried out a plan of genocide in order to halt Bangladesh’s secession from Pakistan.<sup>174</sup> The Tribunal’s intention to only prosecute Bengalis is therefore not a complete bar to the differentiation between perpetrating and target groups—the perpetrating group becomes those Bengalis who collaborated with the Pakistani army, and the target group becomes those Bengali victims who were identified as members of the political opposition.<sup>175</sup> Thus, the

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167. Bhavani Raveendran, *Bangladesh War Crimes Tribunal in the Works*, HUM. RTS. BRIEF (Apr. 20, 2010), <http://hrbrief.org/2010/04/bangladeshwartribunal/>.

168. Iliopoulos, *supra* note 142 (recalling that the International Commission of Jurists reported that genocide could be established where large amounts of Bengalis were indiscriminately massacred).

169. 1973 Act, *supra* note 34, art. 3(2)(c); *see also supra* text accompanying note 123.

170. *See* Iliopoulos, *supra* note 142 (“States that were engaged in the drafting process did not want their own people to be tried for genocide for the very common practice of targeting their political enemies.”).

171. 1973 Act, *supra* note 34, art. 3(2)(c).

172. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 516 (Sept. 2, 1998), available at <http://www.un.org/ictt/english/judgements/akayesu.html>.

173. *See* Linton, *supra* note 10, at 228 (stating that Bengali freedom fighters, Bengali militias, and Bengali civilians who were either pro- or anti-Pakistan, committed crimes in the Bangladeshi war of independence).

174. *See* MASCARENHAS, *supra* note 145, at 117 (“The others were inscribed as targets for the genocide because it was thought that their political ambitions were a direct threat to the integrity of the state.”).

175. *See* Linton, *supra* note 10, at 229 (reasoning that it would be sound prosecutorial strategy to proceed against locals who played a part in the genocide).

“different group”<sup>176</sup> requirement is satisfied.

Another obstacle arises from the government’s plan to prosecute only Bengalis who committed crimes in 1971. Leaders in the Pakistani government and army controlled and commanded the attacks on Bengalis, while the Bengalis who collaborated with the Pakistani army were mainly “foot soldiers and followers.”<sup>177</sup> To focus the Tribunal’s efforts on the prosecution of Bengali collaborators, while leaving the planners, commanders, and leaders of the Pakistani army untouched, “creates a dangerously warped process from the start.”<sup>178</sup>

This obstacle can be overcome in two ways. First, the crime of genocide does not require that the perpetrator be the planner, leader, or commander of a genocidal attack, as was *Akayesu*.<sup>179</sup> Bengalis who collaborated with the Pakistani army could be charged with any of the ancillary acts of genocide listed under Article III of the Genocide Convention: genocide, conspiracy to commit genocide, attempt to commit genocide, and complicity in genocide.<sup>180</sup> Second, the Tribunal’s proceedings against Bengalis could bring light to much evidence of the role of the Pakistani army and political leaders, and, as Linton argues, could produce a call to action from Pakistan’s government.<sup>181</sup> This would be significant if the government of Bangladesh or the government of Pakistan later decides to charge Pakistanis for their participation in the 1971 genocide.

### 3. Proving Genocidal Rape

In order to prove the existence of genocidal rape during the 1971 war, the Tribunal’s prosecution must show that the acts of sexual violence were committed with the specific intent of destroying the Bengalis as a political group.<sup>182</sup> The success of the prosecution depends on what standard the Tribunal uses: whether it requires specific proof that the rapes themselves were committed with the intent to destroy the group or whether it will assume such intent from the existence of an overall strategy of genocide coupled with genocidal consequences of rape.

As the *Akayesu* case represents the only successful prosecution of genocidal rape, it may provide some guidance for interpretation of the intent requirement.<sup>183</sup> In *Akayesu*, the ICTR held that rape and sexual violence

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176. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 516.

177. Linton, *supra* note 10, at 229.

178. *Id.*

179. *See Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 499 (“Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under Article 2(2) of the Statute be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group.”).

180. Genocide Convention, *supra* note 39, art. III.

181. Linton, *supra* note 10, at 229.

182. 1973 Act, *supra* note 34, art. 3(2)(c).

183. *Akayesu*, Case No. ICTR-96-4-T, Judgment.

constitute genocide only when they are committed with the specific intent to destroy, in whole or in part, a particular group.<sup>184</sup> The ICTR established that the Hutus acted with the overall genocidal intent to destroy the Tutsis,<sup>185</sup> and rape victims were chosen specifically because they belonged to the Tutsi group.<sup>186</sup> Rape and sexual violence were used to cause physical and psychological destruction of the Tutsi women and contributed to the destruction of the Tutsi group as a whole.<sup>187</sup> This holding can be interpreted in at least two ways. The first interpretation suggests that the ICTR did not require each act of rape to be carried out with genocidal intent; rather, if the overall intent of the perpetrating group was to commit genocide, then each act carried out by the perpetrating group is assumed to have such a genocidal intent. The second interpretation requires proof that the acts of sexual violence were committed with the intent to destroy the target group.<sup>188</sup> The Tribunal's choice of standard is important in determining what kinds of evidence the prosecution needs to put forward in order to prove genocidal rape. The results-oriented broad interpretation would allow the prosecution to more easily prove that the rapes themselves were genocidal.

#### ***a. Broad Interpretation***

The broad interpretation focuses more on the outcomes of rape and sexual violence. The ICTR emphasizes the fact that the rapes *resulted in* physical and mental destruction of the victims and of the group.<sup>189</sup> Thus, evidence that the acts of rape and sexual violence caused, at least in part, destruction of a group is evidence that the acts were committed with genocidal intent. Under this interpretation, the Tribunal may find that the rapes of the Liberation War were genocidal. As mentioned above, there is much evidence to suggest that the Pakistani army and its collaborators acted with genocidal intent in 1971. Additionally, the acts of sexual violence committed by the perpetrators resulted in genocide, satisfying this broad interpretation of intent.

The acts of sexual violence committed against the Bengali women resulted in both the physical and psychological destruction of the group. Rapes often preceded or accompanied murder: after raping women, perpetrators "often murdered them by forcing a bayonet between their legs."<sup>190</sup> Pre-pubescent girls often died from injuries associated with gang-

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184. *Id.* ¶ 731.

185. *Id.* ¶ 730.

186. *Id.*

187. *Id.* ¶ 731.

188. *See generally* Iliopoulos, *supra* note 142 (noting that Article 2 of the Genocide Convention reflects customary international law and requires that the prohibited acts be committed with the intent to destroy a particular group, in order to constitute genocide).

189. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 731.

190. Sharlach, *supra* note 4, at 95 (citing *The Terrible Blood Bath of Tikka Khan*,

rape and cutting.<sup>191</sup>

Along with the physical consequences, the acts of sexual violence committed against Bengali women and girls had drastic psychological and sociological consequences. The sexual violence caused the disintegration of the family and community structure and resulted in the social isolation of the rape victims.<sup>192</sup> Bangladesh is a traditional Muslim society.<sup>193</sup> At the time of the war in 1971, Bengali women were accustomed to living in *Purdah*—strict, veiled isolation that includes separate, secluded shelter arrangements apart from men, even in their own homes.<sup>194</sup> In this culture, modesty and chastity are closely tied to a woman's status in society and are particularly linked to family honor.<sup>195</sup> After the war, the Bengali women and girls who endured the genocidal rape had to cope “not only with their physical injuries and trauma, but with a society hostile to violated women.”<sup>196</sup> Rape victims were shunned from society; Bengalis often refused to allow wives and daughters back into their families “because of the dishonor associated with having a family member raped,” and many rape victims either committed suicide or fled to West Pakistan “where their shame would be a secret.”<sup>197</sup>

Under the broad interpretation, the prosecution will be able to prove that the rapes were genocidal as there is sufficient evidence to show a strategy of genocide. Hundreds of thousands rapes occurred as a part of the Pakistani army's attack on the Bengali opposition, and the rapes resulted, at least in part, in the destruction of the Bengalis as a group.

### ***b. Narrow Interpretation***

The second interpretation of the *Akayesu* holding is that there must be evidence that the acts of sexual violence were specifically committed with the intent to destroy the group. With the broader interpretation, the existence of a genocidal plan, coupled with rapes that result in destruction of a group, create a presumption for genocidal rape. The narrower interpretation involves a higher evidentiary standard. The prosecution must show that the perpetrators actually intended the rapes themselves to cause the destruction

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NEWSWEEK, June 28, 1971, 43, 44, reprinted in BANGLADESH: GENOCIDE AND THE WORLD PRESS, *supra* note 20, at 155, 158.

191. *Id.*

192. DANIEL JONAH GOLDHAGEN, WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ASSAULT ON HUMANITY 454 (2009) (“A month after Pakistanis had gang-raped one young woman, then a bride, she was in a shelter for rape victims in Dhaka. Her husband had cast her out, her father was ‘ashamed,’ and the people of her village ‘did not want me.’” (quoting BROWNMILLER, *supra* note 1, at 85)).

193. See BROWNMILLER, *supra* note 1, at 80 (“Eighty percent of the raped women were Moslems, reflecting the population of Bangladesh . . .”).

194. *Id.*

195. Sharlach, *supra* note 4, at 95.

196. *Id.*

197. *Id.* (citing Santi Rozario, ‘Disasters’ and Bangladeshi Women, in GENDER & CATASTROPHE 255, 264 (Ronit Lentin ed., 1998)).

of the group, and the result—whether or not the group was actually destroyed—is not necessary for a finding of genocide.

The type of evidence required to show such intent must be very explicit. In *Akayesu*, the ICTR's holding relied in part on evidence of a Hutu genocidal propaganda campaign that presented Tutsi women as sexual objects.<sup>198</sup> Statements made by the perpetrators of rape demonstrated a “sexualized representation of ethnic identity,”<sup>199</sup> and the ICTR found that the Hutus intentionally used rape as a means to destroy the Tutsi group.<sup>200</sup> In the ICTY “Genocide Case,”<sup>201</sup> in which Bosnia and Herzegovina sued the Federal Republic of Yugoslavia for a campaign of genocide against the non-Serb populations of Bosnia and Herzegovina, the court required a similar showing of intent for genocidal rape.<sup>202</sup> The ICTY held that, in order for rapes to constitute genocide, specific intent must be “convincingly shown by reference to particular circumstances.”<sup>203</sup> Rape was part of the “larger context of inflicting harm,”<sup>204</sup> but there was insufficient evidence to show that the rapes were committed explicitly with the intent of destroying the target group.<sup>205</sup> A narrow interpretation of ICTR and ICTY holdings, therefore, requires very specific evidence clearly demonstrating the genocidal intent behind the acts of sexual violence.

In order to carry out a successful prosecution of rape as genocide in Bangladesh, the prosecution would have to present evidence that the Pakistani army and its collaborators raped Bengali women with the express intent that the acts would destroy the Bengalis as a group.<sup>206</sup> Some evidence suggests that the rapes were systematic and organized and were used as a “special weapon of war” by the Pakistan army and its collaborators during the second phase of the liberation struggle.<sup>207</sup> It is alleged that the Pakistani army and its collaborators committed rape with the knowledge that it would break down family structures and weaken Bangladeshi society.<sup>208</sup> Like the Tutsi

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198. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 732 (Sept. 2, 1998), available at <http://www.un.org/ict/english/judgements/akayesu.html>.

199. *Id.*

200. *Id.*

201. Anthony Marino, Note, *Bosnia v. Serbia and the Status of Rape as Genocide Under International Law*, 27 B.U. INT'L L.J. 205, 206-07 (2009).

202. *Id.*

203. *See id.* at 212. (“[T]he Court held that there was insufficient evidence to find the specific intent to destroy the protected group in whole or in part, and thus failed to find that genocide had occurred.”).

204. *Id.* (quoting Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 373 (Sept. 2, 1998), available at <http://www.un.org/ict/english/judgements/akayesu.html>).

205. *Id.* at 213.

206. Marino, *supra* note 201, at 212-14 (noting that both the ICTR and ICTY required evidence of specific intent to prosecute rape as genocide).

207. Jahan, *supra* note 147, at 298.

208. GOLDHAGEN, *supra* note 192, at 454.

women in Rwanda, Bengali women were raped and sexually assaulted because of their identity within a group—they were chosen as victims because they were Bengali.<sup>209</sup> However, it may be difficult for the prosecution to obtain specific evidence that explicitly links the Pakistani army's intent to destroy the political opposition and the thousands of rapes that occurred. The Pakistani government may have exclusive access to such information, and many records were allegedly destroyed after the war.<sup>210</sup> The Tribunal may therefore have to rely on the testimonial evidence of victims and witnesses in order to prove such intent, a task that will not be easily accomplished.<sup>211</sup>

### C. Defining Rape

In order to prosecute the crime of rape, whether as an act of genocide or a crime against humanity, the Tribunal must provide a definition for rape. As it stands now, the 1973 Act does not define rape or sexual violence.<sup>212</sup> The Tribunal could potentially adopt a previously established definition from another international criminal tribunal or statute. The definition of rape and sexual assault established by the ICTR is the most progressive and inclusive definition in international criminal law today and was adopted wholesale by the International Criminal Court.<sup>213</sup> If the Tribunal adopts this definition, then the prosecution could charge individuals with more types of sexual violence than the traditional definition of rape would allow. On the other hand, the Tribunal may choose to adopt the definition of rape codified in the Penal Code of 1860, which is far more restrictive and would limit the types of sexual violence that could be prosecuted before the Tribunal.<sup>214</sup>

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209. See *id.* (explaining that Pakistanis understood the political effect of raping Bengali women).

210. Ahmed Ziauddin, *What Is To Be Done About the Pakistani War Criminals and Collaborators*, LIBERATION WAR MUSEUM, <http://www.banglagallery.com/LWM/what1.html> (last visited Nov. 25, 2011).

211. See *infra* text accompanying notes 197-210.

212. 1973 Act, *supra* note 34, art. 3(2)(c).

213. See INT'L CRIMINAL COURT, ELEMENTS OF CRIMES 8 (2011), available at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> ("1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.").

214. See Linton, *supra* note 10, at 238 ("The definition in the then applicable Penal Code of 1860 reads: 375. A man is said to commit 'rape' who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: Firstly. Against her will. Secondly. Without her consent.



The definition of rape created by the ICTR in *Akayesu* rejects the traditional definition of rape as a “mechanical description of objects and body parts” and redefines rape as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>215</sup> The ICTR’s definition of sexual violence, which encompasses rape, is even broader in the sense that it does not require a showing of physical force at all—it is any act of a sexual nature committed under coercive circumstances.<sup>216</sup> In the *Akayesu* case, this broad definition allowed for non-traditional types of sexual violence—for example, ordering Hutu women to undress, run, and do exercises in front of a crowd—to be prosecuted as rape.<sup>217</sup> Therefore, this broad definition could be used to the Bangladesh Tribunal’s advantage, opening the door for the prosecution of various types of sexual violence.

Alternatively, the Tribunal could adopt the definition of rape from the Penal Code of 1860. The Penal Code of 1860 is the country’s substantive body of law in criminal matters<sup>218</sup> and defines an act of rape as: a man who has sexual intercourse with a woman

1) [a]gainst her will . . . [ 2) w]ithout her consent . . . [ 3) w]ith her consent, when her consent has been obtained by putting her in fear of death or of hurt . . . [ 4) w]ith her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married . . . [ 5) w]ith or without her consent, when she is under fourteen years of age.<sup>219</sup>

If the Tribunal adopts this definition of rape in its prosecution of war criminals, its ability to capture the “totality of the experience” of victims in the 1971 war will be limited.<sup>220</sup> Since the Penal Code only accounts for “sexual intercourse,”<sup>221</sup> the Tribunal is barred from prosecuting criminals for all other

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Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt. Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly. With or without her consent, when she is under fourteen years of age.”)

215. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 597-598 (Sept. 2, 1998), available at <http://www.un.org/ict/english/judgements/akayesu.html>.

216. *Id.* ¶ 598.

217. *Id.* ¶ 732.

218. *People’s Republic of Bangladesh*, WASHINGTON UNIVERSITY MANUAL OF INTERNATIONAL LEGAL CITATION 5, available at <http://law.wustl.edu/wugslr/citationmanual/countries/bangladesh.pdf>.

219. Linton, *supra* note 10, at 238 (citing PENAL CODE OF 1860, § 375 (1860) (Bangl.)).

220. See *Redress for Sexual Violence*, *supra* note 23, at 344 (noting that the prosecutor must be creative and the judiciary open to such creativity).

221. Section 375 of the Penal Code contains a statutory explanation stating, “Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.” PENAL CODE OF 1860, § 375 (1860) (Bangl.). However, the Oxford Dictionary defines sexual intercourse as “sexual contact between individuals involving penetration, especially the insertion of a man’s erect penis into a woman’s vagina, typically culmination in orgasm

types of sexual violence. Acts that do not fall within this definition include things such as public humiliation of a sexual nature, as noted in *Akayesu*,<sup>222</sup> or rape using a weapon or another foreign object.<sup>223</sup>

#### ***D. Providing Victim and Witness Protection***

One of the most significant obstacles to prosecuting rape as genocide in Bangladesh will be gathering evidence. "In post-war Bangladesh, it appears that there was a tendency to conceal, rather than accurately document, the evidence in cases concerning sexual violence."<sup>224</sup> The prosecution will now have to rely on testimonial evidence, which could be difficult to obtain considering the amount of time that has passed and the fact that victims of sexual violence may be reluctant to speak about their experiences. The government of Bangladesh could remedy this problem by providing adequate protection for victims and witnesses throughout the proceedings.

Many rape victims in Bangladesh have denied speaking before the Tribunal, saying "their famil[ies] would be spoiled if they do so."<sup>225</sup> In a culture that values chastity and privacy, the repercussions for speaking out about sexual violence can be immense. Therefore, after the war ended, few rape victims came forward with their experiences.<sup>226</sup> The government attempted to de-stigmatize the victims of sexual violence by naming them "war heroines" in the press.<sup>227</sup> After 1975, however, the issue of rape during the Liberation War disappeared from national discourse.<sup>228</sup> It was not until the 1990s, in a movement called the *Gono Adalat* (People's Tribunal), that the narratives of some rape victims were made public.<sup>229</sup> The names and photographs of three victims who participated in the *Gono Adalat* were published in the national newspaper.<sup>230</sup> Upon returning to their villages, the victims experienced scorn from family and community members.<sup>231</sup> They

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and the ejaculation of semen." *Sexual Intercourse Definition*, OXFORDDICTIONARY.COM, [http://oxforddictionaries.com/view/entry/m\\_en\\_us1289521#m\\_en\\_us1289521](http://oxforddictionaries.com/view/entry/m_en_us1289521#m_en_us1289521) (last visited Nov. 25, 2011).

222. See *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 688.

223. See *supra* text accompanying notes 76-78.

224. *Redress for Sexual Violence*, *supra* note 23, at 344.

225. See *Collecting Evidence Tough Say Investigators*, THE DAILY STAR, Jan. 19, 2011, available at <http://www.thedailystar.net/newDesign/news-details.php?nid=170669> (noting that rape victims do not willingly talk about rape).

226. *Remembering to Forget*, *supra* note 21, at 436 (recounting the experiences of three rape victims who spoke out publicly about the assault and were subsequently shamed by their families and communities).

227. NAYANIKA MOOKHERJEE, *Ethical Issues Concerning Representation of Narratives of Sexual Violence of 1971*, in 'A LOT OF HISTORY': SEXUAL VIOLENCE, PUBLIC MEMORIES AND THE BANGLADESH LIBERATION WAR OF 1971, at 3 (2002), available at [http://www.drishtipat.org/1971/docs/war\\_nayanika.pdf](http://www.drishtipat.org/1971/docs/war_nayanika.pdf).

228. *Id.*

229. *Remembering to Forget*, *supra* note 21, at 436.

230. *Id.* at 433.

231. *Id.*

were chastised for “shaming” themselves and their families by speaking out about the rapes and experienced isolation and loss of sociability.<sup>232</sup> Though almost forty years have passed since the Liberation war, rape victims may fear similar reactions if they come forward with their experiences today.

Contributing to the victims’ reluctance to speak about the rapes, the 1973 Act fails to provide adequate witness protection. This is particularly problematic when gathering testimony from rape victims as they may be particularly sensitive about recounting their traumatic experiences.<sup>233</sup> The only protective provision in the 1973 Act, as amended, is in Section 10(4), under which the Tribunal may take proceedings *in camera*.<sup>234</sup> The International Criminal Court establishes a “complex and demanding” regime for witness protection, which could be used by the Tribunal as a guideline to ensure that witnesses and victims receive proper protection throughout the proceedings.<sup>235</sup> As the Human Rights Watch argues, if the Tribunal wishes to encourage witnesses and victims to testify in proceedings, it will need to ensure their “safety, dignity, privacy, and physical and psychological well-being.”<sup>236</sup>

#### V. THE PROSECUTION OF FORCED PREGNANCY AS GENOCIDE IN BANGLADESH

Some scholars argue that the Tribunal should not focus only on rapes that occurred during the Liberation War, but also on the rapes that resulted in pregnancy as well.<sup>237</sup> As explained in Section III *supra*, forced pregnancy may be used to destroy a target group and can constitute genocide under the Genocide Convention.<sup>238</sup> With forced pregnancy, the perpetrating group forcibly impregnates victims with the intent of diluting the bloodline of the target group and transferring children from the perpetrating group to the target group.<sup>239</sup> In Bangladesh, it is alleged that twenty-five thousand “war babies” were born as a result of the Pakistani army’s intent to forcibly impregnate Bengali women by raping them.<sup>240</sup> Though pregnancy may have been one of the most serious crises of the Liberation War,<sup>241</sup> it cannot be

232. *Id.* at 438.

233. *See* Linton, *supra* note 10, at 304 (describing the process that a victim would have to go through to testify if there were no safeguards in place).

234. *Id.* at 302; 1973 Act, *supra* note 34, art. 10(4) (“[T]he Tribunal may, if it thinks fit, take proceedings in camera.”).

235. Linton, *supra* note 10, at 303.

236. HUMAN RIGHTS WATCH, *supra* note 127, § 7.

237. *See Redress for Sexual Violence*, *supra* note 23, at 343-44 (arguing that sexual violence, including rape, forced impregnation, and forced maternity, could constitute genocide); Sharlach, *supra* note 4, at 93 (arguing that forced impregnation is one manifestation of rape as genocide).

238. *See* discussion *supra* Section III.

239. *See supra* text accompanying notes 114-21.

240. *Redress for Sexual Violence*, *supra* note 23, at 343-44.

241. BROWNMILLER, *supra* note 1, at 84.

successfully prosecuted as genocide. There are two major obstacles to the prosecution of forced pregnancy as rape in Bangladesh. First, the perpetrating group and target group must be of different ethnic groups in order for forced pregnancy to qualify as a pollution of the bloodline, or “transferring children” from one group to the other.<sup>242</sup> As the government of Bangladesh is charging only Bengali nationals with crimes, the perpetrating group and the target group are of the same “bloodline,” and forced pregnancy cannot exist. Second, the crime of forced pregnancy—at least in international criminal law—requires that the perpetrator detain the victim post-rape to ensure that the pregnancy is carried to term.<sup>243</sup> There is no evidence to suggest that the Pakistani army and its collaborators detained Bengali rape victims.

### ***A. Genocidal Intent***

As previously established, there is sufficient evidence to show that the Pakistani army acted with the intent to destroy the Bengali political opposition,<sup>244</sup> and rapes that occurred may constitute genocide.<sup>245</sup> There is also some evidence to suggest that the rapes committed against Bengali women were committed with the express intent of spreading the Pakistani culture’s “seed.”<sup>246</sup> As Bina D’Costa and Sara Hossain note, Bengali women and girls were specifically targeted for rape “because of their reproductive capabilities.”<sup>247</sup> Pakistani soldiers and their Bengali collaborators are said to have raped women with the intent of impregnating them “to change the ethnic makeup of their children.”<sup>248</sup>

However, the prosecution of forced pregnancy as genocide relies heavily on the fact that the perpetrators and victims are of different ethnic groups. In Bosnia and Herzegovina, it is alleged that the Serbs capitalized on the Muslim and Islamic law that a child’s ethnicity is determined by that of the father.<sup>249</sup> By forcibly impregnating non-Serb women, the Serbs were altering the Muslim population and increasing the Serbian population by “making Serbian babies.”<sup>250</sup> Thus, forced pregnancy cannot occur if the perpetrating group is of the same ethnic group as the target group—the perpetrating group cannot increase its own population without also increasing the population of the target group. Because the government of Bangladesh plans to prosecute only Bengali nationals in the Tribunal<sup>251</sup> and the perpetrating group and target

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242. See Miller, *supra* note 152, at 360.

243. See *Sexual Violence as Genocide*, *supra* note 8, at 512.

244. See *supra* text accompanying notes 169-76.

245. See *supra* text accompanying notes 182-211.

246. Sharlach, *supra* note 4, at 95 (quoting AMITA MALIK, *THE YEAR OF THE VULTURE* 152, 154 (New Delhi: Orient Longman, 1972)).

247. *Redress for Sexual Violence*, *supra* note 23, at 343.

248. *Id.*

249. Engle, *supra* note 63, at 132.

250. *Id.* at 793.

251. See *supra* text accompanying notes 166-67.

group are of the same ethnicity, forced pregnancy therefore cannot exist.

### ***B. Confining the Victims***

In order to constitute forced pregnancy, the perpetrators must not only rape with the intent to cause pregnancy, they must also *detain* the victims to ensure that the pregnancy is brought to term.<sup>252</sup> The Rome Statute of the International Criminal Court, the first body of law to codify the crime of forced pregnancy, requires the “unlawful confinement” of a woman forcibly made pregnant.<sup>253</sup> Without such a requirement, the line between rape and forced pregnancy would blur, and it would be impossible to discern whether a resulting pregnancy was an intended consequence or not. The intent to commit forced pregnancy is only inferred when the perpetrator of a rape holds the victim until she either gives birth or is unable to terminate the pregnancy.<sup>254</sup>

Although there is clear evidence of the thousands of women who became pregnant as a result of the rapes that occurred in 1971, there is little to no evidence to suggest that Bengali women were actually *confined* by members of the Pakistani army or its collaborators so that the pregnancies would be carried to term. Without such evidence, the prosecution will not be able to prove that the Pakistani army and its collaborators raped with the intent of “destroying” the target group through forced pregnancy.

## **VI. CONCLUSION**

As the trials begin in Bangladesh, it is unclear whether or not the 1971 crimes committed against Bengali women and girls will be adequately addressed, if at all.<sup>255</sup> Considering that sexual violence occurred on such a large scale during the Liberation War, leaving hundreds of thousands of victims physically and psychologically damaged, it is imperative that the Tribunal makes the prosecution of such crimes one of its main priorities in the upcoming years.

It is not only important for the Tribunal to acknowledge the atrocities committed against the rape victims themselves, but it is imperative that it gives credence to the fact that rape in Bangladesh was genocidal—intentionally used to destroy the Bengali political opposition. There is sufficient evidence to show that the rapes committed against Bengali women

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252. Engle, *supra* note 63, at 792 (noting that those who argue that forced pregnancy constitutes genocide point to the fact that rape victims are often detained to ensure successful impregnation).

253. Rome Statute, *supra* note 9, art. 7(2)(f).

254. Milan Markovic, *Vessels of Reproduction: Forced Pregnancy and the ICC*, 16 MICH. ST. J. INT'L L. 439, 455 (2007).

255. See Roy, *supra* note 122 (“[H]uman rights advocates and lawyers fear that the mass rapes and killings of women will not be adequately addressed. . . . [T]hey hope to ensure they are.”).

and girls was, in part, intended to have genocidal effects on the group to which they belonged. The rapes caused physical and psychological harm to the victims, their families, and their communities, and broke down societal cohesion. The prosecution could successfully prove that the rapes committed by the Pakistani Army's collaborators were genocidal by demonstrating that the collaborators acted with the intent to destroy the political opposition and used rapes as a means through which to cause such destruction. If the Tribunal finds that the collaborators committed genocidal rape in 1971, it could open up the doors for prosecution of members of the Pakistani Army in the future.

There is also a strong sentiment in Bangladesh that the Tribunal should address the thousands of "war babies" that were born as a result of the 1971 rapes.<sup>256</sup> Although pregnancy was arguably one of the biggest crises of the Liberation War, it cannot be successfully prosecuted as genocidal "forced pregnancy." Unfortunately, the fact that the government of Bangladesh is choosing to charge only Bengali nationals under the Tribunal will serve as a complete bar to the establishment of genocidal forced pregnancy because the perpetrating group and target group must be of different ethnicities in order for the crime to exist.

The government of Bangladesh has some substantial obstacles ahead of it if it chooses to prosecute rape as genocide, including developing a prosecutorial plan and making much needed amendments to the 1973 Act. These obstacles are not, however, insurmountable. An effort to overcome them could bring the 1971 Liberation War's perpetrators of sexual violence to justice and would finally provide justice to the thousands of Bengali victims—giving them a voice that has been silenced for four decades.

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256. See generally Bina D'Costa, *1971: Rape and Its Consequences*, BDNEWS24.COM (Dec. 15, 2010), <http://opinion.bdnews24.com/2010/12/15/1971-rape-and-its-consequences> (relating an interview with a doctor who accounted for the horrific war crime and the unfair treatment that rape victims and their "war babies" received).