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Eighteen years ago, hundreds of ethnic Chinese women were raped during three days of mob violence in May 1998 in Jakarta and other areas of Indonesia prior to the downfall of the Soeharto regime. No legal action has been taken to hold the perpetrators to account and to provide justice to the victims. What has happened so far is that despite the evidence of the tragedy having been documented and publicized by reliable sources, the government, military and police, as well as some religious groups that were accused of being responsible for the atrocities have strongly denied the occurrence of the mass rape. (They instead took advantage of victim’s reluctance of publicly coming forward with their claims as evidence that the mass rape tragedy was mere a rumour without proof. Furthermore, the stories provided by some victims to humanitarian and human rights activists were labelled as lies that were nothing more than political propaganda to discredit Indonesia as a nation.) Members of the Indonesian parliament and Supreme Court have even suggested that the tragedy, including mass rape of ethnic Chinese, should be considered as ordinary crimes. In contrast to this suggestion, this paper argues that the Jakarta mass rape tragedy was not only a crime against humanity, but also a crime of genocide, as a particular group of Chinese descent women were intentionally targeted with intent to destroy them because of their ethnicity, race and religion.

Introduction

Nineteen years have passed since the tragic mass rapes of hundreds of ethnic Chinese women in three days of mob violence in May 1998 in Jakarta – and other areas of Indonesia – prior to the downfall of the Soeharto regime. However, the manner in which the government and the courts have previously and continue to handle the atrocities remains mysterious and opaque. This is because despite evidence of the tragedy having been documented and publicised by reliable sources;¹ the Government, military, police, along with certain religious groups allegedly responsible for the atrocities have strongly refuted the occurrence of mass rapes.³ Instead, these groups took advantage of victims’ reluctance to come forward, and the reluctance of witnesses to come forward due to security concerns, as counter-evidence to instead counter-claim that the mass rapes were mere rumour without proof, and further labelled the stories

Editors Note: All names and identities have been modified for security purposes.

² Ibid.
provided by some victims to humanitarian and human rights activists as lies that were nothing more than political propaganda to discredit Indonesia as a nation. As a result, it is not the victims or fact-finding agencies that have determined the truth of the rapes, but powerful criminal actors who – by doing so – are actually trying to obscure the fact, meaning, and magnitude of the criminal acts of rape; not only to eliminate the record thereof but also to avoid any legal accountability. As the title of an article in the Jakarta Post correctly points out, “Power dictates whether evidence of rapes exists”. Despite clear evidence pointing to instances of rape, as this power dictated that the evidence did not exist, members of the Indonesian Parliament and Supreme Court have even suggested that the May tragedy, including the mass rapes of ethnic Chinese, should be considered ordinary crimes.

In contrast to this suggestion, some have considered these rapes crimes against humanity. While there is some truth in this contention, this article goes even further and argues that the Jakarta mass rapes were crimes of genocide, where a particular group of women of Chinese descent were intentionally targeted with the intent to destroy them because of their ethnicity, race, and religion. This intent is the core aspect that distinguishes genocide from crimes against humanity, and will constitute the main concern of this paper. The paper begins with an overview of the general understanding of genocide, compared with crimes against humanity. This is followed by an exploration of the notion of rape as a crime against humanity in comparison with rape as genocide in the light of the relevant conventions, statutes, and jurisprudence. The paper then points out and examines the genocidal aspects of the Jakarta mass rape tragedy, focusing on the actus reus and mens rea requirements of genocide.

Understanding Genocide and Crimes against Humanity

The notion of genocide as an international crime first emerged following reactions of shock toward the evil of the Holocaust, itself aimed to exterminate a particular ethnic minority during the Second World War. Even though the practice of the extermination of national or ethnic minorities was not new, it was only in 1944 that the term ‘genocide’ was first introduced by Raphael Lamkin to describe the attempted extermination of the Jewish people by the Nazis as specific type of atrocity

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inadequately covered by then-current notions of crimes against humanity.\textsuperscript{9-11} Article 6(c) of the Charter of the International Military Tribunal contains the following definition of crimes against humanity:

\begin{quote}
‘murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.’\textsuperscript{12}
\end{quote}

In the absence of a legal definition of genocide,\textsuperscript{13} the Nuremberg Tribunal did not recognise genocide as such in its judgments, and what would now constitute genocide was instead prosecuted within this understanding of crimes against humanity.\textsuperscript{14-15} This understanding of crimes against humanity has been incorporated into a number of international documents, such as the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY),\textsuperscript{16} the International Criminal Tribunal for Rwanda (ICTR),\textsuperscript{17} and the Statute of the International Criminal Court (ICC),\textsuperscript{18} though there are slight differences concerning the definition and legal elements of this crime. The ICTY and the ICTR Statutes have included the crimes of rape and torture, while the ICC Statute includes a set of specific acts besides rape and torture such as enforced disappearance, apartheid, and other inhumane acts of similar character. What the notions of crimes against humanity in these different Statutes have in common is that they refer to ‘widespread and systematic’ individual crimes both in times of peace and war.

Since the adoption of the 1948 Genocide Convention\textsuperscript{19}, a standard definition of genocide has been introduced in the international legal system. This conception of genocide was subsequently adopted verbatim in the Statutes of the \textit{ad hoc} Tribunals\textsuperscript{20} and the International Criminal Court (ICC),\textsuperscript{21} as:

\begin{quote}
\textsuperscript{10} Robert Cryer and others, \textit{An Introduction to International Criminal Law and Procedure}, (2nd edn, CUP 2007).
\textsuperscript{12} Charter of the International Military Tribunal, August 1945, Art. 6(c).
\textsuperscript{13} (n 10).
\textsuperscript{14} Telford Taylor, \textit{The Anatomy of Nuremberg Trials} (1\textsuperscript{st} edn, Knopf Doubleday Publishing Group 1992).
\textsuperscript{21} Article 6 of Rome Statute of the International Criminal Court (adopted 17 July 1998; entered into force 1 July 2002)
‘any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.’

These acts of genocide are crimes under international law which States are obligated to prevent and punish. Obligations and prohibitions that arise from this substantive provision of genocide have not been only considered customary international law with *erga omnes* status, but also as non-derogable norm of *ius cogens*.

These characteristics put genocide ‘at the apex of the pyramid’ of international crimes, which was declared by the ICTR to be the ‘crime of crimes.’ Since what would be now considered as genocide was in the past prosecuted as crimes against humanity, there are similarities between the two. Influenced by the notion of genocide, the most recent definition of crimes against humanity under the ICC Statute has been expanded to include “persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious [or] gender [grounds].” Thus, all manner of atrocities that may not meet the strict definition of genocide may instead fit within this broader notion of crimes against humanity. It has now been widely accepted that genocide inheres within the broader scope of crimes against humanity, which is considered as the second tier in the pyramid of international crimes.

What distinguishes genocide from more general crimes against humanity is its special intent ‘to destroy in whole or in part’ an identifiable group, which is not a necessary aspect of crimes against humanity which only requires knowledge of systematic and widespread atrocities against civilians. Genocide requires that ‘the intent to destroy the group must accompany the intent to commit the underlying offense.’ In other words, when the atrocity ‘escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of the group,’ it amounts to genocide. The destruction specified here however has to be physical or biological harm against the victims, not the socio-cultural destruction of the targeted groups. Although there were attempts to include such socio-cultural destruction, the ICTY Trial Chamber in *Kristic* case asserted that ‘customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. An enterprise attacking [to annihilate]...
only the cultural or sociological characteristic of a human group […] would not fall under the
definition of genocide.\footnote{Prosecutor v. Kristic, ICTY Case No. IT-98-33-T, Judgment (2 August 2001), para. 580.}

Hence, the scope of the notion of genocide and the protection it offers under the Genocide
Convention is narrower than the concept of, and legal protection from, crimes against humanity.
Although similar to genocide, while crimes against humanity have expanded to include
identifiable groups, genocide focuses primarily on the matter of survival from elimination of
identifiable groups.\footnote{Cryer and others (n 10).} This has been confirmed in Kupreski which notes that ‘in essence, genocide
differs from persecution in that in the case of genocide, the perpetrator chooses his victims because
they belong to a specific group and seeks to destroy in whole or in part this very
group.’\footnote{Prosecutor v. Kupreski, (Judgment) Case No. IT-95-16, (14 January 2000) [636].} Conversely, crimes against humanity – as confirmed in Tadic\footnote{Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment (7 May 1997) [652].} and Akayesu\footnote{Prosecutor v Akayesu (Judgment) ICTR-96-4-T, T Ch I (2 September 1998)} – do not
require the discriminatory intent to destroy as a requirement.

Another difference is that crime against humanity, at least as the Nuremberg Charter seems to
suggest, can only be committed in time of war (although an increasing number of arguments,
described below, abandon the nexus with armed conflict), or have to be a ‘widespread or
systematic attack against civilians’,\footnote{Mettraux (n 28).} while the Genocide Convention indicates that genocide may
be committed in peacetime as in time of war.\footnote{Genocide Convention, Art. 1.} Genocide can be planned or committed on a large
scale or by individual undertakings, and it does not always have to be a ‘widespread or systematic
attack against civilians.’\footnote{Mettraux (n 28).} Genocide must be committed against members of specific protected
groups, whereas crimes against humanity may be a widespread or systematic attack against
civilian populations, not necessarily with the intention to destroy or to eliminate them.

In sum, while the gravity and scale of crimes against humanity require ‘objective circumstantial
elements,’ genocide necessitates also ‘the subjective mens rea’,\footnote{Cryer and others (n 10).} the intent to destroy all or part of
a national, ethnical, racial, or religious group and the ‘underlying offense must have at least a
remote chance of contributing to complete or partial destruction of the victims’ group.’\footnote{Jonathan MH Short, ‘Sexual Violence as Genocide: The Developing Law of the International Criminal
Tribunals and the International Criminal Court’ (2003) 8 Mich J Rage and L, 502.} This intent requirement, as will be explored further below, characterises the genocidal aspect of the
Jakarta mass rape of ethnic Chinese women because the ill-treatment and deliberate rapes and
killings that followed were committed with the intent to destroy the ethnic Chinese as an
identifiable minority group in Indonesia. Before exploring this in detail, it is necessary to highlight
the legal concept of rape as genocide in comparison to rape as a crime against humanity.

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\[\text{Footnotes:}\]

32. Cryer and others (n 10).
34. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment (7 May 1997) [652].
35. Prosecutor v Akayesu (Judgment) ICTR-96-4-T, T Ch I (2 September 1998)
36. Mettraux (n 28).
38. Mettraux (n 28).
39. Cryer and others (n 10).
Rape as Crimes against Humanity and Genocide

Rape as crime against humanity was first expressly recognised under Control Council Law No. 10.\(^41\) It was then included within the list of crimes against humanity under Article 7 of the ICC Statute.\(^42\) Under this provision, rape is defined as an invasion in ‘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.’\(^43\) In order for an instance of rape to be categorised as a crime against humanity – as opposed to an ordinary crime – the violence of rape is ‘no longer directed at the physical welfare of the victim alone but at humanity as a whole.’\(^44\) Additionally, it must have been committed with knowledge that the rape was ‘part of or intended to be part of a widespread or systematic attack’ directed against a significant number of civilian populations.\(^45\)

The ‘widespread and systematic’ nature and knowledge element of rape as a crime against humanity, as well as the scope of an attack that may be categorised as a crime against humanity have been further elaborated in the ad hoc tribunal decisions. The ‘widespread characteristic refers to the scale of the acts perpetrated and the number of victims.’\(^46\) The ICTR Chamber in Akeyasu case defined the concept of ‘widespread’ as ‘massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.’\(^47\) Thus, a criminal offense with the magnitude of a crime against humanity may involve the ‘cumulative effect of a series of inhuman acts or the singular effect of an inhuman act of extraordinary magnitude.’\(^48\) The ‘systematic’ characteristic refers to the organised pattern of the crime,\(^49\) the existence of political objectives that motivated the perpetration of the crime and policy or plan to execute it, as well as the involvement of political and military authorities.\(^50\)

As regards the scope of the attack, it does not have to be an armed conflict. It primarily refers to ‘a course of conduct involving the commission of acts of violence … [that] can precede, outlast, or continue during the armed conflict, but need not be part of the conflict under customary international law.’\(^51\) Thus, the attack may involve any form of mistreatment of a civilian population and is not limited only to armed attack.\(^52\) The primary object of the attack is the civilian population\(^53\) and it does not need to be the entire population of a geographic entity, nor should it

\(^{41}\) See Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945.

\(^{42}\) Rome Statute of the International Criminal Court (n 21) Art. 7.

\(^{43}\) See Assembly of State Parties to Rome Statute of the International Criminal Court, First Session, ICC-ASP/1/3, New York, 3-10 September 2002 at 199.


\(^{46}\) Prosecutor v. Akayesu (n 35).


\(^{49}\) Prosecutor v. Blaskan (n 46).

\(^{50}\) Prosecutor v. Naletilic et al., (Judgment) ICTY Case No. IT-98-34, (31 March 2003).

\(^{51}\) Prosecutor v. Naletilic et al. (n 49).


\(^{53}\) Prosecutor v. Naletilic et al. (n 51).
directed only against ‘a limited and randomly selected number of individuals.’ Where the perpetrators have some knowledge that the rape is part of a widespread and systematic attack against a civilian population, it may amount to a crime against humanity. Otherwise, the rape is simply an ordinary crime that can only be criminalised under the municipal legal system. However, where the rape is ‘systematic and widespread’ – where it touches the concern and interest of the international community and is carried out with an extensive and methodical manner – it falls within the jurisdiction of international law.

Distinct from crimes against humanity, which includes rape and sexual violence as material elements in its definition, there is no explicit reference to rape and sexual violence as a constituent element in the definition of genocide. This is firstly because international legal jurisprudence historically considered the crime of sexual violence as falling under ‘moral crime and outrages on honour’ requiring a response to restore dignity; rather than as a legal crime against humanity in the category of an ‘act of violence and inhumanity constituting crimes against the world community as a whole.’ Secondly, some have argued that recognising rape as genocide would undermine the gendered nature of the crime of rape, since genocide as a crime focuses more on the group rather than on the individual. Therefore, when the crime of sexual violence was widespread in Yugoslavia and Rwanda, rape and genocide were commonly considered separated issues: rape or genocide, not rape as genocide. Thirdly, rape is regrettably conceived of as ‘somehow a ‘lesser’ or ‘incidental’ crime, not worth investigating.’

These attitudes could also be seen in the absence of discussion about rape and sexual violence as a means to destroy an identifiable group based on gender during the process of drafting the Genocide Convention. There were attempts based on some versions of the draft to interpret them as referring to gender-based sexual violence through constructions such as ‘biological genocide’ or ‘preventing … [the] preservation or development’ that follow the phrase “to destroy in whole or in part”. Even when the draft had been finalised, the phrase “serious bodily or mental harm” (Art. 2 (b)) could have been extended to include rape and other sexual violence, but there was a failure to do so. This lack of attention to gender-based identifiable group and sexual violence as a material element in the definition of genocide falsely raises the impression

55 Prosecutor v. Kunarac et al. (n 49).
59 (n 40).
62 See First Draft of the Geneva Convention, prepared by the UN Secretariat, UN Doc. E/447, May 1947, Art. 2 (2): “[Biological genocide] Restricting births by: (a) sterilization and/or compulsory abortion: or (b) segregation of the sexes: or (c) obstacles to marriage”, available at: <http://www.preventgenocide.org/law/convention/drafts>.
63 Art. 2.
that ‘sexual violence cannot be a means of committing genocide and/or to destroy’ a gender-based group.\(^{64}\)

It was only following the ICTY and ICTR that the international community began to take into account the crimes of rape and other sexual violence as genocide due to increasing awareness of the magnitude and severity of the consequences of using rape as a method of destroying certain identifiable groups.\(^ {65}\) The prosecution of Jean-Paul Akayesu marked the turning point for ruling rape and other forms of sexual violence as genocide in international legal jurisprudence, although the possibility of sexual violence as a means to commit genocide was already acknowledged by the ICTY in *Karadzic and Mladic Rule 61 Hearing.*\(^ {66}\) Akayesu, a Hutu, was charged with a crime of genocide not only for knowing, but also facilitating ‘the commission of the sexual violence, beatings and murders by allowing the sexual violence and beating and murders to occur … [against the Tutsis].’\(^ {67}\) In its judgment the Trial Chamber made an innovative decision by explicitly arguing that rape and other sexual violence ‘constitute genocide in the same way as any other act [listed in Art. 2(2) of the ICTR] as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted group as such.’\(^ {68}\) The Trial Chamber also recognised that the crime of rape and sexual violence can be interpreted and prosecuted under the acts in point (b) and (d) of the ICTR Article 2 (2).\(^ {69}\)

In addition, the Trial Chamber provided a progressive definition of rape and sexual violence. Rape is defined as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’ Sexual violence – including rape –is considered as ‘any act of a sexual nature, which is committed on a person under circumstances which are coercive.’\(^ {70}\) While the former is limited to physical invasion of the human body, the latter is not limited to physical invasion and ‘may include acts which do not involve penetration or even physical contact.’\(^ {71}\) Relying on this notion of rape and sexual violence, the Chamber in *Akayesu* acknowledged firstly that rape and sexual violence against Tutsi women were an integral part of systematic genocide in Rwanda and solely directed against them as ‘part of propaganda campaign geared to mobilising the Hutu against the Tutsi,’ who were presented as sexual objects.\(^ {72}\) Secondly, the Chamber recognised genocidal rape is ‘one of the worst way[s] of inflicting harm on the victims as she or he suffers both bodily and mental harm.’\(^ {73}\) Thirdly, genocidal rape was committed as ‘a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.’\(^ {74}\) The various material aspects of the rapes, combined with the intent behind the acts committed by the Hutu against the Tutsi under the leadership of *Akayesu*, satisfy the requirements for accusing him of the crime of genocide.

\(^{64}\) Anne Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, (Intersentia, 2005).

\(^{65}\) MH Short (n 40).


\(^{67}\) *Prosecutor v Akayesu* (n 35).

\(^{68}\) ibid.

\(^{69}\) The ICTR Art. 2 (2)(b); (n 64) 45

\(^{70}\) *Prosecutor v Akayesu* (n 35).

\(^{71}\) ibid.

\(^{72}\) ibid, [732]

\(^{73}\) ibid, [731].

\(^{74}\) ibid.
The Akayesu case sets up a precedent that can become a guiding light for understanding rape and sexual violence as genocide in legal jurisprudence. In the Kayishema and Ruzindana cases concerning charges of genocide against Clement Kayishima and Obed Ruzinanda for their involvement in the killings and sexual violence against the Tutsis, the ICTR Chamber concurred with the decision in Akayesu case by holding that ‘acts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death, were all acts that amount to serious bodily harm,’ which could amount to a crime of genocide. Furthermore, the Chamber ruled that rape as genocide can be punished for ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,’ where the ‘conditions of life’ envisaged included rape. In Rutaganda, a case concerning the charge of genocide against Georges Rutaganda for his involvement in the capture, rape, and torture of Tutsi citizens, the ICTR Chamber considered rape as genocide by interpreting the phrase ‘serious bodily and mental harm’ in Article 2 (2) (b) of the ICTR Statute as ‘act of bodily or mentally torture, inhumane or degrading treatment, rape, sexual violence and persecution,’ and such ‘serious harm need not entail permanent or irremediable harm.’ Likewise, in Musema, a case concerning a charge of genocide and crimes against humanity against Alfred Musema for his involvement in the attack, rape, and murder of Tutsi individuals, the ICTR Chamber used a similar interpretation to consider rape as an act of genocide as stipulated under clause (b) (‘serious bodily and mental harm’) of the ICTR Statute.

These progressive interpretations of genocide indicate that despite the absence of specific references to rape and sexual violence as genocide in the definition of genocide in the ICC Statute (which replicates the definitions of the Genocide Convention and ad hoc tribunal), in the actual practice of legal jurisprudence – in particular in Akayesu, Kahishema and Ruzindana and Musema – the ICTR has established an explicit link between sexual violence and genocide. There is support for this progressive interpretation in the ICC’s Elements of Crimes, in which the footnote to Article 6 (b) regarding ‘serious bodily and mental harm’ explicitly expands the scope of genocide by asserting that ‘this conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.’

This development in legal jurisprudence illustrates that rape and all forms of sexual violence that are committed as a method to destroy in whole or in part a particular identifiable group as such can be prosecuted as genocide. For how this notion is also applicable to the Jakarta mass rapes of ethnic Chinese women, it is necessary to examine the actus reus and mens rea requirements of genocide. The significance of this examination will not only assist in identifying the existence of material and mental elements of the Jakarta mass rapes that evidence a crime of genocide, but at the same time highlight some of the elements necessary to understand the Jakarta mass rapes as a crime against humanity.

75 Prosecutor v. Clement Kayishema and Obed Ruzindana (Judgment) Case No. ICTR-95-1, (May 21, 1999).
76 ibid, [108].
77 ibid [114]—[116].
78 Prosecutor v. Rutaganda (Judgement and Sentence) Case No. ICTR-96-3-T, (Dec. 6, 1999).
79 ibid, [51].
81 ibid, [156].
The Genocidal Aspects of Jakarta Gang Rapes of Ethnic Chinese Women

Since Indonesia gained its independence in 1945, Indonesians of Chinese descent have had difficulty defining themselves within the nation. Although since then they have followed a process of assimilation and integration, current generations continue to struggle to find an effective way to identify as both ethnically Chinese and Indonesian, as there is socio-political stigmatisation referring to them as ‘non-pribumi’ (non-indigenous) as opposed to ‘pribumi’ (indigenous). Ethnically, they are a minority group constituting 1.5% of the population when the 1998 mass rapes occurred. Throughout the 1960s, as the country was struggling in a conflict between two ideologies – democratic-capitalism and socialist-communism – many Indonesians of Chinese descent became the targets and victims of mass murders as they were associated with communists by the democratic-capitalist Indonesia New Order Regime.

A decade later, as the economy was booming, Chinese-Indonesians were very successful in business and became a part of the system of crony capitalism with President Soeharto and his family. Many Indonesians were resentful of their property as they controlled most of Indonesia’s private wealth. As their traditional religion, Confucianism, was banned and excluded from the nation’s five official religions, a majority of them opted to join Catholicism, whose adherents in the late 1990s made up 9% of the population in a country with an 88% Muslim population. Thus, they have also become the target of looting and killings when ethno-religious conflicts break out in the country.

The 1997 economic crisis that hit East Asian countries, including Indonesia, was seen by many Indonesians not only as an opportunity to overthrow the Soeharto regime, but also to place blame at the feet of the Chinese-Indonesians. As riots broke out in Jakarta and other cities between the 13th and 15th of May 1998, mob leaders orchestrated the riots with a ‘strongly demonstrated anti-Chinese sentiment.’ Due to well-founded fears, many Chinese Indonesians fled the country. In the aftermath of the riots, human rights activist reported numerous rapes, almost all cases of which were committed against ethnic Chinese women by organised Indonesian gangs. It was also discovered that other sexual violence had taken place. There are no exact accounts of the incidents, as victims are afraid to speak out due to personal security fears, and no medical records were ever explicitly reported. However, Tim Relawan Kemanusiaan (Volunteer Team for Humanity) – led by the Catholic Priest Sandyawan Sumardi – identified at least 168 ethnic Chinese females as young as ten years old that were raped or sexually abused, some of them by anywhere from three to seven men. The findings also indicated that most of them were raped or sexually

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86 Chiduza (n 7) 464; Purdey (n 84) 22.  
87 Kuan (n 6) 465  
88 Purdey (n 84) ix  
90 Ibid.  
91 Ibid
abused in front of their family members or in public places, and that some of them were killed after the rape.92

I. Actus Reus Elements of the Crime of Genocide

The acts (or omissions) that amount to genocide are listed in the Genocide Convention Article 2(a–e). For the purpose of this article, this section will focus mainly on Article (a), (b), and (d) by explaining how these genocidal acts have been interpreted in legal jurisprudence and how they can be applied to the Jakarta mass rapes. Art (c) is implicitly included in (b), and there is lack of evidence with regard to (e).

The first genocidal act is ‘killing members of the group’. In the Akayesu case the Chamber found that ‘in most cases the rapes of Tutsi women in Taba were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed.’93 This is seen by the Chamber as the determination of the perpetrators to kill Tutsi women after ‘inflicting acute suffering on [them] in the process.’94 In the Kayishema and Ruzindana case, the Prosecutor broadened the interpretation by suggesting that acts not intended to caused death may still be covered by the notion of ‘killing members of the group’ if in fact they result in death. The Prosecutor held that ‘killing is merely the act of causing the death’ and this ‘would permit, if the need arises, a broadening of the meaning or interpretation’ beyond mere deliberate homicide.95 Thus, the term ‘killing’ is synonymous with ‘causing death,’ such as if the victim is dead96 following sexual violence.

The Asian Human Rights Commission has estimated that, in the Jakarta mass rapes, at least 20 women were killed or died after rape.97 It can be reasonably estimated that the numbers of women who were killed or died after rape were higher, as the overall number of people who died during the three day riot was around 1,198, a figure that including non-Chinese.98 Most of those who died were repeatedly raped and then thrown into burning buildings, as fire was used as one of the weapons to destroy ethnic Chinese houses and shops.99 One victim recounted that “her two younger sisters [were] raped by about 10 rioters and pushed from the third floor to the burning ground floor.”100 Another victim, known as Vivian (names have been changed for security reasons) said that she was raped by seven men and her younger sister was stabbed to death after being brutally raped.101 There were, however, some who committed suicide after rape.102 Whether death by suicide after rape can be categorised as genocidal act of killing is not a question easily answered. The notion that killing is synonymous with causing death may help to understand killing through

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92 The Constitution of Zimbabwe (n 1).
93 Akayesu (n 20) para. 733.
94 ibid.
95 (n 21) 50.
96 ibid.
97 Asian Human Rights Commission (n 8)
98 Moyo (n 89).
99 The Bangalore Principles of Judicial Conduct (n 8).
100 ibid
101 The Bangalore Principles of Judicial Conduct (n 8).
suicide. As Ruckert and Witschel noted, this interpretation may be needed in cases ‘where a perpetrator had not “pulled the trigger” himself, but caused the death of a victim in an indirect way.’

The second genocidal act is ‘causing serious bodily or mental harm to members of the group.’ The phrase ‘serious bodily or mental harm’ was held by the Chamber in the Akayesu case to mean ‘acts of torture, be they bodily or mental, inhuman or degrading treatment, persecution.’ It is ‘harm’, as interpreted in Kayishema and Ruzindana, that ‘seriously injures the health, causes disfigurement or causes any injury to external, internal organs or senses.’ With regard to serious mental harm, the Chamber in the Gacumbitsi case noted that it can be ‘some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim.’ But as how the state of “seriousness” is measured, assessment must be on a case-by-case level. The judgment in the Kristic case has suggested that it must be a state of harm that ‘goes beyond temporary unhappiness, embarrassment or humiliation,’ and ‘results in grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.’

The fact that ethnic Chinese females as young as 10 were being raped repeatedly by three to seven men was evidence of serious bodily harm, degradation, and persecution during the Jakarta mass rapes. In testimony to the US Congress, Sandyawan raised a case that represented many other similar cases, saying “some [men] forced the victim’s son to rape his younger sisters. They also coerced the male-house-maid to rape the mother of the family. The gang-rapes were then continued by the group and other unknown persons.” Another report indicated that ‘many of these women also suffered from massive tortures and object penetrations’ In addition, most of the survivors continue to suffer from serious psychological trauma and disorders.

The third genocidal act is ‘imposing measures intended to prevent births within the group.’ It was held in the Akayesu case that this act may include ‘sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriage’. There are no documented accounts of the practices of sterilisation or direct prohibition of marriage during the Jakarta mass rapes. However, a man told the Indonesian Human Rights Commission that a gang had mutilated his wife’s genitals after raping her. Another report indicated that “harmful

104 Prosecutor v. Akayesu (n 35) [504]
105 Prosecutor v. Clement Kayishema and Obed Ruzindana (n 75) [109]
107 Prosecutor v. Clement Kayishema and Obed Ruzindana (n 75) [113]
108 Prosecutor v. Kristic (n 31) [513]
111 ibid.; The Bangalore Principles of Judicial Conduct (n 8).
112 Prosecutor v. Akayesu (n 35) 507.
objects, such as broken bottles or razor blades were used to damage their reproductive organs." \footnote{Marching (n 110).}

Two survivors, Siska and Erna \footnote{Prosecutor v. Sylvestre Gacumbitsi (n 106).}, testified that their breasts were cut off by the rapists before they were dumped at a nearby village. \footnote{Prosecutor v. Sylvestre Gacumbitsi (n 106).}

II. **Mens Rea Element of the Crime of Genocide**

As indicated earlier, the applicability of the notion of genocide does not only necessitate material genocidal acts, but it has to meet the mental genocidal requirement, that is the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’ Thus, the mental element of genocide comprises: (1) targeted group as such; (2) intent to destroy that group; and (3) in whole or in part.

The first requirement is a targeted-identifiable group. In the *Akayesu* case, it was held that ‘the act must have been committed against one or several individuals because such individual or individuals were members of a specific group, and specifically because they belonged to this group.’ \footnote{Prosecutor v. Akayesu (n 35) [521].}

Hence, ‘the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial and religious group’ and ‘chosen as such, which hence, means that the victim of the crime of genocide is the group itself and not only the individual.’ \footnote{ibid.}

Whereas the group’s national identity is characterised by a legal bond of ‘common citizenship, coupled with reciprocity of rights and duty,’ \footnote{ibid [512].} a group’s ethnicity is defined by ‘common language or culture.’ \footnote{ibid [513].}

While a group’s race is characterised by ‘the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors,’ \footnote{ibid [514].}

the group’s religion is differentiated by ‘shar[ing] the same religion, denomination or mode of worship.’ \footnote{ibid [515].}

In the Jakarta mass rapes, Chinese women were targeted mainly because of their ethnicity, race, and religion. This can be seen in the attitude and comments of rapists towards victims. One source quoted a rapist as saying “I have to give you a lesson....You are beautiful and you are a part of the Chinese,” while other rapists said “You must be raped because you are Chinese and non-Muslim.” \footnote{Mydans (n 102).}

Other victims had testified that they were forced to wear Muslim clothes after being raped. \footnote{Harsono (n 113).}

There were also posters put in front of houses and buildings to distinguish ownership based on racial and religious criteria such as “milik orang Islam” (Muslim-owned), “milik pribumi” (indigenous-owned) and “pribumi Islam” (Muslim indigenous). \footnote{Marching (n 110).}
these posters meant non-Muslim and non-indigenous, and as such were identifiably owned by the Chinese.

The second and most important requirement is “intent to destroy” the targeted group. This significantly distinguishes genocide from crimes against humanity because the latter, although targeting a specific group, does not seek to destroy the group as such. As intent is hard – even impossible – to determine, it can be inferred from a certain number of ‘presumption facts.’ The Chambers of both the ICTR and ICTY considered that it can be deduced from: (1) ‘the genocidal intent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether this act was committed by the same offender or by others;’ (2) ‘the general nature of the atrocities in a region or a country, where there are deliberate and systematic act of “targeting victims on account of their membership of a particular group, while excluding members of other groups;’ (3) general political doctrine that allows genocidal acts or “repetition of destructive and discriminatory acts;” (4) the pattern of conducts that violate the very foundation of the group; (5) ‘the combined effect of speeches or projects laying the groundwork for and justifying the act’ with a massive scale of destructive effect, which aims at undermining the foundation of the group.

As indicated in the historical background at the beginning of part IV, there was repetition of destructive and discriminatory acts towards the ethnic minority Chinese community because of their ethnicity, race, and religion, as well as their economic advantage. Many major disputes were ended with the killing of the Chinese and the burning of their property. The Jakarta mass rapes, along with tortures, burning of property, and killings, were a part of a pattern of crimes, not only intended to inflict violence on ethnic Chinese women as individuals, but also to destroy them as a group. Some comments, – “you are raped because you are Chinese and non-Muslim” – described earlier, can be interpreted as a reaffirmation of intent to destroy them as a group.

Intent in the Akayesu case was at least partially inferred from his speeches, ‘calling, more or less explicitly, for the commission of genocide.’ Despite ‘no specific orders for rape … innuendo, jokes and propaganda’ associated with a collective inclination to rape Tutsi women were interpreted as intention to destroy the Tutsi ethnic group. The term kubohoza, meaning ‘to liberate’, become an expression associated with rape as an agenda for Hutus to control over Tutsis. In the Jakarta rape incident, one leader incited his gang by yelling ‘anti-Chinese.’ This was echoed by the rapists themselves who repeatedly screamed ‘Let’s butcher the Chinese!’ Or

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126 de Brouwer (n 64) 72.
127 ibid 76.
128 Prosecutor v. Akayesu (n 35) [523]
129 ibid.
130 Prosecutor v. Radovan Karadzic and Ratko Mladic (n 66).
131 ibid [95].
132 Prosecutor v. Akayesu (n 35) [729].
135 The Constitution of Zimbabwe (n 1).
‘Let’s eat pigs!’ As this was followed by incidents of rape and murder, such expressions can be seen as indications of intent to destroy the ethnic Chinese community.

The third requirement is that the destruction be ‘in whole or in part.’ The term ‘in whole’ does not necessarily mean ‘the actual extermination of a group in its entirety, but is understood as long as genocidal acts in point (a) to (e) are committed with the special intent to destroy.’ The term ‘in part’ can be understood as a ‘substantial part,’ which means ‘a large majority of the group in question or the most representative members of the targeted community.’

The Jakarta mass rapes occurred in the Chinese-Indonesian-populated area in the capital of Indonesia. Geopolitically and economically, they were and are seen as the faces of ethnic Chinese-Indonesians as a whole. Thus, threats to the security of the Chinese-Indonesians in Jakarta can be interpreted as threats to the security of Chinese Indonesians in the rest of the country. As such, when the mass rapes occurred in Jakarta, many Chinese Indonesians in other parts of Indonesia fled the country.

III. Complicity in Genocide and Crimes against Humanity?

Widespread and serious threats of persecution from unidentified gangs and army generals who were accused of masterminding the rapes have traumatised many victims, prevented them from speaking out, and terrorised investigators and human rights activists from collecting adequate evidence of the mass rapes. Doctors who had been privately asked to provide medical care by hundreds of victims have chosen to keep silent for security reasons. The police who had been assigned to provide protection for the victims not only forced the victims to deny that a rape ever happened, but also became rapists themselves in the process of investigation. Despite national and international mass media and independent human rights organisations continuing to expose evidence of the rape, there were strong counter-narratives from the military, as well anti-Chinese xenophobic religious groups and politicians who professed not to know about the incident and expressed doubts suggesting that the rapes never happened.

In fact, there were and are strong indications that the rapes were systematically planned and coordinated by military personnel, and that talk of rape had circulated amongst particular groups prior to the riot and rapes proper. This suggests that not only military personnel, but some other groups, including some anti-Chinese xenophobic religious groups and politicians were also aware of the incident. The given facts regarding the ‘systematic’ nature of rape and the involvement of political elites and military personnel, coupled with the ‘widespread’ character of rape as indicated in the discussion about the actus reus and mens rea of genocide above, demonstrated that the Jakarta mass rapes were a crime against humanity. The fact that the rape targeted ethnic Chinese women

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137 Prosecutor v. Akayesu (n 35) [497].
140 Harsono (n 113) 97; The Bangalore Principles of Judicial Conduct (n 8).
141 The Bangalore Principles of Judicial Conduct (n 8).
142 Moyo (n 3).
143 Mydans (n 102)
144 Moyo (n 4).
145 The Constitution of Zimbabwe (n 1).
in order to destroy them as an ethnic group further qualifies it as a crime of genocide. In criminal law, perpetrators can be prosecuted for complicity with crimes against humanity and/or genocide. As for complicity in genocide, the ICTR Chamber in the Akayesu case held that ‘if the accused knowingly aided and abetted in the commission of such murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer’s intent to destroy the group.’

Conclusion

Due to denials about the evidence of rape by government officials as well as by the military, police, and the national court, it is difficult to obtain justice for victims by prosecuting the perpetrators for facilitating and committing rape as genocide. Since there were indisputably in fact mass rapes between the 13th and 14th of May in Jakarta, this denial should not, however, be considered as transforming the rape into a non-existent fact, or a mere ordinary crime. This article has illustrated that the Jakarta mass rapes were a crime of genocide, although they could also be categorised as a crime against humanity. They were genocide primarily because they were committed with the intent to destroy the ethnic Chinese based on their ethnicity, race, and religion as such. To reduce them to mere ordinary crimes or even merely crimes against humanity would mean to ignore the magnitude of the genocidal crime as the ‘crime of crimes.’

For a country like Indonesia, with a long tradition of repeated gross human rights abuses, expressly acknowledging and publicly calling the 1998 Jakarta mass rapes of women of Chinese ethnic decent genocide (as well as a crime against humanity as this article has shown, though the contention should be examined through a proper and open court hearing) is important because of several reasons. Firstly, despite repeated gross human rights violations involving governmental or political elites and large corporations, there has been a long tradition of impunity due to the unwillingness of government to cooperate and/or lack of law enforcement in the country. Secondly, for a crime with the magnitude of genocide or crimes against humanity, it would be unfair and unjust to the victims in particular and universal humanity in general if the Jakarta mass rapes are reduced simply to the status of ordinary – or even non-existent – crime. Thus, publicly acknowledging the mass rapes as genocide or crimes against humanity can increase global condemnation and pressure to hold the perpetrators liable and bring justice to the victims. Thirdly, as a multicultural country, where there have been always tensions between various groups of people from different ethnic and religious backgrounds, there is a risk that crimes such as rape, or other similar gross crimes against human rights may be repeated in the future, in particular when this tension is exploited to attempt to eliminate other minority groups based on religious or ideological convictions or political agendas. Acknowledging the magnitude of a crime as such and holding the perpetrators and the accomplices in those crimes accountable can form a deterrent to prevent the occurrence of similar crimes in the future. Fourthly, the acknowledgement that the Jakarta mass rapes were genocide and/or crimes against humanity is necessary for a genuine reconciliation process. In dealing with allegations against the mining industry for aiding and abetting South African apartheid regime, the Truth and Reconciliation Commission was of opinion that the Mining Industry must acknowledge its complicit relationship with the regime as ‘first order involvement’ (direct complicity) because such acknowledgement was necessary for

146 Prosecutor v. Akayesu (n 35) 540, 541.
147 Liza Yosephine, ‘Tribunal Says Indonesia Responsible for Genocide in 1965’ The Jakarta Post, (Jakarta, 20 July 2016)
reconciliation process. Similarly, attitudes to acknowledge and identify genocide or crimes against humanity as crimes (as they should be) are also relevant in dealing with the Jakarta mass rapes in order to bring about progress for the process of national reconciliation among citizens of different ethnic and religions, and for the protection of ethnic minority human rights in the future.
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