FROM TOLERANCE TO TACTIC: UNDERSTANDING RAPE IN ARMED CONFLICT AS GENOCIDE

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I. INTRODUCTION

“When people start whispering about war, women will be raped.”2

Sexual violence has been present in armed conflict for millennia and acts such as rape, sexual slavery, and forced pregnancy have historically been recognized as gruesome hallmarks of war.3 Per traditionally patriarchal narratives, however, sexual violence in conflict has been treated as merely “an inevitable by-product,”4 rather than as a tactic of the conflict itself.5 It was either disregarded as a foreseeable consequence6 or tolerated as individual, opportunistic violations7 tangential to the central violence.

Irrespective of theoretical interpretations of violence, one fact stands out clearly: the nature of warfare has and is continuing to change.

In the course of the [twentieth] century . . . the burden of war shifted increasingly from armed forces to civilians, who were not only its victims, but increasingly the object of military or military-political operations. The contrast between the first world war and the second is

dramatic: only 5% of those who died in the first were civilians; in the second, the figure increased to 66%. It is generally supposed that 80 to 90% of those affected by war today are civilians.8

Historians have termed the twentieth century the “most murderous in recorded history.”9 This horrific evolution has paralleled, and I propose driven, the shift towards sexual violence as an explicit tactic of armed conflict: as the trend towards targeting civilian populations grows, so too did the scale of sexual violence committed in this context.

This tactical evolution seems to reflect more than a sophistication of our understanding of gender-based violence, but rather a realization on the part of combatants that sexual violence is a deadly efficient tool of domination.10 With virtually no operational cost to the perpetrators and shockingly effective results, rape and other forms of sexual violence are the ultimate weapons of war. Perpetrators of sexual violence continue to be met with impunity and are rarely held accountable for their actions.11 Given the destructive nature of rape used as a weapon of war, its modern status as a crime in violation of international law has been thoroughly vetted.12 Where the disparity lies, however, is in how this crime is charged — traditionally it has been charged as either a war crime or a crime against humanity;13 however, since the mid-1990s there has been a

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9. Id.
11. “Even after conflict has ended, the impacts of sexual violence persist . . . . Widespread sexual violence itself may continue or even increase in the aftermath of conflict, as a consequence of insecurity and impunity.” Background Information on Sexual Violence Used as a Tool of War, Outreach Prog. on Rwanda Genocide & United Nations, http://www.un.org/en/preventgenocide/rwanda/about/bgssexualviolence.shtml (last visited March 2, 2016).
13. Id. at 246.
growing trend in recognizing rape as a method of committing genocide. It is therefore the systematic incidence and unprecedented scale on which rape continues to take place in conflict zones, as well as the intent that it is committed with, that brings this practice within scrutiny of analysis here.

The nature of this crime is heavily gendered: the majority of victims are women, who are facially targeted because they are women. However, while women remain severely disparately impacted by these tactics, men are not themselves exempt from victimization. For a variety of motivations that I will explore in this paper, men are also targeted for rape and sexual violence in armed conflict and suffer, too, its genocidal consequences. This is important to consider when analyzing the universality with which a genocidal rape paradigm may be legally applied.

It is my contention that rape should be firmly situated within the understanding of genocide, for both conceptual and practical reasons. By examining rape in historical conflicts I will demonstrate the increasing pervasiveness of rape as a weapon of war, thereby underscoring its increasing relevance for both academic and legal consideration. Next, by

14. For a further discussion of this development in jurisprudence, see infra Part III.C.
15. See infra Part II.B for a further discussion of this.
16. See Russel-Brown, supra note 4, at 351, 363.
17. Piccolo, supra note 6, at 11.
19. See infra Part IV.
20. For the purposes of this analysis, the discussion will be limited to the female/male sex binary — this is not intended to exclude narratives from the gender non-conforming community, but rather reflects the current status of international law on sexual violence in armed conflict. See Jaleel, supra note 7, at 123.
examining modern ongoing conflicts, I will elucidate the context in which rape continues to be used as a tactic not only of war, but, indeed, of genocide. I will then discuss the existing sources of international law that support this understanding and, finally, I will explore the implications of understanding rape as genocide under each of the enumerated sub-elements of genocide.

II. THE EVOLUTION OF CONFLICT, THE EVOLUTION OF JURISPRUDENCE

The twentieth century witnessed a shift away from the traditional international conflicts between sovereign states and saw a rise in domestic conflicts.21 This has important legal implications for those who would seek to hold war criminals accountable when the hierarchical structure of responsibility is unclear and the instability of the conflict zone itself renders prosecution within the home jurisdiction impracticable.22

Certainly many different forms of horrific sexual violence continue to be used in armed conflict and may also be used as a tactic of a campaign of genocide.23 For the purposes of the analysis here, however, the scope of discussion will be limited to incidents of mass-rape specifically. The following sections describe various conflicts across the globe, spanning

22. When parties to a conflict are not formally structured (i.e. are guerrilla groups) it can be difficult to ascertain who is responsible for the actions of the group, beyond the direct perpetrators. Further, when conflicts are considered to be domestic, the international community is much less likely to become involved or seek prosecution for international crimes. MacKinnon, supra note 4, at 11. The International Criminal Court may play a new role in this dynamic with its prosecution of individual perpetrators of international crimes. See discussion infra Part III.A.2.
from the turn of the twentieth century to modern day, which illustrate the increasing pervasiveness of rape used on a massive scale as a tactic of war. This list is far from comprehensive, but includes those conflicts whose resulting jurisprudence has significantly impacted (or has the potential to significantly impact) the prosecution of sexual violence in armed conflict.

A. Historical Conflicts Utilizing Rape as a Tactic of War

Leading up to and during World War II, the Japanese military utilized mass-rape as a tactic of war pervasively. During the 1937 Nanking Massacre (also known as the “Rape of Nanking”), sources approximate that somewhere between 20,000 and 80,000 Chinese women were raped by the Japanese Imperial Army.24 An estimated 200,000 additional women were kidnapped by the Japanese throughout the course of World War II,25 almost entirely from Japanese occupied territories (i.e. Korea, the Philippines, China, etc.).26 These women and girls — some as young as eleven years old — termed “comfort women,” were forcibly held as sex slaves, in brothel-like conditions known as “comfort stations,” where they were raped repeatedly.27 Some estimates place the survival rate of these women at only 25-30%.28

In 1971, Bangladesh (then called East Pakistan) seceded from Pakistan in what became known as the “Liberation War.”29 In this conflict, an estimated 200,000–400,000 rapes occurred,


28. *Id.* The government of Japan denied the existence of these “comfort women” until 1993. Stephens, *supra* note 25, at 89 n.7.

allegedly resulting in approximately 25,000 pregnancies. . . . 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.”

The collapse of the Socialist Federal Republic of Yugoslavia, which had unified following World War II, occurred in early 1992 when it fully dissolved into its constituent states. The conflict surrounding this collapse represented the first time that rape as a tactic of war gained international attention concurrent with the violence; that is to say, sexual violence in previous armed conflicts had only been examined retrospectively.

During what was later termed the “Bosnian Genocide,” it is estimated that Serbian forces raped between 10,000 and 60,000 women. As the violence came to a conclusion, reports emerged that women were being “targeted for mass and repeated rapes,” forced to serve as sex workers, and “intentionally impregnated and detained until abortion was no longer feasible.” Sometimes these rapes were committed publicly, in front of
the whole village, to terrorize the population into fleeing.\textsuperscript{35} Rape was used as a tool of ethnic cleansing, serving as an attack on the individuals as well the larger ethnic group, whom the perpetrators were attempting to “humiliate, shame, degrade, and terrify.”\textsuperscript{36}

Shortly thereafter, in 1994, a variety of ethnic, economic, and geopolitical tensions culminated in the Rwandan genocide of Tutsis by the governing Hutu class.\textsuperscript{37} In the span of just a few short months, it is estimated that up to one million people were massacred\textsuperscript{38} and between 100,000 and 250,000 women were raped\textsuperscript{39} by the members of the \textit{Interahamwe} (a notorious Hutu militia group), soldiers in the armed forces, and other civilians.\textsuperscript{40} Murder and sexual assault were publicly encouraged through propaganda, which routinely dehumanized the Tutsi, referring to them as “cockroaches.”\textsuperscript{41} This same “extremist propaganda which exhorted Hutu to commit the genocide specifically identified the sexuality of Tutsi women as a means through which the Tutsi community sought to infiltrate and control the Hutu community.”\textsuperscript{42} Many survivors of these rapes described their rapists’ explicit references to their ethnicity tactics of rape and detention for the purposes of forced pregnancy. For example, after 10 weeks gestation hospitals required special committee approval to provide abortions and even then were only required to approve the procedure “where immediate danger [was] present to the life or health of the pregnant woman.” \textit{Id.} Committees would often refuse to approve the procedure without proof of rape, “but the absence of ‘proof’ [was] itself a consequence of prolonged detention.” \textit{Id.;} PICCOLO, \textit{supra} note 6, at 36.

\begin{itemize}
\item \textsuperscript{35} Stephens, \textit{supra} note 25, at 91.
\item \textsuperscript{36} \textit{Id.;} PICCOLO, \textit{supra} note 6, at 35–40.
\item \textsuperscript{37} Jaleel, \textit{supra} note 7, at 126.
\item \textsuperscript{38} BINAIFER NOWROJEE, \textsc{Human Rights Watch/Africa}, \textsc{Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath} 4 (Sept. 1996). To put this number in perspective, by 1994 the total population of Rwanda was less than 8 million. \textsc{Rwanda: A Brief History of the Country}, \textsc{Outreach Prog. on Rwanda Genocide} \\& \textsc{United Nations}, \textsc{http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml} (last visited Oct. 8, 2016).
\item \textsuperscript{39} Background Information on Sexual Violence Used as a Tool of War, \textit{supra} note 11.
\item \textsuperscript{40} Nowrojee, \textit{supra} note 38, at 2.
\item \textsuperscript{41} \textit{Id.} at 13.
\item \textsuperscript{42} \textit{Id.} at 2.
\end{itemize}
before or during the attack itself,\textsuperscript{43} which commonly took the forms of individual rape, gang rape, rape with objects “such as sharpened sticks or gun barrels,” sexual slavery, forced marriage, or sexual mutilation.\textsuperscript{44} However, many voices and testimonies were lost because, according to surviving witness statements, “many women were killed immediately after being raped.”\textsuperscript{45}

B. Contemporary Conflicts Utilizing Rape as a Tactic of War

With this historical context in mind, consider two contemporary conflicts that have been marked by incidents of mass-rape. As previously discussed, modern conflicts are often characterized by rogue militant group actors, rather than nation-states.\textsuperscript{46} History has yet to bestow labels on many of these conflicts, so for ease and clarity of reference I will address them by primary geographic location and dissenting faction.

Boko Haram is a militant Islamic extremist group\textsuperscript{47} that first gained its footing in Nigeria in 2002, but has since expanded its campaign of terror to neighboring territories.\textsuperscript{48} Although the United States labeled the group a terrorist organization in 2013, it was in 2014 that Boko Haram captured global attention when it kidnapped more than two hundred schoolgirls, vowing to “treat them as slaves and marry them off.”\textsuperscript{49} Kidnapping victims, often women, appears to be a common tactic of the group – with some sources citing as many as 7,000 victims,\textsuperscript{50} though reports on their

\begin{itemize}
\item \textsuperscript{43} Id. at 6.
\item \textsuperscript{44} Id. at 1.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} See supra, Part II.A.
\item \textsuperscript{47} The name “Boko Haram” loosely translates to “Western education is forbidden.” Farouk Chothia, \textit{Who are Nigeria’s Boko Haram Islamists?}, BBC AFRICA (May 4, 2015), http://www.bbc.com/news/world-africa-13809501. The group later declared allegiance to the Islamic State, which accepted and named the territory under Boko Haram’s control as the “Islamic State of West Africa Province.” Id.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id.
treatment of prisoners are varied. One report asserts that the women were not sexually violated by their abductors—at least not until after they were forcibly married to them.51 Following a massive rescue in May 2015, however, reports claimed that 214 of the 234 freed women were visibly pregnant.52

The Islamic State, also a militant terrorist organization, first appeared in 2013 as an outgrowth of al-Qaeda, based in Iraq.53 The Islamic State has since been disavowed by al-Qaeda, but has independently become the wealthiest militant group in the world,54 as well as one of the primary militant Islamic factions opposing the governments in Syria and Iraq.55 Minority groups have suffered particular persecution at the hands of this organization, with the Yezidi religious sect especially facing massacres and mass sexual enslavement.56 The United Nations High Commissioner


54. What is ‘Islamic State’?, BBC MIDDLE EAST (Dec. 2, 2015), http://www.bbc.com/news/world-middle-east-29052144. Income sources are speculated to include private donates from those seeking to oust Syrian President Assad, the sale of crude oil, ransom payments, and the selling of antiquities in captured areas. Id.

55. Syria Iraq: The Islamic State Militant Group, supra note 53. The Islamic State currently controls territory in Iraq and Syria, comprising an area roughly the size of Belgium. The Islamic State currently controls territory in Iraq and Syria, comprising an area roughly the size of Belgium. Sophy Ridge, Mass Graves of Women ‘Too Old to Be Isis Sex Slaves’: This is What We’re Up Against, TELEGRAPH (Nov. 17, 2015, 2:22 PM), http://www.telegraph.co.uk/women/ womens-politics/12000148/Islamic-State-sex-slaves-Sinjar-mass-graves-show-what-were-fighting.html.

for Human Rights has issued a report compiled by investigators sent into the region detailing crimes, against the Yezidi and others, that may amount to genocide. Reports from victims indicate that the Islamic State considers female prisoners their property and uses them as sexual slaves, possibly killing those not considered fit to be sexual partners. In the town of Tal Afar alone it is estimated that 3,500 women are being held as slaves. Reports also indicate that the girls are forcibly married to Islamic State fighters and are subsequently raped by their new husbands.

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59. These reports are obtained by cell phone – the Islamic State tactically allows victims to keep their phones so that they will report their experiences to the outside world as part of their campaign of terror. Nick Squires, Yazidi Girl Tells of Horrific Ordeal as Isil Sex Slave, TELEGRAPH (Sept. 7, 2014, 4:38PM), http://www.telegraph.co.uk/news/worldnews/middleeast/iraq /11080165/Yazidi-girl-tells-of-horrific-ordeal-as-isil-sex-slave.html.

60. Rep. of the OHCHR, supra note 57, ¶ 35.

61. Squires, supra note 59; Ridge, supra note 55.

62. Spencer, supra note 56.

C. Evolution

Charging rape as a crime in armed conflict, let alone as an international crime, is a very modern proposition.64 Once established, however, the succeeding evolution in jurisprudence was rapid.65 When tactical mass rape first gained international attention in the early 1990s, the status of rape as a crime in international humanitarian and human rights law was far from secure.66 However, within a few short years it became “ensconced within the pantheon of human rights,” was enumerated as a war crime and a crime against humanity, and was also posited and prosecuted as genocide.67 If the evolving tactics of combatants drove the evolution of conflict, then the evolution of jurisprudence was just as assuredly driven by growing feminist movements seeking to bring the crimes of rape and sexual violence in armed conflict within the jurisdiction of the Yugoslavia and Rwanda tribunals.68

While historically rape may or may not have been used genocidally, an examination of the evolution of conflict over the last hundred years

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64. Historically, rape in armed conflict was not charged as a crime at all. For example, although evidence of sexual violence was permitted when charging crimes against humanity, no prosecutions for rape per se took place during the Nuremburg Trials following World War II. KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 163 (1997); K. Alexa Koenig, et al., Contextualizing Sexual Violence Committed During the War on Terror: A Historical Overview of International Accountability, 45 U.S.F. L. REV. 911, 918–19 (2011). It was not until the case of Prosecutor v. Tadić at the International Criminal Tribunal for the Former Yugoslavia where a “defendant was specifically charged with rape and sexual violence as crimes against humanity and war crimes.” Ellis, supra note 12, at 226.

65. This rapid evolution may be attributed in no small part to the legal activism of feminist attorneys, scholars, and organizers and represents a (as yet still developing) culmination of conflict and compromise between these actors. See generally Jaleel, supra note 7.

66. Id. at 116.

67. Id.

68. Id. at 119. These legal developments were far from inevitable, but rather were the result of the advocacy of feminists of varying orientations and beliefs railing against sexual violence in armed conflict. Id.
indicates that this is how it is being used in modern conflict. Reflecting this evolution of changing war tactics, as well as the sophistication of the academic understanding of gender-based violence, it is therefore appropriate to modify our approach to the genocide paradigm.

III. SOURCES OF INTERNATIONAL LAW THAT SUPPORT UNDERSTANDING RAPE IN ARMED CONFLICT AS GENOCIDE.

Article 38 of the Statute of the International Court of Justice (ICJ) enumerates sources of international law. Following this structure, I will address substantive sources of international law that support understanding rape in armed conflict as genocide, including international conventions, international custom, and judicial decisions.

A. International Conventions

International conventions, also known as multilateral treaties, or treaties between multiple countries, are the highest source of international law. Because sovereign states have knowingly and voluntarily bound themselves to these legal agreements, they serve independently as sources of law and also as evidence of international customary law (to be discussed at greater length below). In this context

69. Regardless of time period, any dismissal of sexual violence as an opportunistic crime during times of armed conflict should be examined critically, as such claims ignore the coercive nature of the circumstances—these acts take place in the context of, and contribute to the destructive climate of, war. See Patricia Viseur Sellers, The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation 23–25 (2008), http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf.


71. See id.

72. See generally id. Beyond codifying an international condemnation of a certain type of behavior, these instruments will often also require state parties to implement domestic law that furthers its ends.
states, and their actors, have a legal obligation to uphold the treaties as they have agreed to them.\footnote{73. See generally id. I.e., with the exception of any reservations appropriately made.}

\section{1. The Genocide Convention}

The Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948, was drafted in response to the horrors of World War II following a resolution of the United Nations General Assembly.\footnote{74. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Int’l Comm. of the Red Cross [hereinafter ICRC], https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=1507EE9200C58C5EC12563F6005FB3E5&action=openDocument (last accessed Dec. 7, 2015); G.A. Res. 180(II) (Dec. 21, 1947); Russel-Brown, supra note 4, at 361.} This resolution condemned “genocide [as] an international crime entailing national and international responsibility on the part of individuals and States.”\footnote{75. G.A. Res. 180 (II), supra note 74 (emphasis added).} The Genocide Convention governs actions taken in times of peace, as well as during war, and governs both international and national conflicts.\footnote{76. Fisher, supra note 5, at 121 n.181.} It states, in relevant part, the governing definition of genocide, as it continues to stand today and which will also serve as the structure for our discussion of genocidal rape:

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

\begin{enumerate}
\item Killing members of the group;
\item Causing serious bodily or mental harm to members of the group;
\item Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
\end{enumerate}

\footnote{73. See generally id. I.e., with the exception of any reservations appropriately made.}


\footnote{75. G.A. Res. 180 (II), supra note 74 (emphasis added).}

\footnote{76. Fisher, supra note 5, at 121 n.181.}
d) Imposing measures intended to prevent births within the group;

e) Forcibly transferring children of the group to another group.77

Because none of the enumerated forms of genocide are gender specific in this definition, under this paradigm it is conceivable that rape of men and women alike could qualify as genocide, once the requisite intent has been established.78 Some scholars advocate for adding gender to the list of protected groups within the definition of genocide (in addition to the existing national ethnical, racial, and religious groups).79 Others advocate for enumerating rape and sexual violence as a constituent element of genocide.80 While both propositions are admirable and would undoubtedly serve to bolster the status of crimes of sexual violence in international law, it is my contention that rape may be prosecuted within the existing genocide paradigm.

2. The Rome Statute of the International Criminal Court

The International Criminal Court (the ICC) was established by the Rome Statute, another multilateral treaty, in 1998.81 The ICC is the first body of its kind — a permanent, treaty-based court82 created by virtue of the Rome Statute.83 It is an independent international judicial body with the authority to investigate and prosecute individuals for international crimes. The ICC is designed to supplement and complement national judicial systems, and its jurisdiction extends to crimes committed in territories not under the jurisdiction of member states or where the state in question has given its consent to the ICC’s jurisdiction.


78. See infra Part IV.A.1.

79. ASKIN, supra note 64, at 341–43. The notable value of this approach would be to more directly encompass other gender-based crimes of sexual violence against women, beyond rape, within the understanding of genocide (i.e. forced sterilization, forced abortion, sexual mutilation, etc.).


82. Id.
independently of the United Nations to for the purpose of ending impunity for perpetrators of the most serious international crimes.\footnote{Id.} What makes the ICC unique within international law is that it prosecutes individuals, rather than states, for these crimes.\footnote{Which crimes fall within the jurisdiction of the ICC?, ICC, https://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/10.aspx (last visited March 5, 2015). While the ICC has the jurisdiction to try individuals for violations of international law, the International Court of Justice tries cases between state parties. See infra Part III.C.3.} This is especially significant for our consideration because, historically, individuals and groups were not empowered by human rights instruments to act against states; rather, states had to take action against other states.\footnote{MacKinnon, supra note 4, at 14–15.}

This problem was particularly severe for women’s human rights because women are typically raped not by governments but by . . . individual men. The government just does nothing about it. This may be tantamount to being raped by the state, but it was legally seen as “private,” therefore as not a human rights violation.\footnote{Id. at 14.}

As a result of this view of states as the only violators of human rights, acts of rape perpetrated by individuals were excluded from this paradigm.\footnote{Id.} This highlights the modern value of the ICC in holding individuals accountable for international crimes outside of the context of an \textit{ad hoc}, conflict-specific tribunal.\footnote{See infra Part III.C.} However, because the ICC was created by the Rome Statute, the court’s jurisdiction is limited to consenting parties to the treaty.\footnote{See infra Part III.C.}

The Rome Statute was adopted after the creation of the statutes of both the International Criminal Tribunal for Rwanda (ICTR) and the Former Yugoslavia (ICTY) and was heavily influenced by and built upon

their prior work. Of its advances, perhaps most significant is the fact that, under the Elements of Crimes, it explicitly “recognizes that rape can constitute genocide” by causing serious bodily or mental harm to members of the group. I note this provision with caution, however, as the Elements of Crimes do not reference rape under the other four sub-elements of genocide and therefore some may construe this as confining an interpretation of rape as genocide to sub-element (b) causing serious bodily or mental harm to members of the group.

Nonetheless, the Rome Statute’s definition of forced pregnancy does seem to borrow language from the Article 6 prohibition on genocide. The Rome Statute defines forced pregnancy as “the unlawful confinement of a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”

There is reason to be optimistic, therefore, about the future development of ICC jurisprudence of rape and forced pregnancy as genocide, possibly under sub-elements (d) imposing measures intended to prevent births within the group, or (e) forcibly transferring children of the group to another group.

Finally, in a policy paper on sexual and gender based crimes the ICC’s Office of the Prosecutor provided: “acts of rape and other forms of

90. Koenig, supra note 61, at 931–32; see Ellis, supra note 12, at 238–39. A more thorough discussion of the statutes of the ICTY and the ICTR, which were created by the United Nations Security Council (see infra notes 106 and 111) and are not treaties, is outside the purview of this article. But I believe that the most valuable contributions of the tribunals’ jurisprudence has been their case law, discussed below. Whereas, because the ICC’s statute is a multilateral treaty, it is relevant for our consideration here. Situations and Cases, ICC (last accessed Feb. 18, 2016) https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

91. Ellis, supra note 12, at 240 (emphasis added). This is explicitly provided for in a footnote to Article 6(b) of the Rome Statute - Elements of Crimes. Id.

92. Rogers, supra note 80, at 294–95.

93. Id.

94. Id. at 296 (emphasis omitted) (citation omitted).

95. Id.

96. These theories are discussed in greater depth in infra Part IV.A.2.
sexual violence may, depending on the evidence, be an integral component of the pattern of destruction inflicted upon a particular group of people, and in such circumstances, may be charged as genocide.”

This theoretically expands the ICC’s potential application of rape to the genocide definition sub-element (c) – inflicting conditions calculated to bring about the destruction of the group.

B. International Custom

International custom serves as the next source of international law. “[C]ustomary international law’ results from a general and consistent practice of states that they follow from a sense of legal obligation.”

While it is beyond the purview of this paper’s analysis to comprehensively review the established state practices of every nation in the world, there is one functioning organ that potentially represents these nations en masse. The United Nations General Assembly is representative of virtually every country in the world – with representatives from all 193 U.N. member states. Its publications in the form of General Assembly Resolutions therefore potentially have

98. Rogers, supra note 80, at 300. This view is not without its skeptics, however. As one scholar noted, the Elements of the Crimes were amended in 2010, but the genocide provisions were not updated to reflect the precedents established in Akayesu (genocidal rape under sub-element (d)) and Kayishema (genocidal rape under sub-element (c)), suggesting that the ICC may maintain a narrow interpretation of the actus reus of genocide. Id. at 295. This is particularly in light of the fact that sexual crimes are expansively enumerated under war crimes and crimes against humanity under the Rome Statute. Id. “The ICC’s historic reluctance to prosecute sexual violence under Article 6, coupled with the fact that recent progress reflects a purely discretionary policy choice by the Prosecutor, suggests that the statutory regime remains insufficient to adequately prosecute sexual violence committed in furtherance of genocide.” Id. at 300.
normative value – especially when they are endorsed by a majority of member states.\textsuperscript{101}

In 1996, the General Assembly adopted resolution 50/192 on the “Rape and abuse of women in the areas of armed conflict in the former Yugoslavia.”\textsuperscript{102} This resolution stated in relevant part:

Convinced that this heinous practice [rape] constitutes a deliberate weapon of war in fulfilling the policy of ethnic cleansing . . . and recalling [an earlier resolution], in which the Assembly stated, inter alia, that the abhorrent policy of ethnic cleansing was a form of genocide[ . . . [The General Assembly e]presses its outrage that the systematic practice of rape has been used as a weapon of war and an instrument of ethnic cleansing . . . [and r]eaffirms that rape in the conduct of armed conflict constitutes . . . under certain circumstances . . . an act of genocide as defined in the [Genocide] Convention . . . .\textsuperscript{103}

Here the General Assembly of the United Nations explicitly condemns rape in the context of armed conflict as a form of genocide.

An extremely important concept within customary international law is \textit{jus cogens}, also known as “peremptory norms,” which represent “certain fundamental, overriding principles of international law, from which no derogation is ever permitted.”\textsuperscript{104} Such norms out-rank all other norms of international law, except for other \textit{jus cogens} norms,\textsuperscript{105} and serves as a basis for universal jurisdiction (to be discussed further below).

\begin{footnotes}
\item[101] “The General Assembly can adopt resolutions declaratory of international law only if those resolutions truly reflect what international law is. If a resolution purports to be declaratory of international law, if it is adopted unanimously (or virtually so, qualitatively as well as quantitatively) or by consensus, and if it corresponds to State practice, it may be declaratory of international law.” Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion. 1996 I.C.J. 311, 319 (July 8) (dissenting opinion of Vice-President Schwebel), http://www.icj-cij.org/docket/files/95/7515.pdf.
\item[102] G.A. Res. 50/192 (Feb. 23, 1996).
\item[103] Id. (emphasis omitted).
\item[105] Vienna Convention, \textit{supra} note 104, art. 53.
\end{footnotes}
The jurisprudence of *jus cogens* norms has evolved over time; of principle significance is the fact that the prohibition against the crime of genocide has risen to the level of a *jus cogens* norm. This is to say, not only has it been internationally condemned, but (barring procedural barriers) under this paradigm, criminal liability may be found for genocide even when the state government is not a party to the Genocide Convention, as a violation of a peremptory norm in customary international law.

Given its status as a *jus cogens* norm, genocide has come to be characterized by universal jurisdiction. Universal jurisdiction is the principle that any individual person may be prosecuted in any national court for serious international crimes, under the theory that “such crimes harm the international community or international order itself, which individual States may act to protect” — even when traditional grounds of jurisdiction do not exist. The implication for our discussion, then, is that if rape in armed conflict can successfully be characterized as genocide, it will be found as a violation of a *jus cogens* norm, and will therefore come within universal jurisdiction and may be prosecuted in any national court.

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106. ARCHBOLD: INTERNATIONAL CRIMINAL COURTS § 13-6 (Rodney Dixon et al. eds., 2003) (“The [Genocide] Convention is now considered part of international customary law . . . .”).


110. For a critique of such a model, see Ellis, supra note 12, at 246. “There are those who argue that rape should stand as an international crime on its own—not as a subsection of another crime. The failure to define rape as a separate crime permits serious violence to be viewed as a ‘lesser’ crime.” *Id.*
C. International Judicial Decisions

In the case of sexual violence in armed conflict, judicial decisions have proven to be especially valuable over the last several decades in developing the law.

1. The International Criminal Tribunal for the Former Yugoslavia

The ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by a resolution from the United Nations Security Council in 1993 in response to the widespread violations of international law taking place in that territory.111 As previously discussed, the Bosnian Genocide was a conflict characterized by mass sexual violence.112 As such, it is unsurprising to note that the ICTY has been a leading force in developing the jurisprudence surrounding sexual violence in armed conflict, both in terms of interpreting and applying international law.113

Significantly, in Prosecutor v. Karadžić & Mladić,114 the Trial Chamber found that systematic rape and forced pregnancy may provide “evidence of genocidal intent through ethnic cleansing” when its purpose is to impart a new ethnic identity on the child.115

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112. See supra Part III.
115. Ellis, supra note 12, at 234 (citing ARCHBOLD: INTERNATIONAL CRIMINAL COURTS, supra note 106, at §§ 13-23 (“The actus reus of this offense consists of the imposition of the conditions or measures; it need not be proven that they have actually succeeded.”)); “Today, the prosecutions of Karadžić and Mladić are ongoing, and . . . these prosecutions could yield the first genocide convictions for sexual violence in the
In 1994 the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) was established by a resolution from the United Nations Security Council, following quickly on the heels of the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY). "The tribunals were legal breakthroughs. Their statutes staked the terrain of contemporary international humanitarian criminal law via a reordering and consolidation of several strands of international public law." 

As discussed previously, the conflict in Rwanda was one of many in the twentieth century characterized by pervasive sexual violence. Potentially surpassing even its sister tribunal, the ICTR has been incredibly progressive in its development of international law surrounding sexual violence in armed conflict. Perhaps the most significant of these developments is embodied in the case of *Prosecutor v. Akayesu*, which explicitly linked rape and genocide for the first time, with a conviction based on sub-elements (a) and (b) of genocide. In this case the court stated "[T]he Chamber wishes to underscore the fact that in its opinion, [rape and sexual violence] 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." 

ICTY. Moreover, the Karadžić and Mladić judgments have the strong potential to flesh out the existing ICTR case law on the elements of ‘serious physical or mental harm’ and ‘conditions of life calculated to bring about destruction,’ as they apply to sexually violent acts.” Rogers, *supra* note 80, at 293 (emphasis omitted) (diacritics added).

118. *Id.*
119. *See supra* Part III.
120. For a more comprehensive discussion of the ICTR’s case law on sexual violence as genocide, *see generally* Rogers, *supra* note 80, at 273–86.
122. Ellis, *supra* note 12, at 232; *Piccolo*, *supra* note 6, at 63.
123. “[K]illing members of the group [and] . . . causing serious bodily or mental harm to members of the group[.]” Rogers, *supra* note 80, at 278.
rape as genocide in Rwanda, it elaborated further: “Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing . . . to the destruction of the Tutsi group as a whole.”

Dicta from the trial court clarified somewhat with a more specific application:

In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group [subsection (d)] is the case where, during a rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.

_Akayesu_ also established that measures intended to prevent births within a group can be both physical and mental, and that rape may satisfy this standard “when the person raped refuses subsequently to procreate, in the same way that members of a group can be led through threats or trauma, not to procreate . . . .”

In the more recent case of _Prosecutor v. Karemera & Ngirumpatse_ the Trial Chamber found that rape and sexual violence caused serious bodily and mental harm, not only to the Tutsi women that were raped, “but also, by extension, to their families and communities.” This finding was particularly significant in that it highlighted the communal repercussions of sexual violence.

\[125.\] Ellis, _supra_ note 12, at 233 (citing _Akayesu_, ICTR-96-4-T, Judgement, ¶731).

\[126.\] The tribunal appears to have meant “patrilineal”: “Authors commonly misuse the term ‘patriarchal’ in place of patrilineal. Patrilineal refers to the line of heritage, which is of importance here, whereas patriarchal refers to a normative social order.” 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, 513 n.58 (2002–2003).

\[127.\] _Akayesu_, ICTR-96-4-T, Judgement, ¶ 507.


\[130.\] Genocide’s definition sub-element (b).

\[131.\] _Karemera_, ICTR-98-44-T, Judgement, ¶ 1667.
Finally, the case of *Prosecutor v. Kayishema*\(^{132}\) affirmed the *Akayesu* interpretation of rape as imposing measures intended to prevent births\(^{133}\) and further found that “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part\(^{134}\) — ‘includes methods of destruction which do not immediately lead to the death of members of the group’ — such as . . . the act of rape.”\(^{135}\)

### 3. The International Court of Justice

The International Court of Justice (ICJ) is the primary judicial body of the United Nations and was created by the Charter of the UN in 1945.\(^{136}\) Its functions include (but are not limited to) settling legal disputes between States.\(^{137}\) It settles these cases only when both states are members of the UN and the parties have consented to the jurisdiction of the court.\(^{138}\)

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134. Genocide’s definition sub-element (c).


137. Id.

138. Either by becoming parties to the Statue of the Court or by accepting jurisdiction under certain other conditions. How the Court Works, ICJ, http://www.icj-cij.org/court/index.php?p1=1&p2=6 (last visited Mar. 15, 2016). Because of this structure, however, while the cases are valuable for demonstrating legal interpretation and are often incorporated by reference, they are not binding upon later decisions; the court does not practice *stare decisis*. DAMROSCH & MURPHY, supra note 109, at 239.
In the case of *Bosnia & Herzegovina v. Serbia & Montenegro*, the court specifically addressed the issue of systematic rape in the context of that conflict, ultimately agreeing that rape could constitute genocide under Article II(b) of the Genocide Convention. It found that rape could qualify as causing serious bodily or mental harm to members of the group if committed with genocidal intent, stating “rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of [sic] inflict harm on the victim as he or she suffers both bodily and mental harm.” While the court in this case found that there was insufficient evidence of genocidal intent, this may indicate more of a political reluctance to hold a state responsible for genocide, rather than an individual perpetrator.

**IV. UNDERSTANDING RAPE AS GENOCIDE.**

There are both conceptual and practical legal benefits to understanding rape as a form of genocide: the first relates to the academic conception of the crime of genocide and how rape fits within this paradigm; the second relates to justice-oriented policy objectives that are met by this approach.

*“The decision of the Court has no binding force except between the parties and in respect of that particular case.”* Rules of the Court, 1926 P.C.I.J. (ser. D) No. 1, at 25.


141. *Id.* at 211.


143. *Id.* at 228–29.
A. The Conceptual Legal Benefit: Modifying Our Approach to the Existing Paradigm.

By acknowledging that rape comprehensively fits within the understanding of genocide, it assumes “a position at the apex of the hierarchy of international crime.”\(^{144}\) This understanding fulfills one of the main functions that international criminal law should be able to fulfill: “to express the degree of wrongdoing, not simply the fact of wrongdoing.”\(^{145}\) Compared to unrelated acts of wartime rape, which may occur at a high frequency, but are not part of any specific strategy of war,\(^{146}\) genocidal rape is tactical – it is rape ‘under control.’\(^{147}\) Scholarly discourse has long existed around genocidal rape\(^{148}\) in response to a perceived gap in the application of international law to instances of mass rape in armed conflict that target a specific group. This is to say, unlike other international crimes, genocide encompasses the concept of, and is premised on, the destruction of a group.\(^ {149}\)

Modifying the approach to the genocide paradigm, rather than the law itself, to account for acts of rape in armed conflict is necessary given the modern tactical use of rape as a weapon of war. As discussed previously, substantive sources of international law already exist that support an interpretation of rape in armed-conflict as a form of genocide.\(^ {150}\) While this jurisprudence largely (though not exclusively) appears to interpret this within Article II sub-elements (b) and (d) of the Genocide Convention, this constitutes an overly narrow reading.\(^ {151}\) While some scholars recommend expanding the definition of genocide to explicitly

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146. This is not to say that the acts are free from coercion, nor should they be dismissed as opportunistic. See discussion, supra note 69.
147. Takai, supra note 29, at 400.
149. Fisher, supra note 5, at 120 (emphasis added).
150. See supra Part III.
account for sexual violence within its text, others, myself included, contend that rape, when committed with genocidal intent, satisfies the requirements of the existing paradigm and may constitute genocide under all five of the Genocide Convention’s existing sub-elements.

1. Mens Rea: Genocidal Intent

The crime of “[g]enocide is distinguished from other international crimes, not by the scope of the acts, but rather by the intent of the perpetrators.” It involves acts committed with genocidal intent, or the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group. . . .” Here the group itself is the ultimate target, not an individual person or even several people who happen to be part of a group. The crime (rape) must be perpetrated against a person, or

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152. Rogers, supra note 80, at 300–02.
153. See id. at 305: Because rape and sexual violence were so widely recognized as illegal at both a national and international level, many scholars maintain “that it did not violate the principle of legality for the [Rwanda] tribunal ‘to undertake additional legal interpretations . . . that involve categorizations of conduct generally acknowledged to be illegal.’” (quoting THEODOR MERON, THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: A VIEW FROM THE BENCH, SELECTED SPEECHES 112 (2011)).
154. NOWROJEE, supra note 38, at 20.
155. Genocide Convention, supra note 77; “As recalled by the Appeals Chamber of ICTY in Jelisić, the Statute defines the specific intent required for the crime of genocide as ‘the intent to accomplish certain specific types of destruction’ against a targeted group. Pursuant to the Statute, therefore, specific intent implies that the perpetrator seeks to destroy, in whole or in part, a national, ethnic, racial or religious group as such, by means of the acts enumerated under Article 2 of the said Statute.” Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Judgement, ¶ 524 (Int’l Crim. Trib. for Rwanda May 26, 2003) (emphasis omitted); “In order to prosecute the crime of genocide, two elements must be proven: the actus reus (the criminal act) and the mens rea (the mental intent to commit the act). Sub-elements (a) through (e) constitute the actus reus of the crime: those acts that, if committed with the requisite specific intent, will rise to the level of genocide. The mens rea for genocide requires specific intent (dolus specialis) to destroy a protected group – or a group ‘as such’ – in whole or in part.” Rogers, supra note 80, at 270 (internal citations omitted).
people, because of their membership in a protected group\textsuperscript{157} as a part of an overall objective to destroy the group itself.\textsuperscript{158}

In terms of prosecution, there are two approaches available to establish genocidal intent behind rape in armed conflict: the first would consider the overall intent of the perpetrating group to commit genocide and would assume this intent for individual acts of rape by members of the perpetrating group; the second would require proving the genocidal intent of every individual act of rape.\textsuperscript{159} The distinction between these choices has important prosecutorial implications for evidentiary standards, with the first results-oriented interpretation providing a lower burden of proof for the element of intent.\textsuperscript{160}

While the specific intent requirement of genocide must be distinguished from personal motive to commit the genocidal act, the existence of such a motive does not preclude the possession of genocidal intent.\textsuperscript{161}

Admittedly, for those who are the victims of rape, the intent of the perpetrator in the context of armed conflict may not be personally relevant – they suffer just as rape victims in any other situation do. Such comparisons of severity between rape in war and rape in times of peace have been criticized;\textsuperscript{162} however, as Catherine MacKinnon eloquently analogized, “These rapes are to everyday rape what the Holocaust was to everyday anti-Semitism. Without everyday anti-Semitism a Holocaust is impossible, but anyone who has lived through a pogrom knows the difference.”\textsuperscript{163} The distinction is not intended to degrade the experience

\textsuperscript{157} Protected groups are those defined in the Genocide Convention: national, ethnical, racial or religious groups. Genocide Convention, \textit{supra} note 77.


\textsuperscript{159} Takai, \textit{supra} note 29, at 412–13 (discussing interpretations of the \textit{Akayesu} case) (citations omitted).

\textsuperscript{160} Id.


\textsuperscript{162} Jaleel, \textit{supra} note 7, at 125.

\textsuperscript{163} MacKinnon, \textit{supra} note 4, at 8. “[If all men do this all the time, . . . war or no war, why do anything special about this now? This war becomes just a form of business as usual. But genocide is not business as usual. . . .]” Id. at 11 (citations omitted). “[R]ape
of rape outside the context of armed conflict. Rather, when these acts are framed as nothing more than systemic aggression by all men against all women all the time . . . It does not so much galvanize opposition to rape whenever and wherever it occurs, but rather obscures the fact that these rapes are being done by some men against certain women for specific reasons, here and now.

Rape and other forms of sexual violence used as a targeted tactic of armed conflict can therefore constitute genocide when committed with the requisite intent. Incidents of mass-rape in particular seem to be encompassed within this understanding, due to the pervasive nature of the pattern of violence. This is to say, the sheer scope of the tactical sexual violence that continues to take place in the context of modern is often an incident of war. [There are] multiple psychological and sociological explanations for individual instances of rape revolving around issues of power and organized violence. However, such explanations would not fit within the evidence of a calculated policy of rape, particularly as part of an ethnic cleansing goal.”

164. See Jaleel, supra note 7, at 127–28 for a more in depth discussion of feminist critiques of genocidal rape.

165. MacKinnon, supra note 4, at 9–10. Further, critical race theorists object to generalizing rapes committed (especially during a genocide) against women of color, because of their identification as such. See Andrea Smith, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 7–33 (2005) (recognizing rape as genocide comports with theories of intersectionality by both recognizing a) the victim’s identity in terms of gender and nationality, ethnicity, race, and/or religion, and b) the reality that the victim was targeted because of this identity).

166. Ellis, supra note 12, at 232. One specific example of finding genocidal intent behind rape was the International Criminal Tribunal for Rwanda case of Prosecutor v. Muhamana, which found that when “a Hutu victim was raped based on the defendant’s mistaken belief that she was actually a Tutsi [he later apologized to her when he was informed that she was a Hutu] was sufficient . . . to conclude that the defendant acted with the requisite intent to target a protected ethnic group.” Rogers, supra note 80, at 285 (citing Case No. ICTR-95-1B-T, Judgement, (Apr. 28, 2005)).

167. “The existence of a plan or policy is not a legal ingredient of a crime, but may facilitate the proof of the requisite specific intent.” Archbold: International Criminal Courts, supra note 106, § 13-10 (internal citations omitted).
armed conflicts seems to speak to the intent of the perpetrators. 168
International courts have found repeatedly that under certain circumstances genocidal intent can be inferred, rather than being clearly expressed. 169

2. Actus Reus

Although a widespread pattern of conduct undoubtedly speaks to intent, 170 this is not a required element of genocide. 171 The prohibited

168. See Nowrojee, supra note 38, at 20–21.
169. “Genocidal intent need not be clearly expressed, but it may be implied by factors including the general political doctrine giving rise to the criminal acts or the repetition of destructive and discriminatory acts[.]” Archbold: International Criminal Courts, supra note 106, § 13-12 (emphasis added) (internal citations omitted). See Human Rights Watch, Genocide, War Crimes, and Crimes Against Humanity: Topical Digest of the Case Law of the International Criminal Tribunal for Rwanda 13–15 (2004); The International Court of Justice has effectively restricted this proposition as it relates to state liability, however this court does not practice stare decisis—meaning later courts are free to reject this reasoning. See supra note 138. “Although the Court found that acts had been committed under Article II(b) that, if accompanied by the specific intent requirement, would constitute genocide, the 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. Bosnia asserted that ‘the very pattern of the atrocities committed over many communities, over a lengthy period, focussed [sic] on Bosnian Muslims and also Croats, demonstrates the necessary intent.’ The Court, however, cryptically rejected this argument, requiring that the specific intent be ‘convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist.’... The Court explicitly stated, however, that ‘for a pattern of conduct to be accepted as evidence’ of specific intent, the pattern ‘would have to be such that it could only point to the existence of such intent.’” Marino, supra note 23, at 210 (emphasis added).
170. See discussion supra Part IV.
171. “Neither the existence of armed conflict nor a ‘widespread or systematic attack against a civilian population’ is a prerequisite for the crime of genocide,” as they are for war crimes and crimes against humanity, respectively. Rogers, supra note 80, at 304 (internal citations omitted); see, e.g., Prosecutor v. Popović, Case No. IT-05-88-T, Judgement, ¶ 829 (Int’l Crim. Trib. for the Former Yugoslavia Jun. 10, 2010). “Finally, it has been clearly established by [genocide] jurisprudence that the requirement that the prohibited conduct be part of a widespread or systematic attack ‘was not mandated by customary international law.’” Id.
genocidal acts must simply fall within one or more of the five sub-elements listed in the genocide definition. Further, three of the five sub-elements require proof of a result: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; and (e) forcibly transferring children of the group to another group. The other two acts, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group, do not require such a showing. Finally, the genocidal destruction itself must be either physical or biological in nature.

With these parameters in mind, rape in armed conflict can be analyzed as genocide under each of the sub-elements.

a. Killing members of the group.

Rape in conflict has historically been used as a method to kill people in two distinctive ways: first and foremost, in some cases the massive injuries resulting from rapes and gang rapes can ultimately lead to death. A second tactic that has been observed is the use of rape to inflict long-term damage that ultimately leads to death, such as the deliberate transmission of HIV. Some victims of rape may also commit suicide as a result of the assault.

173. Id.
174. “As clearly shown by the preparatory work for the [Genocide] Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, cultural or other identity of a particular group.” International Law Commission, supra note 158, at 90–91.
175. Takai, supra note 29, at 401. “Because sexual violence in itself sometimes results in death, [sub-element] (a) killing members of the group, can also be satisfied.” Askin, supra note 64, at 344.
177. Id. at 414.
b. Causing serious bodily or mental harm to members of the group.

Rape meets this criterion in an immediately obvious way, as it consistently causes both bodily and mental harm to those who are victimized.\(^{178}\) Even beyond any other physical assault that may accompany the attack,\(^{179}\) rape is a grievous harm unto itself. This is exacerbated when the victim is a child (i.e. not physically mature enough to engage in sexual intercourse)\(^{180}\) and in situations of gang-rape, which are common in areas marked by armed conflict.\(^{181}\)

Beyond the immediate physical harm of being sexually assaulted are the long-term physical, or bodily, harms that come as a result of the assault. Among these, victims of rape are at risk of contracting venereal diseases\(^{182}\) and, in the case where the victim becomes pregnant, being forced to give birth — with all of the physical consequences that that act entails.\(^{183}\) Especially of concern for women giving birth in rural areas, where there is restricted access to healthcare services, are fistulas.\(^{184}\)

178. ASKIN, supra note 64, at 344; NOWROJEE, supra note 38, at 34, 35; AFRICAN RIGHTS, supra note 176, at 25–26.

179. “Rapes were sometimes followed by sexual mutilation, including mutilation of the vagina and pelvic area with machetes, knives, sticks, boiling water, and in one case, acid.” NOWROJEE, supra note 38, at 1.


181. “That the interviewed women were victims of whole groups of men is consistent with the cited reports from the Eastern DRC, as well as with reports from other armed conflicts and has been described as a strategy of belligerence. . . . In fact, one function of gang rape could be to inflict maximum physical damage upon the women and thus to increase the mark left behind.” Id. at 140.


183. Pregnancy is of special concern when the rape victim is a young girl. Sexual Violence, supra note 182. “Young mothers of babies born of rape often stay with the armed group because of the family ties and dependency that have evolved over time and
As regards serious mental harm, victims of rape commonly suffer severe and protracted psychological trauma and community rejection. A less palatable, but no less valid, concern to communities is the psychological trauma that unwilling perpetrators may also suffer. In the instance of child soldiers, being forced, by their commander or through peer pressure, to perpetrate sexual violence may traumatize boy soldiers. In this circumstance, unwilling perpetrators (especially children) become victims to a certain degree themselves. This brings us to the third, and directly related, enumerated act.

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to avoid social stigma in the communities at home. These girls and their children are particularly vulnerable to all forms of exploitation including prostitution and trafficking and need special protection.” Id. Further, “[g]irls younger than [fifteen] are five times more likely to die in childbirth than women in their [twenties], and pregnancy is the leading cause of death worldwide for women ages [fifteen] to [nineteen].” International Center for Research on Women, Child Marriage and Health, TOO YOUNG TO WED: EDUC. & ACTION TOWARD ENDING CHILD MARRIAGE (2006), http://www.icrw.org/files/images/Child-Marriage-Fact-Sheet-Health.pdf.

184. Maedl, supra note 2, at 136. “These are lesions in genital tissues, which unnaturally connect the bladder and/or the rectum with the vagina, leading to urine and/or stool incontinence. Fistulas can have medical causes, such as giving birth at a very young age or unattended obstructed labor. They are also a consequence of brutal rapes, including gang rapes and rapes with foreign objects. The only effective treatment for these fistulas is a surgical repair, which is rarely available in resource-poor settings. Besides the severe consequences of this medical trauma, many families and communities reject women with fistulas . . . . The women are considered as ‘worthless,’ because they cannot do heavy work, it is difficult for them to bear children, and men do not want to engage in sexual relationships with them. Additionally, most of the women do not have the necessary resources to wash several times a day to maintain the hygienic standards that their condition requires. Thus, they smell bad. Their odor is noticed by the persons around them, which leads to further social and economical exclusion within the community.” Id. For a further discussion of community rejection, see infra Part IV.

185. Sexual Violence, supra note 182; Ellis, supra note 12, at 231–32; Fisher, supra note 5, at 122; see infra Part IV.

186. Sexual Violence, supra note 182.
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Rape is frequently used as a tool to intentionally inflict conditions calculated to destroy a group. As one scholar observed:

The pattern of sexual violence in Rwanda shows that acts of rape and sexual mutilation were not accessory [sic] to the killings, nor, for the most part, opportunistic assaults. Rather, according to the actions and statements of the perpetrators, as recalled by survivors, these acts were carried out with the aim of eradicating the Tutsi. Taken as a whole, the evidence indicates that many rapists expected, consequent to their attacks, that the psychological and physical assault on each Tutsi woman would advance the cause of the destruction of the Tutsi people.

This sentiment has been echoed in other conflicts, such as the war in the Democratic Republic of the Congo, where one social worker observed, “This [sexual] violence was designed to exterminate the population.”

In the abstract, rape in conflict is also used as a means of destroying the social fabric of a particular group.

When rape is used as an instrument of destruction, it is oftentimes within the context of a policy of ethnic cleansing. . . . An objective of ethnic cleansing as an act of genocide becomes the destruction of a cultural group. . . . ”Raping women in a community can be seen as raping the body of the community, in doing so, undermining the entire fabric of that community.”

187. ASKIN, supra note 64, at 344.
188. NOWROJEE, supra note 38, at 16.
190. Ellis, supra note 12, at 225.
191. Id. at 231–32.
As this source indicates, women who are victimized feel the impact of rape used for this tactical purpose keenly. This is particularly the case in cultures where women’s worth and the family’s honor is caught up in female sexual chastity. To demonstrate this, consider these case studies of community responses to rape in armed-conflict:

i. Bangladesh: “The Bengali government . . . publicly refer[ed] to the [rape] victims as birangonas, or ‘war heroines.’ The Prime Minister of Bangladesh called birangonas his ‘daughters’ and asked the nation to ‘welcome them back into the community and the family.’ However, his efforts proved futile in the context of traditional Bengali views of sexuality, privacy, and purity. 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. Bengali men refused to marry birangonas because of the dishonor that accompanied rape in their culture, and many birangonas either killed themselves or fled to West Pakistan.”

ii. Bosnia: “[I]n the Bosnian Muslim culture . . . a woman may not be marriageable if she has been raped or carried the child of another man, because ‘the religion emphasizes virginity and chastity before marriage.’ According to traditional Islamic culture, victims of rape ‘have been spoiled for marriage and motherhood [because they are] no longer virgins in a culture that condemns pre-marital sex and ostracizes even those women who have been [forcibly raped or assaulted].”

iii. Congo: “[Rape victims] are often too physically damaged to farm, or bear children, and there is such stigma associated with rape in Congo — where female virginity is prized and the husband of a rape survivor

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192. “Rape is effective as genocide in a patriarchal society because it renders female victims socially infertile, by virtue of their ‘unmarriageability’ or untouchability.” Rosalind Dixon, Rape as a Crime in International Humanitarian Law: Where to from Here?, 13 EUR. J. INT’L L. 697, 703–04 (2002) (see Dixon n. 37); “[W]omen who are raped and bear the children of the aggressors may no longer be marriageable in their society.” Fisher, supra note 5, at 93.
193. Takai, supra note 29, at 396 (citations omitted).
is considered shamed — that rape survivors are routinely shunned by husbands, parents and communities.”

iv. Nigeria: “If any woman is found to be pregnant [by the combatants], in our tradition, the pregnancy is considered Haram (unlawful), hence we cannot accept them wholeheartedly because they can be like baby snakes.”

This tactic is also used against men to exploit gender roles and deeply held beliefs about masculinity.

Sexual violence against men is one of the least told aspects of war. Yet men and boys are victims too of abuse that is frequently more effective at destroying lives and tearing communities apart than guns alone. . . . It can take the form of anal and oral rape, genital torture, castration, gang rape, sexual slavery and the forced rape of others.

By recognizing that rape can destroy the social fabric, thereby deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, secondary layers of victimization, which are often an element of the genocide narrative that is overshadowed by the murders and rapes themselves (i.e. forced maternity, social rejection, etc.), become central to recognizing the insidious and pervasive nature of genocide.

195. Nolen, supra note 189.
197. “Perpetrators of male/male rape deliberately exploit . . . gendered roles and through the act of rape, they send a message to society that when their men are unable to protect themselves, they are consequently unable to protect their women and children. This can symbolise [sic] the death of the whole community and further encourage male victims into silence.” Wikstøl, supra note 18.
198. Nguyen, supra note 18; see also Natabaalo, supra note 18 (male rape victims are often accused of homosexuality—a troublesome proposition in countries where homosexuality has historically been criminalized).
199. Further consider the impact on indirect victims. At the International Criminal Court, indirect victims may also participate in ICC proceedings if they can 1)
Sub-elements (d) and (e) both pertain to genocidal actions that interfere with reproductive autonomy, thus applying uniquely (though not exclusively) to the rape of women. Rape satisfies this sub-element in two ways, like in sub-element (b), through both physical and mental harm. Physically, this may be because of the resulting damage of rape, which can lead some women to be unable to bear children, or through forced impregnation (to be discussed further under sub-element (e)). Mentally, psychological damage from the rape itself, or the secondary trauma following a forced pregnancy (another element that would apply uniquely to women), may lead male and female victims alike to be unwilling to procreate or even maintain normal sexual relations with other members of their group. Imposing measures intended to prevent births within the group therefore also relates to sub-element (b) causing serious bodily or mental harm to members of the group.

Consider, in line with the discussion of the destruction of social fabric, that beyond a victim’s unwillingness to maintain relations within her community, rape may also serve as a tool of community destruction when the community rejects the victim. Rape in this context may demonstrate “a relationship with the direct victim,” and 2) “show that, ‘the loss, injury, or damage suffered by the latter gives rise to harm to them.’” Rogers, supra note 80, at 307 (citing Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Redacted Version of “Decision on ‘Indirect Victims,’” ¶ 44 (Apr. 8, 2009)). In this way, theoretically, children and other family members of rape victims may be able to seek justice as well.

200. ASKIN, supra note 64, at 344; Rogers, supra note 80, at 272; NOWROJEE, supra note 38, at 10. In Prosecutor v. Akayesu, the court characterized rape and forced pregnancy under sub-element (d), however their explanation appears to support an interpretation of forced pregnancy under sub-element (e), where I have chosen to discuss it. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶¶ 507–508 (Sept. 2, 1998).

201. Fisher, supra note 5, at 93, 122.

202. Akayesu, Case No. ICTR-96-4-T at ¶ 508; Fisher, supra note 5, at 122; Rogers, supra note 80, at 272.

203. See Diane Cole, Some Missing Girls Were Welcomed Back But Others Were Shunned, NPR (June 7, 2016 12:27 PM), http://www.npr.org/sections/goatsandsoda/2016/06/07/480474554/the-long-road-back-
produce “a chilling effect on the normative relations between a man and a woman who might [otherwise] choose to procreate.” 204 This effect “may be particularly intense . . . where victims of sexual violence are perceived as undesirable, soiled, and unfit for marriage.” 205 Rapists in these circumstances may know or believe that by raping their victim, that person will be kept from being accepted by their community or procreating with others. 206 However, it only matters whether the rapist held those views and based on this stereotype intended his act to prevent births. Because the Court must determine the mental state of the perpetrator in order to determine whether genocide is committed, it should not matter that the community refuses to live up to the rapist’s image. 207

e. Forcibly transferring children to another group.

The reality of rape as a weapon of war is that it is often also used as a means of forcibly impregnating women of the opposing side. 208 This interpretation of genocidal rape under sub-element (e) would thus be

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204. Rogers, supra note 80, at 272 (alteration in original) (quoting Short, supra note 126, at 509).
205. Id. (internal citations omitted); Fisher, supra note 5, at 93.
206. “For example, women subjected to sexual violence may be left physically unable to reproduce, or, they may be denied this role by their community given the nature of the attacks they have suffered. . . . Taken as a whole, the evidence indicates that many rapists expected, consequent to their attacks, that the psychological and physical assault on each Tutsi woman would advance the cause of the destruction of the Tutsi people.” Nowrojee, supra note 38, at 10 (emphases added).
207. Marino, supra note 23, at 221.
208. A 2015 Nigerian military raid led to the rescue of 234 women and girls from Boko Haram—at least 214 of them were pregnant. Winsor, supra note 52; Eleanor Goldberg, Here’s Who’s Helping Hundreds of Pregnant, Rescued Boko Haram Kidnapping Victims, HUFFINGTON POST (May 5, 2015, 6:18 PM), http://www.huffingtonpost.com/2015/05/05/boko-haram-pregnant-victims_n_7215792.html.
limited to the rape of women and could conceivably be restricted to women of childbearing age. Quite literally, this is destruction of the group via breeding them out—diluting the bloodline, so to speak. Here, rather than forcibly removing children, combatants are genocidally transferring children by forcibly inserting them into the population, effectively replacing the original populace with the new. Alternatively, another theory of preventing births via forced impregnation includes that of an already “occupied womb.” In essence, this theory states that because a woman is already pregnant with the child of her rapist/the opposing side, she cannot bear the children of her own group during this time because her womb is already occupied.

Genocidal forced impregnation was notably used during the Bosnian Genocide; for example, when one woman “was being raped, her rapist

209. This interpretation reflects historical trends in how forced impregnation in armed conflict has been achieved via rape; while rape and forced impregnation may be theoretically distinct (i.e. could artificially inseminate, without raping, with genocidal intent), the reality of the practice is that rape is often used for these genocidal ends. For a further discussion of genocidal forced impregnation as distinct from rape, see Fisher, supra note 5, at 93.

210. My critique of this paradigm is intended to highlight the limitations of its application, but I would add that it has value in providing a gendered outlet for a crime that uniquely impacts women.

211. Marino, supra note 23, at 222; Fisher, supra note 5, at 92; “When reproduction is used to proliferate members of one group and simultaneously to prevent the reproduction of members of another, it is a form of destruction. When forced impregnation is carried out on a mass, systematic basis, for the purposes of ‘destroying the family life of the victims . . . for cleansing the vicinity of all other ethnicities,’ and producing babies of the conquering group, it becomes genocidal.” Id. at 120-21 (quoting Christine M. Chinkin, Peace and Force in International Law, in RECONCEIVING REALITY: WOMEN AND INT’L LAW at 10 (Dorinda G. Dallmeyer ed., 1993)).

212. See Fisher, supra note 5, at 93.

213. Id.

214. “Serbs raped Muslim women with the intent that they become pregnant. At least some of these women were detained in order to force them to carry the pregnancy until it was too late to obtain an abortion. While there is evidence of forced impregnation on all sides of the conflict, only the rape and sexual assault by Serbs against Muslims has been found to be part of an overall pattern, especially with respect to rapes in detention centers. Finally, the ultimate purpose of Serbian detention camps in Bosnia, according to the Commission of Experts, was ethnic cleansing, and the ultimate purpose of many of
told her, ‘You should have already left this town. We’ll make you have Serbian babies who will be Christians.’”215 Another “woman was detained by her neighbor (who was a soldier) near her village for six months. She was raped almost daily by three or four soldiers. She was told that she would give birth to a chetnik boy who would kill Muslims when he grew up.”216 This tactic continues to be used by the Islamic State;217 for example, a married Yezidi woman who was already pregnant at the time reported “that she was repeatedly raped by an ISIL ‘doctor’ for two and a half months . . . According to the woman, the ‘doctor’ sat on her stomach, aiming to kill her unborn child, saying, ‘this baby should die because it is an infidel; I can make a Muslim baby.’”218

For women that choose to raise the children they were forcibly impregnated with, that child will often not be accepted by the community — particularly in cultures where the child is identified by the ethnicity of their father.219 For example:

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

216. The Commission of Experts, supra note 23.
217. The Islamic State also commits rapes in a context where abortion is not feasible. See Wheeler, supra note 63.
218. Representative of the OHCHR, supra note 57, at ¶ 39. Another witness report detailed forced abortions — before the procedure an Islamic State fighter was overheard stating, “[W]e do not want more Yezidis to be born.” Id. at ¶ 41.
219. “Forced pregnancy and maternity may also be instruments of genocide where strict patriarchal notions of patrilinearity ‘cast out’ children born to men outside the ethnic group, as nonmembers of their mother’s ethnic group.” Dixon, supra note 192 at 704. For example: in both Serbian and Muslim culture, the ethnicity of the father determines the ethnicity of the child, whereas in Jewish culture a child’s ethnicity is determined by the ethnicity of the mother. Fisher, supra note 5 at 114.
Bangladesh and created a government policy that forced women to either obtain abortions or give their “war babies” up for adoption in other countries. 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.”220

This is not an insignificant problem in countries such as Bangladesh (example above) or Rwanda where, following the genocide, an estimated 2-10,000 children known as “pregnancies of the war,” “children of hate,” “unwanted children,” and “children of bad memories” were born.221 This speaks again to the concept of destruction of the social fabric: in this case scenario, the identity of the child is less of a biological reality than a cultural one, but speaks volumes about the intent of the perpetrators, who believe that they are diluting the blood line.222 As a final note, laws criminalizing abortion may further exacerbate the effects of both sub-elements (d) and (e), as was seen in Bosnia and continues to be seen in Iraq,223 by forcing women to carry these pregnancies to term and give birth to children who will live with the consequences of their parentage.

There are several possible barriers to prosecution under this paradigm worth noting. To establish intent to transfer children between groups would require the perpetrator and victim to be from different groups and proof that pregnancy was the intended consequence of the rape, such as evidence that the woman was detained to ensure that the pregnancy was carried to term (as was discussed in regards to the Bosnian genocide).224

As discussed here, each of the sub-elements, while distinct, are also interrelated: a single act of rape, let alone rape on a mass scale, may

220. Takai, supra note 29, at 396 (citations omitted).
223. See discussion in notes 34 and 63.
224. Takai, supra note 29, at 421.
satisfy multiple elements of the definition of genocide. Rape in armed conflict, in its many incarnations, has the potential to satisfy every element of genocide.

B. The Practical Legal Benefit: Why This Approach Serves the Greater Good.

Beyond conceptual fit, understanding rape as a form of genocide also meets justice-oriented policy objectives. As previously discussed, genocide rises to the level of a *jus cogens* prohibition, which in turn gives rise to universal jurisdiction to prosecute.225 In addition to this, the Genocide Convention establishes a duty among States Parties to prosecute226 and there is some indication that violations of *jus cogens* norms give rise to a duty to extradite or prosecute.227 These factors in combination thus create an increased number of courts jurisdictionally permitted to prosecute rape in armed conflict as an act of genocide, theoretically reducing the rates of impunity.228

Such an approach also provides more opportunities for forums to recognize and acknowledge the suffering of victims. This serves an important function of providing closure and healing for victims, as has been internationally acknowledged.229 By recognizing that secondary victimization (i.e. rape leading to disease, forced motherhood, the destruction of the social fabric, etc.) integral to the charge of genocide,

225. See Part III.
the victims will have an opportunity to provide perspective on their suffering; narratives that are generally ignored, will now become central evidence. Prosecuting rape in armed conflict as genocide communicates clearly international condemnation of the acts, an acknowledgment of the severity of the harm, solidarity with the victims, and a prioritization of justice.

V. CONCLUSION

Targeted rape in armed conflict has been and continues to be a problem of significant proportions globally, deserving of greater legal and academic consideration. While historically rape in conflict was tolerated as an inevitable by-product, by observing its increasing prevalence and the purposes for which it is employed we now know that it is explicitly used as a tactic of war. As conflict has evolved over the last century, so too has the jurisprudence which governs the prosecution of rape committed in this context. From the substance of existing international law, what has clearly emerged is the premise that rape utilized as a tactic in armed conflict is internationally condemned. Rather than changing the law itself, by changing our approach to the existing paradigm we can conclusively establish that when rape is targeted against a particular group of people because of their identity as such, it becomes genocide.