

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

Courtney McCausland¹

I. INTRODUCTION.....	150
II. THE EVOLUTION OF CONFLICT, THE EVOLUTION OF JURISPRUDENCE.....	153
A. Historical Conflicts Utilizing Rape as a Tactic of War.....	154
B. Contemporary Conflicts Utilizing Rape as a Tactic of War.....	157
C. Evolution.....	160
III. SOURCES OF INTERNATIONAL LAW THAT SUPPORT UNDERSTANDING RAPE IN ARMED CONFLICT AS GENOCIDE.....	161
A. International Conventions.....	161
1. The Genocide Convention.....	162
2. The Rome Statute of the International Criminal Court.....	163
B. International Custom.....	166
C. International Judicial Decisions.....	169
1. The International Criminal Tribunal for the Former Yugoslavia.....	169
2. The International Criminal Tribunal for Rwanda.....	170
3. The International Court of Justice.....	172
IV. UNDERSTANDING RAPE AS GENOCIDE.....	173
A. The Conceptual Legal Benefit: Modifying Our Approach to the Existing Paradigm.....	174
1. Mens Rea: Genocidal Intent.....	175
2. Actus Reus.....	178
a. Killing members of the group.....	179
b. Causing serious bodily or mental harm to members of the group.....	180
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.....	182
d. Imposing measures intended to prevent births within the group.....	185
e. Forcibly transferring children to another group.....	186

1. J.D. Candidate May 2017. Many thanks to Professor Hannah Brenner for her invaluable guidance throughout the writing process.

B. The Practical Legal Benefit: Why This Approach Serves the Greater Good.	190
V. CONCLUSION.....	191

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

2. Anna Maedl, *Rape as Weapon of War in the Eastern DRC? The Victims’ Perspective*, 33 HUM. RTS. Q. 128, 146 (2011).

3. Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 65 (1999).

4. Catherine A. MacKinnon, *Rape, Genocide, and Women’s Human Rights*, 17 HARV. WOMEN’S L.J. 5, 10 (1994); Sherrie L. Russel-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT’L L. 350, 350-51 (2003).

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

6. Bedont & Hall-Martinez, *supra* note 3, at 65; IRENE PICCOLO, *RAPE AND INTERNATIONAL CRIMINAL LAW* 11 (2013).

7. Rana Jaleel, *Weapons of Sex, Weapons of War*, 27 CULTURAL STUD. 115, 118 (2013).

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

8. Eric Hobsbawm, *War and Peace*, THE GUARDIAN (Feb. 22, 2002, 8:40 PM), <http://www.theguardian.com/education/2002/feb/23/artsandhumanities.highereducation>.

9. *Id.*

10. For a discussion of sexual violence as an explicit tactic of warfare throughout history, see KATHY L. GACA, GIRLS, WOMEN, AND THE SIGNIFICANCE OF SEXUAL VIOLENCE IN ANCIENT WARFARE, IN *SEXUAL VIOLENCE IN CONFLICT ZONES* 73 (Elizabeth D. Heineman, ed., 2011).

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/bgsexualviolence.shtml> (last visited March 2, 2016).

12. Rape in armed conflict is now most often charged as a war crime or a crime against humanity. Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT’L L. 225, 246 (2007).

13. *Id.* at 246.

growing trend in recognizing rape as a method of committing genocide.¹⁴ It is therefore the systematic incidence and unprecedented scale on which rape continues to take place in conflict zones,¹⁵ 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.¹⁶ However, while women remain severely disparately impacted by these tactics¹⁷, men are not themselves exempt from victimization.¹⁸ 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.¹⁹ This is important to consider when analyzing the universality with which a genocidal rape paradigm may be legally applied.²⁰

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.

18. Sexual violence against men is often used to exploit gender roles. Katie Nguyen, *Powerful Myths Silence Male Victims of Rape in War*, THOMSON REUTERS FOUND. (May 15, 2014, 3:44 PM), <http://www.trust.org/item/20140515154437-het27/>; see Grace Natabaalo, *Male Rape Survivors Fight Stigma in Uganda*, AL JAZEERA (Apr. 12, 2013, 3:53 PM), <http://www.aljazeera.com/indepth/features/2013/04/201341111517944475.html>; see also Thomas E. Wikstøl, *The Silence of Male/Male Rape Victims in Burundi and DRC*, INSIGHT ON CONFLICT (Oct. 10, 2012), <https://www.insightonconflict.org/es/blog/2012/10/malemale-rape-victims-burundi-drc/>; see *infra* discussion at notes 197 - 198 and accompanying text.

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

21. Hobsbawm, *supra* note 8.

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.

23. “[One] pattern of rape involves individuals or groups committing sexual assaults against women for the purpose of terrorizing and humiliating them often as part of this policy of ‘ethnic cleansing.’” The Comm’n of Experts, *Final Report of the Comm’n of Experts Established Pursuant to Sec. Council Resolution 780*, delivered to the Security Council, ¶ 248, U.N. Doc. S/1994/674 (May 27, 1994). In another example, guards in detention camps established during the genocide in Bosnia were reported to have regularly castrated male prisoners. See Anthony Marino, *Bosnia v. Serbia and the Status of Rape as Genocide Under International Law*, 27 B.U. INT’L L.J. 205, 218–19 (2009).

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,

24. *Nanjing Massacre*, HISTORY.COM (2009), <http://www.history.com/topics/nanjing-massacre>.

25. Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL’Y SYMP. 87, 89 n.7 (1999); Ellis, *supra* note 12, at 228.

26. See Katherine Brooks, *The History of ‘Comfort Women’: A WWII Tragedy We Can’t Forget*, HUFFINGTON POST (Nov. 25, 2013, 8:52 AM), http://www.huffingtonpost.com/2013/11/25/comfort-women-wanted_n_4325584.html; see BEHIND FORGOTTEN EYES, (Anthony Gilmore 2007) (documentary).

27. Brooks, *supra* note 26.

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

29. Alexandra Takai, *Rape and Forced Pregnancy as Genocide Before the Bangladesh Tribunal*, 25 TEMP. INT’L & COMP. L.J. 393, 393 (2011).

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.”³⁰

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.³¹ 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.³²

During what was later termed the “Bosnian Genocide,” it is estimated that Serbian forces raped between 10,000 and 60,000 women.³³ 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.”³⁴ Sometimes these rapes were committed publicly, in front of

30. *Id.* at 395 (citations omitted).

31. Office of the Historian, *The Breakup of Yugoslavia, 1990-1992*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1989-1992/breakup-yugoslavia> (last visited Dec. 3, 2015). The United States National Intelligence Counsel warned of the pending breakup in 1990, “[t]he violence will be intractable and bitter.” *Id.*

32. Maedl, *supra* note 2, at 129. Representation of this conflict as a civil war among equal aggressors further obscured the nature of the conflict and disincentivized international intervention. MacKinnon, *supra* note 4, at 10.

33. See Lisa Sharlach, *Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda*, 22 NEW POL. SCI. 89, 96 (2000).

34. Stephens, *supra* note 25, at 91; Takai, *supra* note 29, at 403. “A gynecologist would come to the hall, to one of the classrooms... Only the younger women would see the doctor. I think they were checking to see if we were pregnant because he would say, ‘You’re not pregnant.’ The Serbs said to us, ‘Why aren’t you pregnant?’... They wanted women to have children to stigmatize us forever.” 2 HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 21 (1993) at 218-19. “One example... is the case of 17-year-old Marianna, who was raped by guards in a Serbian detention camp as many as 10 times a day. During the rapes, she was reportedly told, ‘Now you will have Serbian babies for the rest of your life.’” Rachel N. Pine, *Women and War: Double Jeopardy*, USA TODAY, Oct. 7, 1992 at 13A. Restrictive abortion laws of the day facilitated this ethnic cleansing via

the whole village, to terrorize the population into fleeing.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.”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.³⁷ In the span of just a few short months, it is estimated that up to one million people were massacred³⁸ and between 100,000 and 250,000 women were raped³⁹ by the members of the *Interahamwe* (a notorious Hutu militia group), soldiers in the armed forces, and other civilians.⁴⁰ Murder and sexual assault were publicly encouraged through propaganda, which routinely dehumanized the Tutsi, referring to them as “cockroaches.”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.”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.” *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.” *Id.*; PICCOLO, *supra* note 6, at 36.

35. Stephens, *supra* note 25, at 91.

36. *Id.*; PICCOLO, *supra* note 6, at 35–40.

37. Jaleel, *supra* note 7, at 126.

38. BINAIFER NOWROJEE, HUMAN RIGHTS WATCH/AFRICA, 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. *Rwanda: A Brief History of the Country*, OUTREACH PROG. ON RWANDA GENOCIDE & UNITED NATIONS, <http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml> (last visited Oct. 8, 2016).

39. *Background Information on Sexual Violence Used as a Tool of War*, *supra* note 11.

40. Nowrojee, *supra* note 38, at 2.

41. *Id.* at 13.

42. *Id.* at 2.

before or during the attack itself,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.⁴⁴ However, many voices and testimonies were lost because, according to surviving witness statements, “many women were killed immediately after being raped.”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.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 group⁴⁷ that first gained its footing in Nigeria in 2002, but has since expanded its campaign of terror to neighboring territories.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.”⁴⁹ Kidnapping victims, often women, appears to be a common tactic of the group – with some sources citing as many as 7,000 victims,⁵⁰ though reports on their

43. *Id.* at 6.

44. *Id.* at 1.

45. *Id.*

46. *See supra*, Part II.A.

47. The name “Boko Haram” loosely translates to “Western education is forbidden.” Farouk Chothia, *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.*

48. *Id.*

49. *Id.*

50. *Two Years Since the Chibok Girls’ Abduction: Providing Support for Women and Girls Surviving Boko Haram*, UNITED NATIONS POPULATIONS FUND (UNFPA) (Apr. 15, 2016), <http://www.unfpa.org/news/two-years-chibok-girls%E2%80%99-abduction-providing-support-women-and-girls-surviving-boko-haram>.

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

51. Chika Oduah, *Executions, Beatings, and Forced Marriage: Life as a Boko Haram Captive*, AL JAZEERA AMERICA (Mar. 23, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/3/23/life-as-a-boko-haram-captive.html>; see, e.g., Chika Oduah, *How I Escaped Marrying a Boko Haram Fighter*, AL JAZEERA AMERICA (Mar. 24, 2015, 5:00AM), <http://america.aljazeera.com/articles/2015/3/24/how-i-escaped-marrying-a-boko-haram-fighter.html>.

52. Morgan Winsor, *Boko Haram Rescue: Pregnant Women, Girls Among Those Found in Sambisa Forest by Nigerian Army*, INT'L BUS. TIMES (May 4, 2015, 8:21 AM), <http://www.ibtimes.com/boko-haram-rescue-pregnant-women-girls-among-those-found-sambisa-forest-nigerian-army-1906965>.

53. *Syria Iraq: The Islamic State Militant Group*, BBC MIDDLE EAST (Aug. 2, 2014), <http://www.bbc.com/news/world-middle-east-24179084>.

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>.

56. Richard Spencer, *Isil Carried out Massacres and Mass Sexual Enslavement of Yazidis, UN Confirms*, TELEGRAPH (Oct. 14, 2014, 10:16 AM), <http://www.telegraph.co.uk/news/worldnews/islamic-state/11160906/Isil-carried-out-massacres-and-mass-sexual-enslavement-of-Yazidis-UN-confirms.html>. The Yezidis are

for Human Rights has issued a report⁵⁷ compiled by investigators sent into the region detailing crimes, against the Yezidi and others, that may amount to genocide.⁵⁸ Reports from victims⁵⁹ indicate that the Islamic State considers female prisoners their property and uses them as sexual slaves,⁶⁰ possibly killing those not considered fit to be sexual partners.⁶¹ In the town of Tal Afar alone it is estimated that 3,500 women are being held as slaves.⁶² Reports also indicate that the girls are forcibly married to Islamic State fighters and are subsequently raped by their new husbands.⁶³

a religious sect that is an offshoot of Zoroastrianism. *Id.* Yezidi is alternatively spelled “Yazidi.”

57. Rep. of the Office of the United Nations High Comm’r for Hum. Rts. [hereinafter OHCHR] on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-called Islamic State in Iraq and the Levant and Associated Groups, U.N. Doc. A/HRC/28/18 (Mar. 13, 2015) [hereinafter Rep. of the OHCHR].

58. *ISIL May Have Committed Genocide, War Crimes in Iraq, Says UN Human Rights Report*, UN NEWS CENTRE (Mar. 19, 2015), <http://www.un.org/apps/news/story.asp?NewsID=50369#.VpIU75MrKAw>; see Rep. of the OHCHR, *supra* note 57, ¶ 76.

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.

63. Rep. of the OHCHR, *supra* note 57, ¶¶ 37–38. Compounding the effects of this, rape victims who are impregnated are unable to access abortions under Iraqi or Kurdish law. Skye Wheeler, *Why Has the World Forgotten Islamic State’s Female Sex Slaves?*, HUMAN RIGHTS WATCH (Apr. 14, 2016, 4:17 PM), <https://www.hrw.org/news/2016/04/14/why-has-world-forgotten-islamic-states-female-sex-slaves>.

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

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 Nuremberg 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.⁶⁹ 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.⁷⁰ 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.⁷¹ 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).⁷² 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.

70. U.N. Charter art. 38, 59 Stat. 1055 (1945) [hereinafter Statute of the ICJ].

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.⁷³

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.⁷⁴ This resolution condemned “genocide [as] an international crime entailing national and international responsibility on the part of individuals and States.”⁷⁵ The Genocide Convention governs actions taken in times of peace, as well as during war, and governs both international and national conflicts.⁷⁶ 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:

- 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;

73. See generally *id.* I.e., with the exception of any reservations appropriately made.

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.

75. G.A. Res. 180 (II), *supra* note 74 (emphasis added).

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

77. Convention on the Prevention and the Punishment of the Crime of Genocide art. 2, December 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The Genocide Convention goes on to define punishable acts, which are: “genocide; [c]onspiracy to commit genocide; [d]irect and public incitement to commit genocide; [a]ttempt to commit genocide; [and] complicity in genocide.” *Id.* art. 3.

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.).

80. I.e., creating a sub-element (f) that explicitly accounts for sexual violence. See Shayna Rogers, *Sexual Violence or Rape as a Constituent Act of Genocide: Lessons From the Ad Hoc Tribunals and a Prescription for the International Criminal Court*, 48 GEO. WASH. INT’L L. REV. 265, 265 (2016).

81. *About the Court*, INT’L CRIM. CT. [hereinafter ICC], https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Dec. 7, 2015).

82. *Id.*

independently of the United Nations to for the purpose of ending impunity for perpetrators of the most serious international crimes.⁸³ What makes the ICC unique within international law is that it prosecutes individuals, rather than states, for these crimes.⁸⁴ 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.⁸⁵

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.⁸⁶

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.⁸⁷ This highlights the modern value of the ICC in holding individuals accountable for international crimes outside of the context of an *ad hoc*, conflict-specific tribunal.⁸⁸ However, because the ICC was created by the Rome Statute, the court's jurisdiction is limited to consenting parties to the treaty.⁸⁹

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

83. *Id.*

84. *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.

85. MacKinnon, *supra* note 4, at 14–15.

86. *Id.* at 14.

87. *Id.*

88. *See infra* Part III.C.

89. *Rome Statute of the International Criminal Court, 17 July, 1998*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/ihl/INTRO/585?OpenDocument>, (last visited Dec. 7, 2015). The Rome Statute currently maintains 124 state parties. *Id.*

their prior work.⁹⁰ 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.⁹¹ I note this provision with caution, however, as the Elements of Crimes do not reference rape under the other four sub-elements of genocide⁹² 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.⁹³

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.”⁹⁴

There is reason to be optimistic, therefore, about the future development of ICC jurisprudence of rape and forced pregnancy as genocide,⁹⁵ 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.⁹⁶

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.”⁹⁷ 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.⁹⁸

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.”⁹⁹ 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.¹⁰⁰ Its publications in the form of General Assembly Resolutions therefore potentially have

97. ICC, Office of the Prosecutor, Policy Paper on Sexual and Gender Based Crimes ¶ 31 (2014).

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.

99. *Customary International Law*, LEGAL INFO. INST. (last accessed Dec. 12, 2015), https://www.law.cornell.edu/wex/customary_international_law. “[A]s opposed to obligations arising from formal written international treaties . . .” *Id.* (citation omitted).

100. *Functions and Powers of the General Assembly*, GEN. ASSEMBLY OF THE U.N., <http://www.un.org/en/ga/about/background.shtml> (last visited Sept. 7, 2016).

normative value – especially when they are endorsed by a majority of member states.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.”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]xpresses 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] Convention¹⁰³

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

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>.

102. G.A. Res. 50/192 (Feb. 23, 1996).

103. *Id.* (emphasis omitted).

104. *Jus Cogens*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/jus_cogens (last visited Dec. 12, 2015). Peremptory norms (*jus cogens*) are similarly defined in the Vienna Convention on the Law of Treaties in Article 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

105. Vienna Convention, *supra* note 104, art. 53.

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.¹⁰⁶ 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.¹⁰⁷

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”¹⁰⁸ — even when traditional grounds of jurisdiction do not exist.¹⁰⁹ 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.¹¹⁰

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

107. “The Genocide Convention, which refers explicitly to territorial jurisdiction, has been interpreted as not prohibiting the application of the principle of universal jurisdiction to genocide.” JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES, 605 (2009). The Genocide Convention currently maintains 147 state parties. ICRC, *supra* note 74.

108. *Universal Jurisdiction*, INT’L JUSTICE RES. CENTER, <http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (last visited Dec. 5, 2015).

109. Such as “connections of territoriality, nationality or protection of state interest.” LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW CASES AND MATERIALS 790 (West Academic Publishing 6th ed. 2014).

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

111. S.C. Res. 827, at 1, U.N. Doc. S/RES/827 (May 25, 1993).

112. *See supra* Part III.

113. See the ICTY Legacy Project: PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY (Serge Brammertz & Michelle Jarvis, eds., Oxford University Press) (2016).

114. *Prosecutor v. Karadžić & Mladić*, Case No. ICTY-95-5-R61, ICTY-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, (Int’l Crim. Trib. for the Former Yugoslavia July 11, 1996). See especially ¶ 94: “The systematic rape of women[] . . . is in some cases intended to transmit a new ethnic identity to the child. In other cases, humiliation and terror serve to dismember the group.”

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

2. *The International Criminal Tribunal for Rwanda*

In 1994 the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) was established by a resolution from the United Nations Security Council,¹¹⁶ following quickly on the heels of the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹¹⁷ “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.”¹¹⁸

As discussed previously, the conflict in Rwanda was one of many in the twentieth century characterized by pervasive sexual violence.¹¹⁹ Potentially surpassing even its sister tribunal, the ICTR has been incredibly progressive in its development of international law surrounding sexual violence in armed conflict.¹²⁰ Perhaps the most significant of these developments is embodied in the case of *Prosecutor v. Akayesu*,¹²¹ which explicitly linked rape and genocide for the first time,¹²² with a conviction based on sub-elements (a) and (b) of genocide.¹²³ 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.”¹²⁴ Regarding specifically the use of

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).

116. S.C. Res. 995, para. 1, U.N. Doc. S/RES/995 (Nov. 8, 1994).

117. Jaleel, *supra* note 7, at 119.

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.

121. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

119. 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.

124. *Akayesu*, ICTR-96-4-T, Judgement, ¶ 731.

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.”¹²⁵ Dicta from the trial court clarified somewhat with a more specific application:

In patriarchal¹²⁶ 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.¹²⁷

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”¹²⁸

In the more recent case of *Prosecutor v. Karemera & Ngirumpatse*¹²⁹ the Trial Chamber found that rape and sexual violence caused serious bodily and mental harm,¹³⁰ not only to the Tutsi women that were raped, “but also, by extension, to their families and communities.”¹³¹ 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.

128. ARCHBOLD: INTERNATIONAL CRIMINAL COURTS, *supra* note 106, at § 13-23.

129. *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Judgement and Sentence (Int’l Crim. Trib. for Rwanda Feb. 2, 2012).

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 births¹³³ and further found that “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part¹³⁴ — ‘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

132. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶ 117 (Int’l Crim. Trib. for Rwanda May 21, 1999).

133. ARCHBOLD: INTERNATIONAL CRIMINAL COURTS, *supra* note 106, at § 13-23. Genocide’s definition sub-element (d).

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

135. Rogers, *supra* note 80, at 282 (quoting *Kayishema*, ICTR-95-1-T, Judgement at ¶ 116). The case of *Prosecutor v. Musema*, also discussed rape as genocide. In that case the Trial Chamber “found Musema individually criminally liable for . . . rape as a mode of committing genocide.” However the conviction was quashed on appeal. Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT’L & COMP. L. 135, 151 (2005) (quoting *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement & Sentence (Int’l Crim. Trib. for Rwanda Jan. 27, 2000)).

136. *The Court*, INT’L CT. OF JUST., <http://www.icj-cij.org/court/index.php?p1=1> (last visited Mar. 15, 2016) [hereinafter ICJ] (referencing the Charter of the United Nations, Oct. 24, 1945, 1 U.N.T.S. XVI).

137. *Id.*

138. Either by becoming parties to the Statute 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*,¹³⁹ Bosnia and Herzegovina alleged that the Federal Republic of Yugoslavia and its successor were involved “in a campaign of genocide” against them.¹⁴⁰ The court here 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.¹⁴¹ 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.”¹⁴² 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.¹⁴³

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.

139. Case Concerning the Application of the Convention on Prevention and Punishment of Crime of Genocide (Bos. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. (Feb. 26); commonly known as the “Genocide Case.” Marino, *supra* note 23, at 207.

140. Marino, *supra* note 23, at 206–07.

141. *Id.* at 211.

142. *Id.* at 212 (emphasis added) (quoting Application of Convention on Prevention and Punishment of Crime of Genocide, 2007 I.C.J. Rep. at ¶ 299). Note particularly the inclusion of “he.” *Id.*

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 rape¹⁴⁸ 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

144. ARCHBOLD: INTERNATIONAL CRIMINAL COURTS, *supra* note 106, at § 13-6.

145. Micaela Frulli, *Are Crimes Against Humanity More Serious than War Crimes?*, 12 EUR. J. INT'L L. 239, 350 (2001) (citing A. ASHWORTH, PRINCIPLES OF CRIMINAL LAW 37 (1999) (emphasis altered)).

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.

148. Jaleel, *supra* note 7, at 123–28.

149. Fisher, *supra* note 5, at 120 (emphasis added).

150. *See supra* Part III.

151. “Acts of rape . . . can fall into the categories of proscribed acts under the Genocide Convention.” NOWROJEE, *supra* note 38, at 20.

account for sexual violence within its text,¹⁵² 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.¹⁵³

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.”¹⁵⁴ It involves acts committed with genocidal intent, or the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group. . . .”¹⁵⁵ Here the group itself is the ultimate target, not an individual person or even several people who happen to be part of a group.¹⁵⁶ The crime (rape) must be perpetrated against a person, or

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).

156. Int’l Law Comm’n, Rep. on the Work of its Forty-Eighth Session, U.N. Doc. A/51/10, at 88 (1996).

people, *because of* their membership in a protected group¹⁵⁷ as a part of an overall objective to destroy the group itself.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.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.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.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;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.”¹⁶³ The distinction is not intended to degrade the experience

157. Protected groups are those defined in the Genocide Convention: national, ethnical, racial or religious groups. Genocide Convention, *supra* note 77.

158. Int’l Law Comm’n, Rep. on the Work of its Forty-Eighth Session, U.N. Doc. A/51/10, at 88 (1996); see Russell-Brown, *supra* note 4, at 351–55, 363 for a discussion of genocidal rape as an intersectional crime based on gender and ethnicity.

159. Takai, *supra* note 29, at 412–13 (discussing interpretations of the *Akayesu* case) (citations omitted).

160. *Id.*

161. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 554 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

162. Jaleel, *supra* note 7, at 125.

163. MacKinnon, *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.¹⁶⁴ 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.¹⁶⁵

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.¹⁶⁶ Incidents of mass-rape in particular seem to be encompassed within this understanding, due to the pervasive nature of the pattern of violence.¹⁶⁷ 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. [H]owever, such explanations would not fit within the evidence of a calculated policy of rape, particularly as part of an ethnic cleansing goal.” Marino, *supra* note 23, at 227.

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. Muhimana, 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.¹⁷² 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.¹⁷³ Finally, the genocidal destruction itself must be either physical or biological in nature.¹⁷⁴

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.¹⁷⁵ 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.¹⁷⁶ Some victims of rape may also commit suicide as a result of the assault.¹⁷⁷

172. ARCHBOLD: INTERNATIONAL CRIMINAL COURTS, *supra* note 106, § 13-8a.

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.

176. Takai, *supra* note 29, at 401 (“During the Rwandan genocide . . . Reports indicate that members of the Hutu army deliberately transmitted human immunodeficiency virus (HIV) to their rape victims as a way to cause pain, suffering, and a certain death for the Tutsi women and girls.”); AFRICAN RIGHTS, RWANDA: BROKEN BODIES, TORN SPIRITS – LIVING WITH GENOCIDE, RAPE AND HIV/AIDS 14–15 (2004) [hereinafter AFRICAN RIGHTS]; Russel-Brown, *supra* note 4, at 354.

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 diseases¹⁸² 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.

180. From June 2006–June 2007 in the DRC 33% of sexual violence victims identified by UNICEF were children. Maedl, *supra* note 2, at 133 (citing U.N. Secretary-General, *Rep. of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo*, delivered to the Security Council, ¶ 40, U.N. Doc. S/2007/391 (June 28, 2007)).

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.

182. Takai, *supra* note 29, at 401; *Sexual Violence*, U.N. OFF. OF THE SPECIAL REP. OF THE SEC’Y-GEN. FOR CHILD. & ARMED CONFLICT, <https://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/sexual-violence/> (last visited Feb. 29, 2016).

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.¹⁸⁵ 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.¹⁸⁶ 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.

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.¹⁸⁷ 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.¹⁸⁸

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.”¹⁸⁹

In the abstract, rape in conflict is also used as a means of destroying the social fabric of a particular group.¹⁹⁰

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.”¹⁹¹

187. ASKIN, *supra* note 64, at 344.

188. NOWROJEE, *supra* note 38, at 16.

189. Stephanie Nolen, “Not Women Anymore...”: *The Congo’s Rape Survivors Face Pain, Shame and AIDS*, MS. MAGAZINE (Spring 2005), <http://www.ms magazine.com/spring2005/congo.asp> (quoting Louise Nzigire).

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.¹⁹² 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."¹⁹³

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].'"¹⁹⁴

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

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).

194. Fisher, *supra* note 5, at 123–24.

is considered shamed — that rape survivors are routinely shunned by husbands, parents and communities.”¹⁹⁵

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.”¹⁹⁶

This tactic is also used against men to exploit gender roles and deeply held beliefs about masculinity.¹⁹⁷

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.¹⁹⁸

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.¹⁹⁹

195. Nolen, *supra* note 189.

196. Nima Elbagir, *Boko Haram Kidnap Victim: Stigmatized for Carrying Captor’s Baby* (quoting leader of vigilante group), CNN, <http://www.cnn.com/2015/06/11/africa/boko-haram-pregnant-victim/> (last updated June 11, 2015, 12:26 PM).

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)

d. Imposing measures intended to prevent births within the group.

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,²⁰⁰ 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),²⁰¹ may lead male and female victims alike to be unwilling to procreate or even maintain normal sexual relations with other members of their group.²⁰² 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.²⁰³ 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

from-boko-

haram?utm_source=facebook.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=2039 (discussing community rejection of girls who had been kidnapped by Boko Haram).

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 women²⁰⁹ and could conceivably be restricted to women of childbearing age.²¹⁰ 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.²¹¹ Alternatively, another theory of preventing births via forced impregnation includes that of an already “occupied womb.”²¹² 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.²¹³

Genocidal forced impregnation was notably used during the Bosnian Genocide,²¹⁴ 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

the rapes, according to the team of medical experts, also was ethnic cleansing.” Marino, *supra* note 23, at 225 (citations omitted).

215. Permanent Rep. of the U.S. to the U.N., Letter dated Apr. 12, 1993 from the Permanent Rep. of the U.S. to the U.N. to the United Nations addressed to the Secretary-General, U.N. Doc. S/25586 (Apr. 13, 1993), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/215/15/img/N9321515.pdf?OpenElement>.

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).

221. Sandra Le Courtois, *Justice and Reparations for Rwanda’s Enfants Mauvais Souvenirs*, in *SEXUAL VIOLENCE IN CONFLICT AND POST-CONFLICT SOCIETIES: INTERNATIONAL AGENDAS AND AFRICAN CONTEXTS* 158, 159 (Doris Buss et al., eds., Natasha De Cruz & Gwendolyn Schulman, trans., 2014).

222. ALONA HAGAY-FREY, *SEX AND GENDER CRIMES IN THE NEW INTERNATIONAL LAW: PAST, PRESENT, FUTURE* 129 (Stephanie Raker trans., Nijhoff Law Specials) (2011).

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.

226. DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 484 (LexisNexis 4th ed. 2009).

227. Int'l Law Comm'n, Final Rep. on the Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*), at 8 (2014).

228. For example, in *State Attorney's Office v. Jorgic*, the Higher Regional Court of Dusseldorf, Germany convicted Bosnian Serb Nicolai Jorgic of genocide on grounds of universal jurisdiction. He appealed this exercise of jurisdiction to the European Court of Human Rights, which rejected the claim. Douglas Singleterry, "Ethnic Cleansing" and Genocidal Intent: A Failure of Judicial Interpretation?, 5 GENOCIDE STUD. & PREVENTION 39, 57 (2010) (citing Oberlandesgericht Dusseldorf [OLG][Higher Regional Court of Dusseldorf] Aug. 26, 1997, 2 StE 8/96 (Ger.)).

229. Dixon, *supra* note 192, at 709; see Rogers, *supra* note 80, at 313 ("Prosecuting Sexual Violence as Genocide Could Provide Symbolic Vindication for Victims").

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.

