

FORCED PREGNANCY: CODIFICATION IN THE ROME STATUTE AND ITS PROSPECT AS IMPLICIT GENOCIDE

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The Bosnia–Herzegovina political conflict between 1992 and 1995 shone international light on the use of forced pregnancy campaigns as tools in ethnic conflicts. The Rome Statute of the International Criminal Court is the first international treaty to explicitly define the crime of forced pregnancy, but its enactment was controversial. This article discusses the intensive opposition to its inclusion in the Rome Statute, from religious, cultural and political perspectives. It also suggests that domestic anti-abortion laws and control over women's reproductive rights raise different issues from a forced pregnancy provision, and that there was a need for the express codification of forced pregnancy as a separate offence, given that it is neither novel nor rare. The Rome Statute lists forced pregnancy as a separate offence, but it is not expressly criminalised as genocide. However, this article argues that forced pregnancy is implicit genocide. It involves attacking women in the targeted group for the purpose of their impregnation through rape, and their detention to facilitate the birth of resulting babies. Forced pregnancy campaigns infiltrate the targeted community through gene pool pollution and manipulation of cultural beliefs.

I INTRODUCTION

Bodily integrity is a fundamental human right. As such, it is morally, legally, politically and socially abhorrent when bodily contact, restraint or interference is used for military advantage. This contention is strengthened by the fact that such breaches of the right to bodily integrity are widely practised on civilians, who are reduced to the status of pawns in armed conflicts. The abhorrence increases where victims are selected on the basis of their gender, thereby extending the effects to indignity, humiliation and dishonour.

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Forced pregnancy has been internationally recognised as a military strategy used in recent ethnic conflicts. It is a policy-based crime of a collective nature that is committed on a large scale. It involves not just forcible impregnation, but confinement of the victimised women.¹ Severe harm is inflicted through occupation of women's bodies and then forcing them to bear their rapists' children.² Forced pregnancy is a hybrid of existing offences against laws and customs of war, such as prohibitions against sexual violence,³ violence to life, torture or inhuman treatment, wilfully causing grave suffering or serious injury to body or health, enslavement and outrages against personal dignity.⁴

Forced pregnancy is explicitly categorised as a war crime and a crime against humanity under the Rome Statute of the International Criminal Court, and can be implicit genocide. The forced pregnancy provision was the most contentious of all the gender crimes included in the Rome Statute,⁵ and was a controversial issue through the entire Rome Diplomatic Conference.⁶

This article begins, in Part II, by looking at the factual situation in Bosnia–Herzegovina for the purposes of understanding the nature of forced pregnancy campaigns. Part II also highlights the relevant general legal framework in international law prior to the Rome Statute coming into force, and examines the definition of forced pregnancy under the Statute.

The main grounds of opposition to the inclusion of forced pregnancy into the Rome Statute are discussed in Part III. It is argued here that forced pregnancy involves separate considerations from those raised by the Holy See and Arab States over freedom of national anti-abortion and domestic

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- 1 Kristen Boon "Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent" (2001) 32 Colum Hum Rts L Rev 625, 655.
 - 2 Barbara Bedont and Katherine Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court" (1999) 6 Brown J World Aff 65, 74 [Bedont and Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court"].
 - 3 Human Rights Watch Africa: Human Rights Watch Women's Rights Project *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (Human Rights Watch, New York, 1996) 2 <<http://www.hrw.org/reports/1996/Rwanda.htm>> (last accessed 31 July 2006).
 - 4 Human Rights Watch *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court* (Human Rights Watch, New York, 1998) 16.
 - 5 Marlies Glasius "How Activists Shaped the Court" (December 2003) *Crimes of War Project: The Magazine* <http://www.crimesofwar.org/icc_magazine/icc-glasius.html> (last accessed 31 July 2006); Cate Steains "Gender Issues" in Roy S Lee (ed) *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, The Hague, 1999) 357, 366.
 - 6 Barbara Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court" in Flavia Lattanzi and William A Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (II Sirente, Ripa Fagnano Alto, 1999) 183, 199 [Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court"].

family laws, and that the same can be said of concerns about abortion rights raised by non-governmental organisations (NGOs) and pressure groups. In light of the intense opposition to the forced pregnancy provision, and the nature of international law, the final definition of forced pregnancy represents a good compromise.

Part IV discusses the inclusion of forced pregnancy as a separate offence. Although it was argued at the Conference that there was no need for a separate offence because forced pregnancy could be prosecuted under existing offences due to its hybrid nature, accepting such an argument would not have adequately reflected the international community's affirmation as a whole of the need to punish serious crimes.⁷

Part V discusses forced pregnancy as a crime of genocide. The International Criminal Tribunal of Rwanda (ICTR) decision in *The Prosecutor v Akayesu*⁸ is considered for the purpose of discussing forced pregnancy as a crime of genocide in the form of "killing members of the group" under Article 6(a), "causing serious bodily or mental harm to members of the group" under Article 6(b) and "imposing measures intended to prevent births within the group" under Article 6(d) of the Rome Statute. Part VI concludes that although there have been significant developments in international law, such as the codification of the forced pregnancy provision and the decision in *Akayesu*, these are only preliminary steps towards upholding the value of international criminal law.

II CRYSTALLISATION OF FORCED PREGNANCY UNDER INTERNATIONAL LAW

A Factual Background

The Bosnia–Herzegovina political conflict between April 1992 and November 1995⁹ brought forced pregnancy to the world's attention.¹⁰ Part of the Serbian political agenda was the goal of artificially separating the different ethnic groups to achieve an ethnically homogeneous state.¹¹ On a large scale, and often publicly, Muslim females (adults, teenagers and children) were captured,

7 International Crimes and International Criminal Court Act 2000, Schedule: Rome Statute of the International Criminal Court, preamble [Rome Statute].

8 *The Prosecutor v Akayesu* (Judgment) (2 September 1998) ICTR-96-4-T, para 507 (Chamber I, ICTR).

9 Florence Hartmann "Bosnia" in Roy Gutman and David Rieff (eds) *Crimes of War: What the Public Should Know* (W W Norton & Company, Singapore, 1999) 50, 50.

10 R Charli Carpenter "Assessing and Addressing the Needs of Children Born of Forced Maternity" (International Conference on World Affected Children, Winnipeg, 11 September 2000), reproduced in *The War Children of the World: Report 1 – 2001* <<http://www.warandchildren.org/>> (last accessed 4 October 2006).

11 UNGASC "The Situation of Human Rights in the Territory of the Former Yugoslavia" (26 February 1993) Note by the Secretary-General A/48/92 S/25341 para 16; Hartmann, above n 9, 52.

imprisoned in rape/death camps¹² and repeatedly raped by uniformed Bosnia–Serb troops.¹³ During their period of detention, victims would have to watch other women being gang raped.¹⁴

The majority of these victims were confined in detention camps to prevent the termination of pregnancies resulting from rape.¹⁵ They would only be released when visibly pregnant.¹⁶ By the time they were able to cross the borders for proper medical care, for example, in Croatia, fetuses would have been too developed to be safely aborted.¹⁷ For many, the raping continued during pregnancy and victims who failed to conceive were often murdered.¹⁸ The Bassiouni Report states:¹⁹

Perpetrators tell female victims that they will bear children of the perpetrator's ethnicity, that they must become pregnant, and then hold them in custody until it is too late for the victims to get an abortion.

Apart from unwanted pregnancies, the victimised women suffered from other consequences such as sexually transmitted diseases, severe physical injuries, mental trauma and social stigma.²⁰

[T]he mass rape of women has as its purpose the ruin of women as future wives and mothers, or the wrecking of their marriages. In Islamic society modesty is highly prized; by tradition, many women still will not allow themselves to be seen naked even by their husbands. One can imagine the attitude towards a woman who has been raped by many men, daily, for months. And her despair [For example,] the attitude of [Muslim] men to raped wives was: "It would be better if she'd died."

12 Beverly Allen *Rape Warfare: The Hidden Genocide in Bosnia–Herzegovina and Croatia* (University of Minnesota Press, London, 1996) 63.

13 Kelly Dawn Askin *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers, Hague, 1997) 282. For more information on the history of the formation of these troops, see Carole Rogel *The Breakup of Yugoslavia and the War in Bosnia* (Greenwood Press, London, 1998).

14 Thom Shanker "Sexual Violence" in Gutman and Rieff, above n 9, 323, 323.

15 Equality Now, Women's Action 3.6 "Bosnia-Herzegovina: The Failure to Arrest Radovan Karadzic and Ratko Mladic" (updated August 2001) <http://www.equalitynow.org/english/actions/action_0306_en.html> (last accessed 31 July 2006).

16 UNSC "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)" (27 May 1994) S/1994/674 Annex paras 232–253.

17 Shanker, above n 14, 323.

18 Allen, above n 12, 63.

19 The Bassiouni Report, para 250(b) cited in Allen, above n 12, 77.

20 Blanche D'Alpuget "A Crack in the Human Heart" (1993) *The Australia Magazine* 36 cited in Askin, above n 13, 270.

Forced pregnancy campaigns are not random aggressive actions. They are deliberate attacks as part of a wider strategy to eliminate the targeted group. Victims are selected on the basis of their ethnicity and reproductive capabilities. This is rape as an instrument of ethnic cleansing:²¹ the aim of impregnating victims to propagate the offenders' ethnic group is the clear underlying political purpose. The Bosnia–Herzegovina conflict involved an organised and systematic attempt to cleanse the Muslim population from territories that the Serbians wanted to conquer in their political desire to expand Serbia.²² A Serbian guard at Sussica concentration camp in Vlasenica said: "Our aim was simply to get rid of the Muslims."²³

Forced pregnancy campaigns also attack the self-esteem of the victim's family, the father and husband, as it signifies their impotence in protecting "their women".²⁴ The importance of women's sexual purity in these societies translates the attack on an individual to an attack upon her community. It "is intended to humiliate, shame, degrade and terrify the entire ethnic group".²⁵ This is the social reality where the culture defines a woman as a man's possession, and her virginity as his most valuable asset.²⁶ Forced pregnancy causes the community to reject the victimised women as procreation candidates,²⁷ ultimately causing a reduction in the community's reproductive pool.

The Serbian perpetrators believed that they could end the Bosnian–Herzegovinan population by fathering the babies of Bosnian–Herzegovinan women. This belief is preposterous for two reasons. First, the belief is flawed in terms of genetics. These babies would be half Bosnian–Herzegovinan and half Serb. Secondly, a person is shaped not only by nature, but also by nurture. Culture shapes an individual. Unless the child is raised by the Serbian father, it is unlikely that the child would be

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- 21 UNGASC "The Situation of Human Rights in the Territory of the Former Yugoslavia" (26 February 1993) Note by the Secretary-General A/48/92 S/25341 para 84.
- 22 Allen, above n 12, 95; Catharine A MacKinnon "Rape, Genocide, and Women's Human Rights" (1994) 17 Harv Women's LJ 5, 8. This largely refers to the parts that were under the power of Croats. For further information on the ethnic and political history between Croatia and Serbia over Bosnia–Herzegovina, see Edward R Ricciuti *War in Yugoslavia: The Breakup of a Nation* (Evans Brothers Limited, London, 1993); Ann L Griffiths *Ethnicity and Conflict in the Former Yugoslavia* (The Centre for Foreign Policy Studies, Dalhousie University, Nova Scotia, 1999); Bogdan Denitch *Ethnic Nationalism: The Tragic Death of Yugoslavia* (University of Minnesota Press, London, 1994).
- 23 Roger Cohen "Ethnic Cleansing" in Gutman and Rieff, above n 9, 136, 138.
- 24 Helen Fein "Genocide and Gender: The Uses of Women and Group Destiny" (1999) 1 Journal of Genocide Research 43, 58.
- 25 UNGASC "The Situation of Human Rights in the Territory of the Former Yugoslavia" (26 February 1993) Note by the Secretary-General A/48/92 S/25341 para 85.
- 26 Allen, above n 12, 96.
- 27 Carpenter, above n 10.

detached from the Bosnian–Herzegovinan culture. In reality, if the child survives and is not abandoned, it is likely to be raised by the mother in accordance with her culture.²⁸

However, from the perspective of the forced pregnancy perpetrators, genocide is a possibility, as every aspect of the victim's identity is robbed: nationality, culture, ethnicity and religion.²⁹ These identities are eliminated by virtue of the victim's gender, which is the very characteristic that makes her a victim in the first place. Ironically, she still remains an enemy who has to be destroyed because she will still be considered as part of the targeted cultural group by the perpetrators.³⁰ The resulting pregnancies are the major genocidal weapon.³¹ In patriarchal societies, membership of a group is determined by the identity of a person's father.³² This was the Nazi philosophy: culture is genetic.³³ Children of forced pregnancies are largely ostracised as "children of the enemies" and often are killed at birth or abandoned after birth.³⁴ This furthers the attainment of the forced pregnancy perpetrators' ultimate goal of annihilation of a human population.³⁵

It has been asserted that the Serb genocide of non-Serbs has been successful in that not only has it permanently maimed or traumatised hundreds of thousands of people – which includes the females forcibly impregnated by genocidal rape, their families, communities and the resulting children – it has grown to become a model of behaviour for the Croatian and, abhorrently, even Bosnian–Herzegovinan forces, to imitate.³⁶ The Bosnia–Herzegovina conflict has become the model for wars of ethnic cleansing.³⁷

28 Allen, above n 12, 87.

29 Allen, above n 12, Introduction, xiii.

30 Allen, above n 12, 101.

31 Allen, above n 12, 91.

32 *The Prosecutor v Akayesu* (Judgment) (2 September 1998) ICTR-96-4-T, para 507 (Chamber I, ICTR).

33 MacKinnon, above n 22, 13.

34 Allen, above n 12, 99.

35 Allen, above n 12, 131.

36 Allen, above n 12, 104.

37 Hartmann, above n 9, 50.

B General Legal Environment Prior to the Rome Statute

There was no definition of forced pregnancy in international law prior to the Rome Statute. However, as identified above, forced pregnancy is a hybrid of existing offences. In addition, the underlying values of protecting autonomy, equality and reproductive choice are long-standing fundamental human rights.³⁸

1 The 1949 Geneva Conventions,³⁹ Common Article 3 and 1977 Additional Protocols I and II⁴⁰

The Geneva Conventions set the standards for international humanitarian law. In essence, they state the general prohibition against violence to life and against persons not taking part in conflicts. This is supported by common Article 3(1),⁴¹ Article 75(2)(a) of Additional Protocol I and Article 4(2)(a) of Additional Protocol II. "Cruel treatment and torture", "outrages upon personal dignity", "humiliating and degrading treatment", and "torture or inhuman treatment" are grave breaches of the Geneva Conventions.⁴² Specifically, Article 27(2) of the Fourth Geneva Convention and Article 76 of Additional Protocol I both state that women shall be protected against any attack on their honour, in particular, rape, enforced prostitution and any form of indecent assault. If unjustified by military necessity, such acts constitute a grave breach of Article 147 of the Fourth Geneva Convention and amount to war crimes under Additional Protocol I.

Common Article 3 applies to armed conflict occurring within the territory of contracting parties to the Geneva Conventions. It applies to a situation where the conflict is within the State, between the government and rebel forces or between the rebel forces themselves. This protects women in non-international conflict.

38 Boon, above n 1, 657.

39 The four Geneva Conventions are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (12 August 1949); Geneva Convention for Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (12 August 1949); Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (12 August 1949); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949).

40 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) (Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) (Additional Protocol II).

41 Common Article 3 to the 1949 Geneva Conventions.

42 In particular, these are breaches under the Fourth Geneva Convention.

2 *Other relevant international treaties*

Article II of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide⁴³ (Genocide Convention) criminalises forms of genocidal rape. Article 46 of the Convention Respecting the Laws and Customs of War on Land⁴⁴ (Hague Convention) states that "family honour and rights, individual lives and private property, as well as religious convictions and liberty, must be respected". The lack of reference to sexual violence means that it will be read into "family honour".⁴⁵ This is based on an unfortunate stereotype, but one which is an accurate reflection of social attitudes: that victims of sexual violence are shamed or dishonoured.⁴⁶

The 1993 Vienna Declaration and Programme of Action (Vienna Declaration) condemns systematic rape.⁴⁷ The 1995 Beijing Declaration and Platform for Action (Beijing Declaration) explicitly recognised forced pregnancy as a war tactic.⁴⁸ Adopted during the Fourth World Conference on Women,⁴⁹ the Beijing Declaration identified the need to focus international and domestic attention on the effects of armed conflict on women. Other relevant international treaties include the Convention on the Elimination of All Forms of Discrimination against Women,⁵⁰ the International Convention on the Elimination of All Forms of Racial Discrimination⁵¹ and the International Covenant on Civil and Political Rights.⁵²

43 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277 [Genocide Convention].

44 Convention Respecting the Laws and Customs of War on Land (18 October 1907).

45 Theodor Meron "Rape as a Crime under International Humanitarian Law" (1993) 87 AJIL 424, 425.

46 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 190.

47 UNGA "Vienna Declaration and Programme of Action" (12 July 1993) A/CONF.157/23 para 28 ["Vienna Declaration and Programme of Action"].

48 UN "Beijing Declaration and the Platform for Action, Fourth World Conference on Women" (15 September 1995) A/CONF.177/L.5/Add.20, paras 114, 132 and 135 ["Beijing Declaration"].

49 "Beijing Declaration", above n 48.

50 UNGA "Convention on the Elimination of all Forms of Discrimination against Women" (18 December 1979) GA 34/180.

51 UNGA "International Convention on the Elimination of all Forms of Racial Discrimination" (21 December 1965) GA 2106.

52 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

C Definition under the Rome Statute

The Rome Statute is the first international treaty to define forced pregnancy.⁵³ It was opened for signature on 17 July 1998,⁵⁴ came into force on 1 July 2002⁵⁵ and establishes the jurisdiction of the International Criminal Court (ICC). The main definition of forced pregnancy is in article 7.2(f) of the Rome Statute, where it is defined as:⁵⁶

[T]he 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. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

1 Crime against humanity

Article 7.1(g) criminalises forced pregnancy as a crime against humanity. Additional elements to the main definition are that:⁵⁷

- the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- the perpetrator knew or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

It must be a course of conduct involving multiple commissions of forced pregnancy against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.⁵⁸ In addition, it is "persecution against any identifiable group collectively on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognised as impermissible under international law".⁵⁹

53 Bedont and Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court", above n 2, 72; Steains, above n 5, 364.

54 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court "Rome Statute of the International Criminal Court" (17 July 1998) A/CONF.183/9. To date, there are 100 parties, see <<http://www.iccnw.org/?mod=romesignatures>> (last accessed 1 August 2006).

55 A minimum of 60 countries had to sign the treaty before it could come into force.

56 Rome Statute, above n 7, art 7.2(f).

57 United Nations Preparatory Commission for the International Criminal Court "Report of the Preparatory Commission for the International Criminal Court, Addendum Part II Finalized draft text of the Elements of Crimes" (2 November 2000) PCNICC/2000/1/Add.2 art 7(1)(g). Rome Statute, above n 7, art 21 provides that the Court shall apply amongst others, the elements of crimes. Article 9 states that the elements of crimes shall assist the Court in the interpretation and application of Articles 6, 7 and 8.

58 Rome Statute, above n 7, art 7.2(a).

59 Rome Statute, above n 7, art 7(1)(h).

2 *War crime*

Forced pregnancy is also categorised as a war crime in both internal⁶⁰ and international⁶¹ conflicts. Forced pregnancy as a war crime involves acts committed as part of a plan, policy or large-scale commission.⁶² In addition to the main definition, the elements are that:⁶³

- the conduct took place in the context of and was associated with an armed conflict; and
- the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

3 *Genocide*

Implicitly, forced pregnancy is incorporated into the crime of genocide under Article 6 of the Rome Statute. Genocide includes acts committed with the intent of destroying in whole or in part a national, ethnic, racial or religious group, in particular, by:

- killing members of the group;⁶⁴
- causing serious bodily or mental harm to members of the group;⁶⁵
- imposing measures intended to prevent births within the group.⁶⁶

The conduct must also be taken against a person or persons belonging to the above mentioned groups in a manifest pattern that could effect the destruction of the group.⁶⁷ "Manifest" is judged objectively.⁶⁸

4 *Conclusion*

To date, there has yet to be a prosecution of forced pregnancy in the ICC. The main definition of forced pregnancy makes it clear that the accused need not be the person that made the victim pregnant. The accused must have knowledge that the woman or women were forcibly made pregnant for the purpose of "affecting the ethnic composition of any population or carrying out other

60 Rome Statute, above n 7, art 8.2(e).

61 Rome Statute, above n 7, art 8(2)(b)(xxii).

62 Rome Statute, above n 7, art 8(1).

63 United Nations Preparatory Commission for the International Criminal Court, above n 57, art 8(2)(b)(xxii)–4.

64 Rome Statute, above n 7, art 6(a).

65 Rome Statute, above n 7, art 6(b).

66 Rome Statute, above n 7, art 6(d).

67 United Nations Preparatory Commission for the International Criminal Court, above n 57, arts 6(a), (b) and (d).

68 United Nations Preparatory Commission for the International Criminal Court, above n 57, art 6.

grave violations of international law" and must intend to confine her or them in furtherance of that purpose. By requiring a specific intent, the detention of a woman who conceives or gives birth to a child as a result of rape does not in itself amount to forced pregnancy.

To a substantial extent, crimes against humanity, war crimes and genocide overlap. In particular, the elements of crimes against humanity and genocide inevitably intersect, as genocide originated as a heinous category of crimes committed against humanity.⁶⁹ In addition, both crimes against humanity and genocide can occur during times of war, thus overlapping war crimes, and peace. However, crimes against humanity do not require the intent to "destroy in whole or in part", as does genocide, but require instead a "widespread or systematic attack directed against any civilian population". Potentially, any form of genocide can also be prosecuted as a crime against humanity, which requires a lower standard of *mens rea*.⁷⁰

Article 21(3) states that the application and interpretation of law must be consistent with internationally recognised human rights, without any adverse distinction found on, amongst others, the grounds of gender, race, religion and ethnic origin. This allows reference to be made to international human rights instruments highlighted earlier in this article, such as the Vienna Declaration and Beijing Declaration, when interpreting the provisions under the Rome Statute.⁷¹

III THE ROCKY ENTRANCE INTO THE ROME STATUTE

In essence, proponents for the inclusion of forced pregnancy in the Rome Statute⁷² argued that there should be international criminalisation because of the specific damage caused to the victims, who are forced to carry the children of their rapists, and the harm to an ethnic community, through the appropriation of their reproductive capacity by the conquering force. Forced pregnancy perpetrators aim to destroy a community by undermining its family structure through targeting women for sexual violence.⁷³ This has devastating effects in communities where women's chastity is bound up with ideas of cultural continuity.

69 Roger S Clark "Crimes Against Humanity and The Rome Statute of the International Criminal Court" in Mauro Politi and Giuseppe Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate Publishing Company, Aldershot, 2001) 75, 92.

70 Clark, above n 69, 92.

71 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 185.

72 Countries which expressed support included Canada, the United States, Australia, Netherlands, Azerbaijan, Slovenia, Croatia, Mexico, Sudan, Estonia, Burundi, Rwanda, Turkey, Nigeria, Austria, India, Solomon Islands and Bosnia–Herzegovina.

73 Carpenter, above n 10.

Undoubtedly, forced pregnancy should be criminalised, but it is less obvious how the offence should be drafted. The inclusion of this crime in the Rome Statute was controversial due to its gender-specific nature and concerns over breaches of reproductive freedom and sexual autonomy. In particular, controversies circled around the definition of the act of detaining a pregnant woman and forcing her to carry the foetus to full term.⁷⁴ This issue sparked considerable debate in countries with domestic laws prohibiting abortion and in organisations concerned with women's control over reproductive choices. Given their strength, they were able to obstruct efforts to address forced pregnancy by refusing the wordings favoured by the majority of countries, forcing its definition to be watered down.⁷⁵

A Formidable Opposition: The Holy See and Arab States

1 Defining the Holy See and its influence

The influence of the Holy See⁷⁶ in defining forced pregnancy in the Rome Statute was phenomenal. Given that it comprises both the Pope and the Roman Curia, the Holy See is effectively the government of the Roman Catholic Church and a representative of Catholic countries.⁷⁷ The influence of the Roman Catholic Church is felt both in the international sphere and in national laws in the formulation of universal standards of reproductive rights.⁷⁸

The Roman Catholic Church is uniquely positioned to influence international policy-making. It speaks on issues of concern for its religious followers in numerous nations around the world. At the international level, the Roman Catholic Church uses its distinctive position at the United Nations to affect a wide range of global issues, including international economic development, women's status, population, and family planning.

74 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 197.

75 Bedont and Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court", above n 2, 74.

76 The Holy See comprises the Pope, the College of Cardinals and the Roman Curia (the departments and ministries that assist the Pope in the government of the Roman Catholic Church). New Advent Catholic Website: The Catholic Encyclopaedia <<http://www.newadvent.org/cathen/07424b.htm>> (last accessed 1 August 2006).

77 Including Ireland and several Latin American countries.

78 Center for Reproductive Rights "The Holy See at the United Nations: An Obstacle to Women's Reproductive Health and Rights" (Briefing Paper, August 2000) <http://www.reproductiverights.org/pdf/pub_bp_holyseeattheun.pdf> (last accessed 1 August 2006); Rishona Fleishman "The Battle Against Reproductive Rights: The Impact of the Catholic Church on Abortion Law in both International and Domestic Arenas" (2000) 14 Emory Int'l L Rev 277, 277.

The Holy See has legal personality under international law⁷⁹ and is the only permanent non-member State maintaining a permanent observer mission at the United Nations.⁸⁰ The Vatican City is a sovereign state and is a separate legal entity from the Holy See. However, the Holy See administers the Vatican City. For example, all foreign embassies are accredited to the Holy See rather than to the Vatican and the Holy See establishes diplomatic agreements with other sovereign states on behalf of itself and of the Vatican.

2 *The Holy See's concerns*

There was no dispute about criminalising the act of forcibly making a woman pregnant through rape, although, interestingly, this is not reflected in the wording of the forced pregnancy provision.⁸¹ Rather, the concern was in relation to defining the detention of a woman and forcing her to give birth to the child. The Holy See was worried that its domestic legislation and policies of denying women access to abortion might fall within the scope of forced pregnancy;⁸² hospitals and clinics run by the Catholic Church adopt the policy of not providing abortion services.⁸³ It argued that a forced pregnancy provision would pave the way for legitimising abortion for rape victims. In addition, Archbishop Renato Martino, the Holy See's Permanent Observer at the United Nations, argued that the forced pregnancy provision could be used against husbands who persuade their wives against abortion, and domestic laws that prohibit abortions after a few weeks,⁸⁴ as such laws "forced" a woman to stay pregnant and to carry the foetus to term.⁸⁵

79 For more on the status of the Holy See under international law, see Center for Reproductive Rights, above n 78.

80 This means that the Holy See maintains, amongst other things, the right to participate in the general debate of the General Assembly, the right of reply, the right to have its communications issued and circulated directly as official documents, and the right to co-sponsor draft resolutions and decisions that makes references to the Holy See: The Permanent Observer Mission of the Holy See to the United Nations <<http://www.holyseemission.org/>> (last accessed 1 August 2006).

81 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 197.

82 Bedont and Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court", above n 2, 42.

83 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 197.

84 Marco Bardazzi (ed) "War: A One-Way Adventure" (November 2002) *Traces: Communion and Liberation International Magazine* <<http://www.traces-cl.com/nov02/waraone.htm>> (last accessed 1 August 2006).

85 Peter Simpson "UN Power Grab: The International Criminal Court" (September 1999) *Crisis* 17, cited in Clark, above n 69, 85.

In addition, the Holy See claimed that forced pregnancy campaigns could be prosecuted under existing offences,⁸⁶ in particular, rape and imprisonment.⁸⁷ With this background, the Holy See submitted a proposal for the removal of forced pregnancy, as a war crime, from the Rome Statute.⁸⁸ Similar objections were made to the classification of forced pregnancy as a crime against humanity⁸⁹ for fear that it would impose an international obligation to give forcibly impregnated women access to abortion.⁹⁰

When attempts to remove forced pregnancy as an offence failed, the Holy See switched its focus to restricting the scope of the offence, and was the sole dissenting voice to the term "forced pregnancy".⁹¹ Initially, the Holy See proposed a "forcible impregnation" provision,⁹² which reflects approval of criminalising forcibly impregnating a woman through rape. However, this term is insufficient to cover the situation in Bosnia–Herzegovina, which was one of the main concerns that the forced pregnancy provision was trying to address. "Forcible impregnation" only includes forcibly making a woman pregnant, not keeping her pregnant. During the March 1998 Preparatory Commission, the Holy See submitted another inadequate term: "enforced pregnancy".⁹³ These submissions were both rejected and forced pregnancy was established as a war crime.⁹⁴

86 Fr Robert John Araujo and Fr John J Coughlin "Holy See's Statements on Criminal Court" in *Catholic Culture* <http://catholicculture.net/docs/doc_view.cfm?recnum=459> (last accessed 1 August 2006). It was suggested that the following existing crimes are sufficient for purposes of criminalising forced pregnancy: rape, enforced prostitution, indecent assault, illegal detention, persecution, slavery, torture, willfully causing great suffering, and genocide. Genocide was defined as including:

(1) causing serious bodily or mental harm to members of the group; (2) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (3) imposing measures intended to prevent births within the group; and, (4) forcibly transferring children of the group to another group, extermination, committing outrages upon personal dignity ... in particular, humiliating and degrading treatment ... and medical experimentation.

87 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 196.

88 Louise Chappell "Contesting Women's Rights: The Influence of Religious Force at the United Nations" (Australasian Political Studies Association Conference, Adelaide, 29 September to 1 October 2004) 19.

89 Boon, above n 1, 659.

90 James Cockayne "Islam and International Humanitarian Law" (2002) 84 IRRC 597, 621.

91 Bedont and Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court", above n 2, 73.

92 "Proposal submitted by the Holy See" (1 April 1998) A/AC.249/1998/DP.13 (restricted access).

93 "Proposal submitted by the Holy See", above n 92.

94 Bedont and Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court", above n 2, 73.

The Holy See aggressively pushed for restricting the boundaries of the forced pregnancy provision. This included attempts to limit it to the situation in Bosnia–Herzegovina⁹⁵ and to acts with the intent of ethnic cleansing.⁹⁶ Such proposals were too restrictive, however, and would have unduly excluded critical situations such as the experiences of many Jewish women during World War II. These women were forcibly made and kept pregnant so that their foetuses could be used for medical experiments.⁹⁷ This submission was rejected through the insertion of the phrase "or carrying out other grave violations of international law" into the final definition.

3 *The concerns of the Arab States*

The Arab States had concerns similar to the Holy See, although they were more willing to reach a compromise.⁹⁸ They favoured the term "forcible impregnation" and were concerned that inclusion of the forced pregnancy provision would exert pressure on them to adopt legislation to legalise abortion.⁹⁹ Also, they were of the opinion that forced pregnancy campaigns were adequately covered by existing crimes, in particular, rape and unlawful detention.¹⁰⁰

However, there were specific concerns over interference with Islamic family jurisprudence, particularly with regard to the concept of rape within marriage.¹⁰¹ As such, it was submitted that the following provisions be added to the forced pregnancy provision: that forced pregnancy acts "do not affect family matters recognized by different national laws of the State Parties"¹⁰² and "do not include acts related to natural marital sexual relations or the bearing of children in different national laws in accordance with religious principles or cultural norms".¹⁰³

95 Barbara Bedont and David Matas "Negotiating for an International Criminal Court" (September–October 1998) *Peace Magazine* 21 <<http://www.peacemagazine.org/archive/v14n5p21.htm>> (last accessed 1 August 2006) [Bedont and Matas "Negotiating for an International Criminal Court"].

96 Steains, above n 5, 368.

97 Bedont and Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court", above n 2, 74.

98 Thomas Graditzky "War Crime Issues before the Rome Diplomatic Conference on the Establishment of an International Criminal Court" (1999) 5 UC Davis J Int'l L & Pol'y 199, 205.

99 Steven C Roach "Arab States and the Role of Islam in the International Criminal Court" (2005) 53 *Political Studies* 143, 148.

100 Steains, above n 5, 367.

101 Chappell, above n 88, 19.

102 Preparatory Commission for the International Criminal Court: Working Group on Elements of Crimes "Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes Against Humanity" (3 December 1999) PCNICC/1999/WGEC/DP.39 Article 7(1)(g)(4): Forced pregnancy.

103 Preparatory Commission for the International Criminal Court: Working Group on Elements of Crimes, above n 102, Article 7(1): Chapeau.

B Interest Groups and Non-Governmental Organisations (NGOs)

Initially, little attention was paid to gender issues during the drafting of the Rome Statute.¹⁰⁴ As a result, a group of human rights activists formed the Women's Caucus for Gender Justice in 1997¹⁰⁵ to give voice to gender issues.¹⁰⁶ The Women's Caucus represented approximately 200 international women's organisations at the time of the Rome Diplomatic Conference.¹⁰⁷

The Women's Caucus was in favour of the inclusion of the offence and the term "forced pregnancy". It argued that there was a need for explicit criminalisation of forced pregnancy in international law as the situation in Bosnia–Herzegovina was not novel. Supporting historical facts included the policy of systematic rape used during the ethnic conflict in Rwanda and women held as slaves to bear children during the period of African–American slavery.¹⁰⁸

However, the Women's Caucus was of the opinion that the final definition was too restrictive. Situations where pregnant women who conceived through consensual sex were detained against their will for the purposes of selling their babies on the black market would be excluded. As such, the Women's Caucus was in favour of a broader definition which simply defined forced pregnancy as forcing a woman to remain pregnant. However, although the baby black market situation is possible, its extreme rarity meant that it did not warrant a dangerously broad and vague definition which would be detrimental to the interests of most women.¹⁰⁹

Pro-family pressure groups, such as REAL Women of Canada, argued that the term "forced pregnancy" had been used by the American Civil Liberties Union to describe anti-abortion laws or policies.¹¹⁰ Similarly, anti-choice NGOs seized the opportunity to promote their agenda, falsely

104 Bedont and Matas "Negotiating for an International Criminal Court", above n 95.

105 Now known as Women's Initiative for Gender Justice, see <<http://www.iccwomen.org/>> (last accessed 26 October 2006).

106 Rhonda Copelon "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law" (2000) 46 McGill LJ 217, 233.

107 Bedont and Hall-Matinez, above n 2, 67.

108 See Diane F Orentlicher "Genocide" in Gutman and Rieff, above n 9; Tom Sanders "The Double Oppression of Black Women in America" (March 2001) *Socialist Action* <<http://www.socialistaction.org/paper.htm>> (last accessed 26 October 2006).

109 Rana Lehr-Lehnardt "One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court" (2002) 16 BYU J Pub L 317, 352.

110 Glasius, above n 5.

arguing that the inclusion of forced pregnancy would provide support for an international right to abortion,¹¹¹ which would cause an increase in the demand for abortion.¹¹²

When the Women's Caucus was formed, the decision to define genocide in accordance with the Genocide Convention had largely been settled.¹¹³ The faint attempt to submit that the general commentary should state that "genocide by causing serious bodily injury or mental harm" can include acts of "torture, rape, sexual violence or inhuman or degrading treatment"¹¹⁴ was rejected.

C Mingling for a Compromise

In essence, the main arguments in opposition were that a forced pregnancy provision would undermine or increase pressure for changes to be made to national anti-abortion laws, and further entrench women's rights to reproductive self-determination. Initially, the Holy See conducted negotiations with the Women's Caucus, but eventually it agreed only to continue negotiations with States. This was perceived by some as a deliberate strategy to undercut genuine efforts to pay attention to a gender perspective as government delegations had an under-representation of women.¹¹⁵ Nonetheless, several key delegates persisted in negotiations with the Holy See to keep forced pregnancy alive in the Rome Statute.¹¹⁶ The terminology "forcibly made pregnant" was included on the insistence of the Holy See, to explicitly exclude women made pregnant through consensual sex.

Gender crimes went late into the Rome Diplomatic Conference, with forced pregnancy the last of the gender crimes to be resolved.¹¹⁷ It was finally defined with a proviso that "protects" inconsistent national laws from the effect of the forced pregnancy provision: "This definition shall not in any way be interpreted as affecting national laws relating to pregnancy".¹¹⁸ Clearly, this definition played the political role of reassuring the Holy See and Arab States that forced pregnancy

111 Steains, above n 5, 368.

112 Bedont and Matas "Negotiating for an International Criminal Court", above n 95.

113 Copelon, above n 106, 235.

114 United Nations Preparatory Commission for the International Criminal Court "Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalised Draft Text of the Elements of Crimes" (6 July 2000) PCNICC/2000/INF/3/Add.2 6.

115 Bedont and Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court", above n 2, 74.

116 Including Australia, Bosnia–Herzegovina, New Zealand and the United States: Steains, above n 5, 367.

117 Copelon, above n 106, 234.

118 Rome Statute, above n 7, art 7.2(f).

would neither surpass domestic laws nor endanger Catholic hospitals that refused to perform rape-related abortions.¹¹⁹ This removes any pressure on their governments to change the anti-abortion laws and policies. Attempts to exclude the forced pregnancy provision and replace the term "forced pregnancy" were unsuccessful, but efforts to dilute the forced pregnancy provision succeeded.

IV STRIKING THE BALANCE BETWEEN LAW, RELIGION AND POLITICS IN INTERNATIONAL LAW

A The Paradox

This article advances the opinion that the controversies surrounding domestic laws on abortion and women's reproductive rights arise in different contexts and should not unduly interfere with genuine attempts to criminalise forced pregnancy. Clearly, national laws prohibiting abortion do not amount to forced pregnancy, so long as these laws are not aimed at "affecting the ethnic composition of any population or at carrying out grave violations of international law".¹²⁰ The intent of a forced pregnancy provision is not to challenge domestic laws that prohibit access to abortion services. On the one hand, national laws that criminalise termination of pregnancies are not violations of international law, and hence would not fall within the jurisdiction of the ICC. Such laws would be classified as an omission under criminal law. On the other hand, forced pregnancy seeks to punish intentional acts of making and keeping women pregnant, which are criminal actions that deserve sanction.¹²¹ General concerns surrounding abortion have no platform in discussions of forced pregnancy campaigns.

Religious objections lie at the heart of anti-abortion legislation and policies. The creation of an international criminal court is the creation of a set of representative international norms. As such, fairly divergent views of right and wrong should be taken into account, including those relating to culture and religion. However, it is important to bear in mind that member States have the duty to protect fundamental human rights and freedoms, regardless of their political, economic and cultural systems.¹²² The Holy See, as an influential representative of a widely-practised international religion, should not have allowed pre-occupations with control over women's reproductive capabilities to thwart genuine international efforts to address the serious consequences of forced pregnancy. States should condemn forced pregnancy and not invoke any consideration of tradition, culture or religion to avoid or dilute their obligations with respect to its elimination.

119 Boon, above n 1, 659.

120 Rome Statute, above n 7, art 7.2(f).

121 Bedont and Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court", above n 2, 74; Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 197.

122 "Vienna Declaration and Programme of Action", above n 47, para 5.

Similar arguments can be made with regards to the Arab States' concerns over marital rape. Marital rape is shielded from prosecution under some domestic legislation.¹²³ It is a serious issue but, again, it raises completely separate concerns from those raised by forced pregnancy.

A compelling argument involves the non-discrimination guarantee under Article 21 of the Rome Statute: the forced pregnancy proviso cannot be interpreted inconsistently with international human rights instruments.¹²⁴ As such, if national laws relating to pregnancy violate an internationally recognised human right, there should be no protection under the proviso. The grounds of discrimination include gender, belief, ethnic origin and religion.¹²⁵

Nevertheless, States' consent remains the foundation of international law; the sovereignty of each state should be respected. This is recognised by the preamble to the Rome Statute, which emphasises that the ICC shall be "complementary to national criminal jurisdiction". Different nations participating in the international regime come from different positions and perspectives. Religious and cultural concerns underlie sensitive and subjective issues that can generate intense debates. Together with the opposition from NGOs and pressure groups, the ultimate definition of forced pregnancy was an appropriate compromise, in the interests of the continuance of international law, which is a "delicate mosaic" of "cultures pieced together in a shared heritage" that "may be shattered at any time".¹²⁶

B The Need for Recognition as a Separate Offence

The original concept of the ICC was simply to codify existing international law and not to create new laws. However, NGOs objected, as "traditional" international law had largely neglected violence against women.¹²⁷ As highlighted earlier in this article, both the Holy See and the Arab States argued that forced pregnancy could be prosecuted under existing offences due to its hybrid nature. Given the limited scope of this article, only two of the most salient of those offences are discussed here: rape and unlawful detention.

Rape and unlawful detention cannot adequately reflect the full nature of forced pregnancy. Forced pregnancy has further-reaching consequences and more intense effects than rape. Its effects are more visible: "for nine months, a woman who is forcibly impregnated must perform the most

123 Copelon, above n 106, 239.

124 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 198.

125 Rome Statute, above n 7, art 21(3).

126 Rome Statute, above n 7, preamble.

127 Lehr-Lehnardt, above n 109, 338.

intimate and life-altering work imaginable: the gestation of her captor's child".¹²⁸ As such, forced pregnancy victims and their communities are prevented from protecting themselves by silence or denial.¹²⁹ Putting aside the possibility of failure in prosecuting an offence when charged with multiple offences, rape and unlawful detention do not adequately criminalise the act of making and keeping a woman pregnant. Forced pregnancy is pregnancy-orientated rape, combined with the use of unlawful detention to achieve birth of a child.

Forced pregnancy should be criminalised as a separate offence. Accepting the Holy See and Arab countries' proposal would result in an approval of the international community to treat a crime, which is not novel and potentially growing in its use, as having a "checklist" status under international law. This cannot be acceptable. The Rome Statute plays the role of proclaiming what is unacceptable conduct to the world community. It aims to give recognition to "grave crimes" that "threaten the peace, security and well-being of the world", "to put an end to impunity for the perpetrators ... contribut[ing] to the prevention of such crimes" and to be "[m]indful that children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity".¹³⁰ Recognising forced pregnancy as a separate offence is consistent with these aims.

C Conclusion

The drafting process of the forced pregnancy provision was a classic illustration of the difficulty in resolving opposing legal, political, cultural and religious considerations under international law. This process created a surprising coalition between the Catholic and Arab countries, demonstrating the strength of the relationship between law and religion. It also demonstrated the growing influence of NGOs and pressure groups in the international regime. However, one of the main objectives of the Rome Statute is to be reflective of genuine international efforts to sanction breaches of fundamental human rights. This goal should not be eroded by misconceived concerns over loss of sovereignty and desires to promote unrelated individual political agendas.

V FORCED PREGNANCY AS AN IMPLICIT CRIME OF GENOCIDE

The drafting of the Rome Statute is such that the prosecutor, in deciding what to prosecute, will have ample and overlapping possibilities among the categories of war crimes, crimes against humanity and genocide.¹³¹ Although international crimes should not be classified in a hierarchical

128 Anne Tiemey Goldstein *Recognising Forced Impregnation as a War Crime under International Law* (Center for Reproductive Law and Policy, New York, 1993) 27 cited in Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 196.

129 Carpenter, above n 10.

130 Rome Statute, above n 7, preamble.

131 Clark, above n 69, 92.

way,¹³² genocide has been viewed as the crime of crimes.¹³³ The long-standing rationale of the crime of genocide is to protect the right of a group to exist.¹³⁴ Given its gravity, genocide is not subject to any statute of limitations¹³⁵ or the defence of superior orders,¹³⁶ and is punishable under public and direct incitement.¹³⁷

The different forms of genocide criminalised under the Genocide Convention,¹³⁸ the Statute of the International Criminal Tribunal of Former Yugoslavia,¹³⁹ Rwanda¹⁴⁰ and the Rome Statute¹⁴¹ are identical. The concept of "ethnic cleansing" is often raised in the context of genocide. However, the concept has never been explicitly defined as an international crime. Nonetheless, it is not disputed that "ethnic cleansing" is a "mere synonym for genocide" when coupled with the specific intent of destroying individuals under inhuman conditions.¹⁴² Genocide imposes individual responsibility and is a crime of specific intention.¹⁴³ It is an offence that is "characterized by a psychological relationship between the physical result and the mental state of the perpetrator."¹⁴⁴ The crime of genocide clearly involves premeditation.¹⁴⁵

A The Prosecutor v Akayesu¹⁴⁶

1 Factual background

The ethnic conflict in Rwanda during 1994 was the explosion point of the long-standing hatred between the Hutus and the Tutsi.¹⁴⁷ In particular, the conflict reflected the history and beliefs held

132 *The Prosecutor v Akayesu*, above n 32, para 469.

133 Emanuela Fronza "Genocide in the Rome Statute" in Lattanzi, above n 6, 105, 117.

134 Fronza, above n 133, 119.

135 Rome Statute, above n 7, art 29.

136 Rome Statute, above n 7, art 33: this defence is also not available to crimes against humanity.

137 Rome Statute, above n 7, art 25(3)(e).

138 Genocide Convention, above n 43, art 2.

139 Statute of the International Criminal Tribunal of Former Yugoslavia (25 May 1993) UNSC S/RES/827, art 4.

140 Statute of the International Criminal Tribunal for Rwanda (8 November 1994) UNSC S/RES/955, art 2.

141 Rome Statute, above n 7, art 6.

142 Fronza, above n 133, 120; MacKinnon, above n 22, 8.

143 *The Prosecutor v Akayesu*, above n 32, para 518.

144 *The Prosecutor v Akayesu*, above n 32, para 518.

145 *The Prosecutor v Akayesu*, above n 32, para 501.

146 *The Prosecutor v Akayesu*, above n 32.

147 See generally *The Prosecutor v Akayesu*, above n 32, paras 78–129.

by Hutu men regarding Tutsi women. In essence, these women were perceived as "beautiful" and "seductress-spies" that were "inaccessible to Hutu men whom they allegedly looked down upon and were 'too good' for".¹⁴⁸

Tutsi women suffered different forms of sexual violence during the conflict and were targeted on the basis of both their ethnicity and gender. The Human Rights Watch Women's Rights Project reported: "The 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."¹⁴⁹ The National Population Office estimated 2000–5000 children were born from rape as a result of the 1994 Rwandan conflict. Victimized Tutsi women who have decided to keep and raise these children generally do not have the support of their families, let alone the community, who view such children as members of the Hutu ethnic group.¹⁵⁰

The evidence pointed to Akayesu, the bourgmestre of the Taba commune, as one of the political perpetrators behind the ethnic conflict. Initially, the charges against him did not include sexual violence. However, during the trial, substantial evidence of sexual violence was presented,¹⁵¹ which resulted in pressure from international interest groups.¹⁵² Chief Prosecutor Louise Arbour was allowed by the Court to amend the charges to include sexual violence.¹⁵³ This marked the turning point in international legal jurisprudence: the genocide charges against Akayesu as an individual were framed in a way that made reference to rape: "genocide, complicity in genocide, direct and public incitement to commit genocide ... rape, other inhumane acts and outrages upon personal dignity".¹⁵⁴ This paved the way for a conviction of rape as an instrument for genocide if supported by evidence.

2 *The judgment*

On the evidence presented, the Chamber was satisfied that genocide was being committed against the Tutsi group by the Hutu group.¹⁵⁵ More significantly, the Chamber held that rape and

148 Human Rights Watch Africa: Human Rights Watch Women's Rights Project, above n 3.

149 Human Rights Watch Africa, Human Rights Watch Women's Rights Project, above n 3.

150 Carpenter, above n 10.

151 *The Prosecutor v Akayesu*, above n 32, paras 416–460.

152 Kelly D Askin "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles" (2003) 21 Berkeley J Int'l L 288, 303 [Askin "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law"]. The ICTR Chamber emphasised that the amendment was a result of the sexual violence testimonies presented in Court and not due to public pressure: *The Prosecutor v Akayesu*, above n 32, para 417.

153 *The Prosecutor v Akayesu*, above n 32, Charges.

154 *The Prosecutor v Akayesu*, above n 32, para 10.

155 *The Prosecutor v Akayesu*, above n 32, para 730.

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."¹⁵⁶

The judgment was injected with repeated references to the use of sexual violence to infiltrate the Tutsi group: for example, "[s]exual violence was a step in the process of destruction of the [T]utsi group – destruction of the spirit, of the will to live, and of life itself."¹⁵⁷ These acts of sexual violence, often committed publicly, inflicted humiliation on the women, resulting in the physical and psychological destruction of the Tutsi community as a whole. Sexual violence played an important part in destroying the Tutsi group through the destruction of their women.¹⁵⁸ The systematic rape of the Tutsi women in the Taba Commune constituted genocide, as it was "committed with the specific intent to destroy" the targeted group.¹⁵⁹ It "was systematic and was perpetrated against all Tutsi women and solely against them"¹⁶⁰ for purposes of destroying the Tutsi group as a whole.¹⁶¹

In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent to being to destroy the Tutsi group while inflicting acute suffering on its members in the process.

The Chamber accepted that the genocidal act of imposing measures with the intention of preventing birth was established on these facts and evidence. Making women culturally unable to reproduce can amount to a measure intended to prevent births within a group.¹⁶²

In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, through 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.

156 *The Prosecutor v Akayesu*, above n 32, para 731.

157 *The Prosecutor v Akayesu*, above n 32, para 732.

158 *The Prosecutor v Akayesu*, above n 32, para 731.

159 *The Prosecutor v Akayesu*, above n 32, para 731.

160 *The Prosecutor v Akayesu*, above n 32, para 732.

161 *The Prosecutor v Akayesu*, above n 32, para 733

162 *The Prosecutor v Akayesu*, above n 32, para 507.

In addition, the Chamber was of the opinion that the genocidal act of causing serious bodily and mental harm to the members of the group was established.¹⁶³

[R]ape and sexual violence ... constitute infliction of serious bodily and mental harm on the victims and ... [are] one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm ... These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

No allegations of rape were made against Akayesu as the physical rapist, but the Chamber held that Akayesu had "by his presence, his attitude and his utterances" encouraged the acts of "Tutsi women [being] systematically raped".¹⁶⁴ Although the Chamber noted that "[i]ntent is a mental factor which is difficult, even impossible, to determine",¹⁶⁵ they considered that:¹⁶⁶

[I]t is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, which excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.

B The Rome Statute Era: What Happens Now?

As highlighted earlier in this article, one of the main purposes behind the codification of the forced pregnancy provision was to address the situation in Bosnia–Herzegovina. The collected facts and data provide consistent support to the proposition that forced pregnancy campaigns are being (or have been) used as a tool to create a state of ethnic exclusivity.¹⁶⁷ In addition, during the discussion of the elements of the crime of genocide, many States had referred to the ICTR Chamber's decision in *Akayesu*.¹⁶⁸ Despite that, neither forced pregnancy nor rape is explicitly

163 *The Prosecutor v Akayesu*, above n 32, para 731.

164 *The Prosecutor v Akayesu*, above n 32, para 708.

165 *The Prosecutor v Akayesu*, above n 32, para 523.

166 *The Prosecutor v Akayesu*, above n 32, para 523.

167 Fein, above n 24, 54.

168 Valerie Oosterveld "The Elements of Genocide" in Roy S Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc, New York, 2001) 41, 43.

criminalised as a crime of genocide under the Rome Statute. The general consensus was to adopt the definition in the Genocide Convention as it has been widely ratified. An expansion of the list would not reflect customary international law.¹⁶⁹ Hence, to date, the relationship between sexual violence and genocide has not been given explicit recognition under any international treaty.¹⁷⁰

However, forced pregnancy is a form of genocide, in particular, in the killing of members of the group, causing serious bodily or mental harm to members of the targeted group and as a measure intended to prevent births within the targeted group, with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group. The drafting of the genocide provisions allows the courts to relate the facts of each case to the listed categories.

Forced pregnancy campaigns are initiated by the act of capturing the victim, deliberately selected on the basis of her membership of the targeted group, to the exclusion of members of the other groups. Due to the cultural position of women, especially within the family structure, they are the principal target for the purposes of destruction of the targeted group through culture.¹⁷¹ This is evidence of genocidal intent: selection of victims by virtue of membership of the targeted group.¹⁷²

The capture is then followed by the act of rape. *Akayesu* marked the first time that an international tribunal tried and convicted a defendant for the crime of genocide.¹⁷³ More significantly, it is the first international judgment that states that rape can be a genocidal instrument.¹⁷⁴ This is adopting the broad definition of rape, which has been defined as the penetration of the vagina by the penis.¹⁷⁵ Unconventionally, rape was considered a crime against a group.

It has been argued, and rightly so, that the judgment in *Akayesu* did not explicitly state the reproductive consequences as the purpose of genocidal rape,¹⁷⁶ which is a fundamental element in the crime of forced pregnancy. Nevertheless, the decision is an important stepping stone towards entrenching forced pregnancy's position as a crime of genocide in international law. As argued

169 Oosterveld, above n 168, 41.

170 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 209.

171 Annette Lyth "The Development of the Legal Protection against Sexual Violence in Armed Conflicts – Advantages and Disadvantages" (December 2001) <<http://www.iktk.se/publikationer/rapporter/pdf/development.pdf>> (last accessed 1 August 2006).

172 *The Prosecutor v Akayesu*, above n 32, para 517.

173 Jonathan I Charney and others (eds) "Developments in International Criminal Law: Foreword" (1999) 93 AJIL 1.

174 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 209.

175 Copelon, above n 106, 227.

176 Copelon, above n 106, 228.

earlier, the consequences of forced pregnancy are more far-reaching than those of rape. In forced pregnancy, annihilation of the group is attempted first through a physical attack on the victim, which is translated into an attack on the victim's psychic integrity. Culture then translates this attack to one on the psychic integrity of their family and ultimately the community. Rape is used as a tool to instil psychological trauma, to break down the structure of a group by conquering the victims' reproductive capacity, and to produce children of the rapists' ethnic group by the use of unlawful detention. This is forced pregnancy as genocide by causing serious bodily or mental harm to members of the targeted group, through the manipulation of cultural beliefs and reproductive capacity.

The key is gene pool pollution. Victims who fail to get pregnant are often killed. This is genocide through killing members of the targeted group:¹⁷⁷

Reproduction serves to continue the group: genocide to destroy it. Thus, perpetrators of genocide must either annul reproduction within the group or appropriate the progeny in order to destroy the group in the long run.

Unlawful detention to facilitate a rape-resulted pregnancy transforms the shame and humiliation into a tangible form, as the pregnancy progresses and results in the birth of the child. Victims are rejected by their communities, and often by their own family. This results in a further breakdown of family and community structures. The number of the "pure" ethnic group is then decreased as victims are rejected as potential candidates for physical and cultural procreation. The targeted community then rejects the children born from rape. This is genocide through "imposing measures intended to prevent births" within the targeted group. "Ethnic cleansing" is achieved through "ethnic pollution".

Where the intention of the attack is to destroy on the basis of membership of a group, genocide can occur even when only a single member of the group is targeted.¹⁷⁸ Forced pregnancy is a very effective weapon of genocide where culture creates a relationship between chastity of women and the capability of their men as protectors and where membership of the group is dictated by the father. In such conditions, an attack on one individual can be translated into an attack on the family and ultimately on the whole community.

VI CONCLUSION

The ultimate goal of forced pregnancy campaigns is to destroy, in whole or in part, a national, ethnical, racial or religious group. Forced pregnancy campaigns are humiliating and degrading to the victims, their families and communities. More significantly, the damage extends to the next

177 Fein, above n 24, 43.

178 Askin "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law", above n 152, 302.

generation. Children born as a result of such military strategies have an inferior status within their communities, due to gender relations and cultural traditions surrounding their origins. They are potential victims of infanticide, stigma, neglect, abuse and discrimination. Generating such stigmatism is the ultimate goal of those who perpetrate forced pregnancy: annihilation of a human population. It has been argued that not even the Nazi rapist would have knowingly agreed to reproduce with a Jew.¹⁷⁹ A cynical achievement of the Serbian forced pregnancy campaigns is a contribution to "the history of atrocity".¹⁸⁰

The ethnic conflict in Bosnia–Herzegovina signified the inadequacy of international law in addressing conduct that is unacceptable to the international community. The inclusion of forced pregnancy in the Rome Statute is a significant achievement for gender crimes in international law.¹⁸¹ It represents an acknowledgment by the international community that it occurs and, more importantly, that forced pregnancy is a crime on its own, despite its overlap with existing crimes. It acknowledges that it is a crime that of its own nature deserves sanction. It acknowledges that forced pregnancy is among the most serious crimes, and that it should not go unpunished.¹⁸² However, its inclusion is only a first step, albeit an important one. It is hoped that the ICC will take on and strengthen the precedent set by *Akayesu* through prosecuting forced pregnancy as a crime of genocide.¹⁸³ This would be punishing a crime in the way that it ought to be punished. Of course, prosecutions of forced pregnancy as a war crime, crime against humanity and other forms of genocide will be equally important. Only then will the real value of criminalising forced pregnancy under international criminal law be reflected.

179 Allen, above n 12, 92.

180 Allen, above n 12, 92.

181 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 199.

182 Rome Statute, above n 7, preamble.

183 Bedont "Gender-Specific Provisions in the Statute of the International Criminal Court", above n 6, 209.

