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VESSELS OF REPRODUCTION: FORCED PREGNANCY AND THE ICC

Milan Markovic[*]

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INTRODUCTION

In an important victory for both women and the cause of human rights, the International Criminal Court (ICC) has criminalized forced pregnancy.[1] The Court's 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 violations of international law."[2] Although the concept of a forced pregnancy crime is relatively new,[3] "'forced impregnation' has been used throughout history as a tool of assimilation or subjugation of the enemy, minority, or slave populations."[4] There is some evidence that the ancient Athenians used it as part of their genocide of the Melians for example,[5] and in more recent times "thousands of outcast

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1. *See* Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 656 (2001).

2. Rome Statute of the International Criminal Court, art. 7(2)(f), July 17, 1998, 2187 U.N.T.S. 90, *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf [hereinafter ICC Statute].

3. Boon, *supra* note 1, at 656.

4. Robyn Charli Carpenter, *Forced Maternity: Children's Rights and the Genocide Convention*, 2 J. GENOCIDE RES. 213, 223 (2000) [hereinafter Carpenter, *Forced Maternity*].

5. *Id.* at 223 n.36.

children were born as a result of the rapes of Bengali women by the West Pakistani army" in 1971.[6]

Nevertheless, it was not until the mass rapes in Bosnia and Rwanda caught the attention of feminist legal scholars[7] that forced pregnancy began to capture the public consciousness.[8] Estimates vary but victims of rape gave birth to an estimated 2,000 – 5,000 "children of hate" in Rwanda and perhaps 400 – 600 in Bosnia.[9] In Bosnia, particularly, commentators have alleged that Serbs had a systematic plan to impregnate Croatian and Muslim women and force them to bear Chetnik (i.e., Serb) babies.[10] Catherine MacKinnon railed against a legal system that made states lack of protection for women internationally protected.[11]

Against this backdrop, feminist groups united to create the Women's Caucus for Gender Justice in the ICC ("Women's Caucus").[12] The Women's Caucus was enormously influential during the planning phases of the ICC, and over the fierce opposition of some states, was successful in arguing for the inclusion of forced pregnancy in the ICC Statute.[13] While the ICC has only just begun hearing cases, the court

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6. *Id.* at 223.

7. Robyn Charli Carpenter, *Surfacing Children: Limitations of Genocidal Rape Discourse*, 22 HUM. RTS. Q. 428, 431 (2000) [hereinafter Carpenter, *Surfacing Children*] ("Overnight, it seemed, that plight of Bosnian women had become a domestic issue to American feminists"); *see also* Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5 (1994); BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA (1996); Siobhan Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91 (1996).

8. *See generally* Carpenter, *Forced Maternity*, *supra* note 4, at 223.

9. *Id.*

10. Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348, 359 (1998); ALLEN, supra note 7, at 61-65. These allegations have seemingly been called into question because of Bosnia's failure to establish that there was a Serbian policy of forced pregnancy before the International Court of Justice. *See* Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia & Mont.), 2007 I.C.J. 91, at ¶ 367 (Feb. 26).

11. MacKinnon, *supra* note 7, at 12; *see also* Veronica C. Abreu, *Women's Bodies as Battlefields in the Former Yugoslavia*, 6 GEO. J. GENDER & L. 1, 11 (2005) ("The current international legal framework inadequately addresses the realities of . . . sexual terrorism.").

12. *See* Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute for the International Criminal Court*, 16 BYU J. PUB. L. 317, 352 (2002); *see also* Marlies Glasius, *How Activists Shaped the Court*, CRIMES OF WAR PROJECT, Dec. 2003, http://www.crimesofwar.org/icc_magazine/icc-glasius.html.

13. *See* Glasius, *supra* note 12; *see also* Lehr-Lehnardt, *supra* note 12, at 352;

has already gone far beyond any other international tribunal in recognizing crimes committed against women.[14]

Despite the optimism that surrounds the ICC and its recognition of forced pregnancy, little attention has been paid to how the crime will be prosecuted. In this Article, I will examine the potential difficulties associated with prosecuting forced pregnancy before the ICC. In Part I, I examine the ambiguities in the definition of forced pregnancy as well as the *mens rea* and *actus reus* of the crime. A particular problem is that the ICC definition "shall not in anyway be interpreted as affecting national laws related to pregnancy."[15] Is it possible to make sense of "forced pregnancy" without in some sense recognizing a women's fundamental right to terminate her pregnancy? In Part II, I will address the different contexts in which forced pregnancy can potentially be prosecuted. Forced pregnancy qualifies as both a crime against humanity and a war crime under the ICC statute.[16] There are particular challenges to prosecuting forced pregnancy as a crime against humanity and war crime. I will also address the claim that the ICC Statute does not go far enough – that forced pregnancy is genocide.

I. WHAT IS FORCED PREGNANCY?

A. The Elements of Forced Pregnancy

To prove the crime of forced pregnancy, the prosecutor will have to establish that "[t]he accused confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law."[17] This holds true whether the perpetrator is tried for forced pregnancy as a war crime or crime against humanity.[18]

Alessandra Stanley, *Semantics Stalls Pact Labeling Rape a War Crime*, N.Y. TIMES, July 9, 1998, at A3.

14. *See, e.g.*, Lehr-Lehnardt, *supra* note 12, at 353; Boon, *supra* note 1, at 673; *see also* Tina Karkera, *The International Criminal Court's Protection of Women: The Hands of Justice at Work*, 12 AM. U. J. GENDER SOC. POL'Y & L. 197, 198 (2004).

15. ICC Statute, *supra* note 2, 7(2)(f).

16. *Id.* arts. 7(1)(g), 8(2)(b)(xxii).

17. Report of the Preparatory Comm'n for the Int'l Crim. Ct., Finalized Draft Text of the Elements of Crimes, arts. 8,(2)(b)(xxii)-4, U.N. Doc. PCNICC/2000/L.1/Rev.1/Add.2 (2000), *available at* http://daccessdds.un.org/doc/UNDOC/LTD/N00/383/70/PDF/

As the above definition makes clear, the *actus reus* of the crime of forced pregnancy is not the rape and impregnation[19] but rather the unlawful confinement.[20] The perpetrator of forced pregnancy is the person who confined "one or more women forcibly made pregnant"[21] not the one who necessarily committed the rape.[22] As Kristen Boon notes, "[t]he legal harm of forced pregnancy is that women are kept pregnant by means of confinement."[23] The confinement must also be "to a certain location"[24] and the crucial period is between the time a woman is thought to be pregnant and the termination of the pregnancy.[25] To be sure, the prosecutor will have to prove that the woman confined was also "forcibly made pregnant," but in theory a woman could be forcibly made pregnant without a resort to violence.[26] Commentators have speculated that a woman could be forcibly made pregnant through artificial insemination or other modern technology and that preventing a woman from using contraceptives could be sufficient action to make a woman forcibly pregnant under the Statute.[27]

To prove forced pregnancy it is not sufficient for the prosecutor to show that a woman forcibly made pregnant has been confined. The ICC Statute also stipulates that the confinement must be "with the intent of

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N0038370.pdf [hereinafter Elements].

18. *Id.*; *see also id.* art. 7(1)(g)-4.

19. *See* Boon, *supra* note 1, at 660.

20. *See* ICC Statute, *supra* note 2, art. 7(2)(f) ("Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant.").

21. Elements, *supra* note 17, arts. 7(1)(g)(4)(1), 8(2)(b)(xxii)(4)(1).

22. Some commentators seem confused on this point. *See, e.g.*, 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, 512 ("Forced pregnancy is accomplished by impregnating a woman, whether by rape or other medical means, with the sperm of a man of a different ethnicity"); *see also* Carpenter, *Surfacing Children*, *supra* note 7, at 445-49 (2000) (discussing failure of MacKinnon and others to differentiate forced impregnation from forced pregnancy).

23. Boon, *supra* note 1, at 660.

24. Elements, *supra* note 17, art. 8(2)(a)(vii)(2)(1).

25. Boon, *supra* note 1, at 662-63.

26. Machteld Boot, *Article 7(2)(f) "Forced Pregnancy"* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 164-65 (Triffterer ed.,1999) (noting that any form of coercion negates consent).

27. *See* Boon, *supra* note 1, at 661; ANNE TIERNEY GOLDSTEIN, CTR. FOR REPROD. LAW AND POLICY, RECOGNIZING FORCED IMPREGNATION AS A WAR CRIME UNDER INTERNATIONAL LAW 91 (1993); *see also* Carmela Buehler, *War Crimes, Crimes Against Humanity and Genocide: The Crime of Forced Pregnancy in the Nascent System of Supranational Criminal Law*, NEMESIS, Sept.- Oct. 2002, at 158, 163, *available at* http://www.iiav.nl/ezines/DivTs/Nemesis/2002/nemesis_2002_crimes.pdf.

affecting the ethnic composition of any population or carrying out other grave violations of international law."[28] The Croatian government would not be liable for forced pregnancy, for example, if it prevented a Croat raped and impregnated by Serbs from securing an abortion because the government presumably lacked the requisite *mens rea*. As a practical matter, the intent requirement places a limit on the identity of the perpetrators and victims – they must be members or thought to be members of different ethnic groups.[29]

Forced pregnancy can also be prosecuted when the confinement was committed with the intent to perpetrate other grave violations of international law.[30] This alternate intent requirement broadens the scope of forced pregnancy considerably because there is no limit on the ethnicity of perpetrators or victims.[31] Unfortunately, the ICC Statute does not explain what it is meant by "grave violations."[32] Presumably the conduct covered would include confining a forcibly impregnated woman for the purpose of conducting scientific experiments as the Nazis did during World War II[33] or in order to enslave the mother and/or child.[34] Courts will likely have a great deal of discretion to shape the *mens rea* required for forced pregnancy because the ICC Statute does not impose any definite limitations.

B. Conceptual Problems in the Definition of Forced Pregnancy

The definition of forced pregnancy could be more precise in several respects. Although it is relatively clear that the *actus reus* is the unlawful confinement, it is not as clear whether a woman must be forcibly made pregnant with the intent of "affecting the ethnic composition of any population or carrying out other grave violations of

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28. ICC Statute, *supra* note 2, arts. 7(2)f, 8(2)(b)(xxii).

29. Boon, *supra* note 1, at 663.

30. ICC Statute, *supra* note 2, arts. 7(2)f, 8(2)(b)(xxii).

31. Boon, *supra* note 1, at 665.

32. The Statute does refer to grave breaches of the Geneva Conventions. *See* ICC Statute, *supra* note 2, art. 8(2)(a). There is some evidence that sexual crimes would constitute grave breaches of the Geneva Conventions although this is not explicit in Article 8(2). *See* Jocelyn Campanaro, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2589 (2001).

33. *See* Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 74 (1999).

34. *See* ICC Statute, *supra* note 2, art. 7(2)(c). Enslavement encompasses trafficking under the Statute. *Id.*

international law."[35] A textual reading suggests that only the confinement is subject to the heightened requirement because a comma separates "forcibly made pregnant" from "with the intent of." Thus, the prosecutor will not have to explore the reasons underlying a rape, for example.[36] Nevertheless, the ICC Statute could be clearer on this point.

Another important question is what the prosecutor has to prove with regards the pregnancy itself. Presumably he/she will have to present evidence that the pregnancy was not voluntary and was brought about by rape, for example. The person accused of forced pregnancy could, if he chose, challenge this, even if he was not the one who impregnated the victim. To prove forced pregnancy, therefore, it will often be necessary to prove rape by a party not before the court. Yet, surely every time someone is accused of forced pregnancy, the prosecution cannot be expected to hold a full trial for rape as well. Given this, how much evidence will the prosecution have to present on this point? Will the judges have to be satisfied beyond a reasonable doubt that a rape occurred to convict the perpetrator of forced pregnancy?[37] If the rape can be treated as a mere part of the forced pregnancy proceeding, however, the alleged rapist's right to be tried in his presence would appear to be violated.[38] He would be denied the opportunity to contest the claims made against him or put forward the defense of his choosing.[39] There may also be implications for the presumption of innocence if he is later tried.[40] Perhaps the ICC will have to try the rape first and then move on to the forced pregnancy subsequently. The drafters of the Rome Statute may have assumed that the person who forcibly impregnated the victim would also be the one on trial for forced pregnancy although, as I have suggested, this may not always be the case.[41]

The ICC's forced pregnancy provision also does not specify whether the alleged perpetrator must know that the woman he is confining was forcibly made pregnant. Is it enough that he should have known? As a

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35. *Id.* art. 7(2)(f).

36. Proving political motives in rape cases is notoriously difficult as anyone with experience in asylum law can attest to. *See generally* Krishna R. Patel, *Recognizing the Rape of Bosnian Women as Gender-Based Prosecution*, 60 BROOK. L. REV. 929 (1994).

37. ICC Statute, *supra* note 2, art. 66(3).

38. *Id.* art. 63(1).

39. *See generally id.* art. 67.

40. *Id.* art. 66(1).

41. *See also* Boot, *supra* note 26, at 165.

general matter under the ICC statute, a wrongdoer must have knowledge of all the material elements of a crime[42] where knowledge is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[43] Presumably this means that the perpetrator of forced pregnancy must be aware that the woman he is confining is pregnant and also that the impregnation was forcible, whether it occurred through rape or some other means. Considering that he may well not have been present during the impregnation, the perpetrator might credibly argue that he could not know the circumstances of the pregnancy. The court, after all, has to make its own determination on whether a woman was forcibly made pregnant, and this determination involves a mixture of fact and law. The court would presumably consider legal concepts such as "force" and "consent."[44] Would a suspect have to have made a similar determination to "know" that the woman was forcibly made pregnant? The ICC views knowledge as actual awareness, and in forced pregnancy cases prosecutors might be hard-pressed to demonstrate sufficient awareness.

C. Relation to National Abortion Laws

Perhaps the most puzzling part of the ICC's treatment of forced pregnancy is that the definition "shall not in any way be interpreted as affecting national laws relating to pregnancy."[45] This language was added to Article 7.2(f) on the insistence of the Vatican and states opposed to abortion.[46] These delegations to the preparatory conference were concerned that forced pregnancy would be "used to supplant anti-abortion laws and endanger Catholic hospitals that refused to provide abortions."[47] This language ensures that the ICC will not recognize a general right to abortion.

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42. ICC Statute, *supra* note 2, art. 30.

43. *Id.* art. 30(3)

44. Buehler, *supra* note 27, at 163. The ICTY's use of such concepts has not been without controversy. *See generally* Adrienne Kalosieh, *Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, 24 WOMEN'S RTS. L. REP. 121 (2003).

45. ICC Statute, *supra* note 2, art. 7(2)(f).

46. *See* Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L. L. 22, 31 (1999); *see also* Boon, *supra* note 1, at 659; Buehler, *supra* note 27, at 162.

47. Boon, *supra* note 1, at 659.

If there is no right to obtain an abortion, then how do we make sense of the forced pregnancy provision in the ICC statute? Rape and unlawful confinement are already prohibited under the ICC statute.[48] Boon argues that that criminalization of forced pregnancy evidences respect for a woman's bodily integrity and sexual autonomy,[49] but her argument could just as easily apply in the domestic context to oppose all regulation of abortion, and yet, the forced pregnancy provision "shall not in any way be interpreted as affecting national laws relating to pregnancy."[50] More convincingly, Carmela Buehler argues that an unwanted pregnancy greatly exacerbates the pain of the rape.[51] She writes, "[i]f she is forced to bear the child as a consequence of her confinement, this is a long process during which the child will always be a reminder of her ordeal."[52] Others have speculated that "[p]regnancy may worsen the long-term of impact of rape on the victim by eliminating any chance of maintaining acceptance by a husband or family."[53] Perhaps the best way to understand forced pregnancy under the ICC Statute is that women should be able to terminate "forced" pregnancies[54] whereas it is up to individual nation-states to determine if abortion should be available in other situations.

This alternative formulation is equally problematic. As previously noted, a woman can be made forcibly pregnant without necessarily having been sexually assaulted. It seems inadequate, therefore, to justify the crime of forced pregnancy on the assumption that the crime occurs pursuant to a rape. Indeed, if Boon is correct, a woman can be forcibly made pregnant when she is denied access to birth control.[55] If this is the case, I find it hard to believe that the reason this woman should be allowed to terminate her pregnancy is because the pregnancy would represent an ongoing reminder of the harm done to her in

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48. Rape is prohibited as both a crime against humanity and a war crime. *See* ICC Statute, *supra* note 2, arts. 7(1)(g), 8(b)(xxii). Unlawful confinement is a war crime. *Id.* art. 8(2)(vii).

49. Boon, *supra* note 1, at 668.

50. ICC Statute, *supra* note 2, art. 7(2)(f).

51. Buehler, *supra* note 27, at 166.

52. *Id.*

53. *See* Carpenter, *Surfacing Children*, *supra* note 7, at 435.

54. Boon states that this right may already be guaranteed under Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women, but this is a controversial position. *See* Boon, *supra* note 1, at 666 & n.189.

55. *Id.* at 661; *see also* Buehler, *supra* note 27, at 163.

denying her access to contraception. The indignity central to the crime of forced pregnancy is not being forcibly made pregnant – which will usually be punishable as rape or some other crime[56] – but rather that a woman is being forced to carry a child against her will. If it were otherwise, the Statute would criminalize "forced impregnation" not "forced pregnancy."

Second, and perhaps more important, if the ICC Statute recognized a woman's fundamental right to terminate an unwanted pregnancy caused by rape, then the Statute would not have noted that forced pregnancy "shall not in any way be interpreted as affecting national laws relating to pregnancy."[57] There is no guarantee that national abortion laws will not infringe on a woman's right to terminate a forced pregnancy. This is hardly surprising as the provision needed to satisfy constituents that were fervently opposed to abortion in all circumstances.[58] Boon argues that most national abortion laws already recognize an exception for forced pregnancies.[59] Even if this is so, however, the ICC Statute seems to concede that nations have the right to set their own abortion laws, and this would presumably trump any obligations nations may have had under earlier treaties or customary international law.[60]

The consequence of the forced pregnancy compromise is that the ICC appears to have created a 'state action' exception in forced pregnancy cases. If nations are allowed to restrict abortion however they wish, then they can presumably confine women in order to prevent them from having abortions. A person confining a woman forcibly made pregnant pursuant to a national law that prohibited abortion, therefore, would be immune from prosecution by the ICC. If a private individual were to affect the confinement, however, he too might be immune from prosecution depending on whether his conduct would be sanctioned by the state.[61] The ICC Statute never explains exactly what constitutes

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56. Impregnating someone against their will via artificial insemination, for example, presumably falls under the Statute's prohibition on using medical science against the interests of the patient. *See* ICC Statute, *supra* note 2, art. 8(b)(xi).

57. *Id.* art. 7(2)(f).

58. *See* Arsanjani, *supra* note 46, at 31; *see also* Buehler, *supra* note 27, at 162; Boon, *supra* note 1, at 659.

59. *See* Boon, *supra* note 1, at 666.

60. *See generally* Vienna Convention on the Law of Treaties art. 30, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

61. If, for example, it permitted the confinement of abortion-seeking woman by their families.

"unlawful confinement" in the forced pregnancy context, and given this, the ICC seems obliged to consider whether suspects have violated their own nation's abortion laws.

This apparent deference given to national law in forced pregnancy prosecutions is in stark contrast to how other crimes are prosecuted by the ICC. As a general matter, the ICC will only apply domestic law as a last resort and after having examined the ICC Statute and international materials.[62] A worrying possibility is that the ICC might have to apply national abortion laws even when they are fundamentally discriminatory or sexist. While applying such laws is forbidden by Article 21(3) of the ICC Statute, the fact that forced pregnancy "*shall not in any way* be interpreted as affecting national laws relating to pregnancy"[63] suggests that the ICC Statute requires that enormous deference be given to national abortion laws. Thus if the crime of forced pregnancy occurs on the territory of a state where abortion is not permitted and the confinement is not contrary to the laws of that state, it will be impossible for the ICC to prosecute the forced pregnancy. Conversely, if the crime is committed on the territory of a state that permits abortion, the ICC would be able to prosecute the forced pregnancy. This disparity can only be explained by the fact that the core of forced pregnancy is that women cannot be prevented from terminating unwanted pregnancies, but nations who reject abortion appeared to have carved out an exception for themselves in the Statute.

II. THE MANIFESTATIONS OF FORCED PREGNANCY

The ICC Statute recognizes forced pregnancy as a crime against humanity as well as a war crime.[64] Many commentators have also argued that forced pregnancy is genocide[65] although the ICC does not explicitly treat it as such. Forced pregnancy is defined identically in Article 7 (the ICC's crimes against humanity provision) and Article 8 (the ICC's war crimes provision), but the elements of forced pregnancy differ depending on the context. There are particular challenges depending on whether forced pregnancy is prosecuted as a crime against humanity, war crime, or genocide.

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62. *See* ICC Statute, *supra* note 2, art. 21(1).
63. *Id.* art. 7(2)(f) (emphasis added).
64. *Id.* arts. 7(1)(g), 8(2)(b)(xxii).
65. *See, e.g.*, ALLEN, *supra* note 7, at 91; MacKinnon, *supra* note 7, at 11.

A. Forced Pregnancy as a Crime Against Humanity

To be convicted of the crime against humanity of forced pregnancy, the perpetrator's conduct must meet the definition of forced pregnancy in Article 7(2)(f) as outlined above. In addition, the crime must be part of a "widespread or systematic attack directed against a civilian population,"[66] and the perpetrator must know that his conduct was part of or intended to be part of this widespread or systematic attack.[67]

The ICC Statute defines "attack directed against a civilian population" as a "course of conduct involving the multiple commission of acts [such as murder] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[68] Forced pregnancy then must occur against a backdrop of violence where murder, rape, and other enumerated crimes[69] are prevalent. Although there need not be a full-blown war, the attack must be "widespread or systematic" but not necessarily systematic *and* widespread.[70] This is the case for all crimes against humanity.[71]

While the ICC Statute does not define either "widespread" or "systematic," the former requirement seems to suggest that an attack must be of a relatively large scale while systematic refers to the element of coordinated planning.[72] To prosecute forced pregnancy as a crime against humanity, therefore, not only must the crime occur as part of an attack, but the attack must be of a large scale or alternatively involve a high degree of coordination (and the perpetrator must know of the attack and his role in it). There also appears to be a limit on the identity of the perpetrator because the attack of which he is a part must be "pursuant to or in furtherance of a State or organizational policy."[73] This would rule out "free-lancers" who decide to commit crimes on their own.[74]

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66. Elements, *supra* note 17, art. 7(1)(g)(4)(2).
67. *Id.*
68. ICC Statute, *supra* note 2, art. 7(2)(a).
69. *Id.* arts. 7(1)(a)-(k). Forced pregnancy is one of the qualifying crimes listed under 7(1)(g).
70. *See id.* art. 7(1).
71. *Id.*
72. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 108 (2004).
73. ICC Statute, *supra* note 2, art. 7(2)(a).
74. Luban, *supra* note 72, at 96.

Prosecuting forced pregnancy as a crime against humanity is problematic in a number of respects. The *actus reus* of forced pregnancy is unlawful confinement and presumably the confinement will often occur away from any widespread or systematic attack – forced pregnancy is a crime that often occurs in isolation.[75] How can forced pregnancy be part of an attack, however, when the unlawful confinement will often occur far away from the original attack?[76] While crimes like murder are often part of attacks on civilian populations, forced pregnancy is ultimately a crime committed against an individual woman. It is conceivable, moreover, that in many cases the confiner would even be aware of the circumstances of the systematic or widespread attack. This has led some to suggest that the attack requirement must be loosened for sex-related crimes against humanity like forced pregnancy.[77]

The ICC Statute also does not address the issue of whether the prosecution would have to prove that there was a national policy to commit force pregnancies. Without such a policy, the perpetrator might not be acting "pursuant to or in furtherance of a State or organizational policy."[78] The Statute states that it is the attack itself that must be "pursuant to or in furtherance of a State or organizational policy" whereas the forced pregnancy merely needs to be a part of the attack.[79] But how can forced pregnancy be part of this attack unless there is at least implicit state approval of the crime? If history is any guide, prosecutors might be hard-pressed to find the requisite evidence of state sanction.[80]

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75. *Cf.* Brook Sari Moshan, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 FORDHAM INT'L L.J. 154, 183 (1998) (arguing that rape and other sex-related crimes occur in isolation and thus might not constitute crimes against humanity under the Statute).

76. What if the unlawful confinement was to occur in Serbia, for example, but the forced impregnation and rape occurred in Bosnia?

77. *See* Moshan, *supra* note 75, at 183.

78. ICC Statute, *supra* note 2, art. 7(2)(a).

79. *Compare* Elements, *supra* note 17, 8(2)(e)(vi)(4)(3) *with* ICC Statute, *supra* note 2, art. 7(1)(g).

80. In Bosnia, for example, there were documented incidents of forced pregnancy, but these incidents did not appear to be tied to any official Serbian policy of impregnating women and preventing them from terminating their pregnancies. *See* The Secretary-General, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, ¶ 248, at 59, *delivered to the President of the Security Council*, U.N. Doc. S/1994/674 (May 24, 1994).

B. Forced Pregnancy as a War Crime

The ICC Statute allows forced pregnancy to be prosecuted as a war crime if the crime occurs in the context of (or is associated with) either an international conflict[81] or a non-international conflict.[82] Forced pregnancy is one of the war crimes in Article 8 that are "serious violations of the laws and customs"[83] of international law but not "grave breaches" of the Geneva Conventions.[84] This does not necessarily mean that the ICC views forced pregnancy as any less serious than other war crimes, but rather, under the Geneva Conventions (which form the basis of modern prosecution of war crimes), rape and other sex crimes are not acknowledged as "grave breaches."[85] The perpetrator of forced pregnancy must be aware of the factual circumstances that established the existence of an armed conflict whether the conflict is international or internal.[86]

Armed conflict is not precisely defined under the ICC Statute. However, the Statue makes clear that "armed conflicts" are not "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[87] War crimes occur only where there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups.[88] From this, it seems evident that the ICC is precluded from prosecuting war crimes when there are not two hostile parties. If a government were to launch an attack on a population that had not taken up arms, its agents could probably not be charged with war crimes.[89] This is regrettable from the perspective of justice, but the ICC only has jurisdiction over persons "for the most serious crimes of *international* concern."[90] Presumably domestic courts could prosecute war crimes such as forced pregnancy that occur during internal conflicts, whether

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81. ICC Statute, *supra* note 2, art. 8(2)(b)(xxii).
82. *Id.* art. 8.2(e)(vi).
83. *Id.* art. 8(2)(b).
84. *Id.* art. 2.
85. *See* Buehler, *supra* note 26, at 164.
86. Elements, *supra* note 17, arts. 8(2)(b)(xxii)(4)(3), 8(2)(e)(vi)(4)(3).
87. ICC Statute, *supra* note 2, art. 8(2)(f).
88. *Id.*
89. They could potentially be charged with crimes against humanity if the conditions set out in the ICC Statute are met because there is no armed conflict requirement.
90. ICC Statute, *supra* note 2, art. 1 (emphasis added).

there are two opposing parties or not, but it remains to be seen how many governments will follow the ICC's lead and criminalize forced pregnancy.

The elements of forced pregnancy as a war crime are more lax than those of forced pregnancy as a crime against humanity. The perpetrator need only be aware that an armed conflict exists – he need not know that there is a "widespread or systematic" attack or his particular role in the attack.[91] The armed conflict and the crimes committed therein need not be "in furtherance of a state or organizational policy."[92] Moreover, the forced pregnancy does not have to be committed as a part of the armed conflict[93] – it merely has to be associated with it.[94] As long as an armed conflict involves the large-scale or purposeful commission of war crimes,[95] and the perpetrator of forced pregnancy had some connection to the conflict, he can be convicted for committing a war crime.

The ICC's treatment of forced pregnancy as a war crime would seem to still preclude prosecuting free-lancers. This is potentially troublesome. If someone takes advantage of the existence of an armed conflict, where law and order has broken down, he should not be able to escape punishment simply because his conduct was not strictly "associated" with the armed conflict. However, given prior jurisprudence before the International Criminal Tribunal for the Former Yugoslavia (ICTY), namely *Prosecutor v. Tadic*, the Court is likely to find that criminal conduct is associated with an armed conflict if the criminal act is not unrelated to the armed conflict and was not done for the perpetrator's purely personal motives.[96] Under this precedent, the ICC will likely be able to reach even perpetrators whose actions were tangentially connected to armed conflicts. Most prosecutions of forced pregnancy will consequently be under the ICC's war crimes provision.

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91. *Compare* Elements, *supra* note 17, art. 8(2)(e)(vi)(4)(3), *with id.* art. 7(1)(g)(4)(3).
92. ICC Statute, *supra* note 2, art. 7(2)(a).
93. *See* Elements, *supra* note 17, art. 7(1)(g)(4)(2).
94. *See id.* arts. 8(2)(b)(xxii)(4), 8(2)(e)(vi)(4)(3).
95. ICC Statute, *supra* note 2, art. 8(1).
96. Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment and Opinion, ¶ 634, at 228 (May 7, 1997).

C. Forced Pregnancy as Genocide

The ICC Statute does not explicitly treat forced pregnancy as genocide. The Statute lists five acts that constitute genocide when committed with the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group," and forced pregnancy is not among these acts.[97] This seems to stand to reason. As one commentator has put it, "[h]ow is it possible to view the creation of human life as genocidal?"[98] "How precisely is a group destroyed by the creation of individuals?"[99] Moreover, the notion that forced pregnancy is genocide forces us to ignore several biological realities.[100] When a woman is forcibly made pregnant with the intent of affecting the ethnic composition of a group,[101] the ethnic composition of the group is not affected because the child will still in part belong to the mother's group. Children, after all, receive in equal parts genetic material from mother and father.

To some advocates, however, genocide can be equated with the pollution of the bloodline.[102] Catherine MacKinnon has stated bluntly: "Croatian and Muslim women are being raped, and then denied abortions, to help make a Serbian state by making Serbian babies."[103] MacKinnon's argument is that in purportedly patriarchal societies like Serbia, where the ethnic identity is based on the ethnicity of the father, forced pregnancy is used to increase the population of one group at the expense of the other.[104] Siobhan Fisher has put the point more generally: "[w]hen 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."[105] As long as the victim of forced pregnancy is carrying the child of the enemy, she cannot give birth to children of her own group, and after she gives birth she may be too

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97. *See* ICC Statute, *supra* note 2, art. 6.
98. Carpenter, *Forced Maternity*, *supra* note 4, at 222.
99. *Id.* at 218.
100. *See generally* Salzman, *supra* note 10, at 364-65.
101. ICC Statute, *supra* note 2, arts. 7(2)f, 8(2)(b)(xxii).
102. *See* Darren Anne Nebesar, Note, *Gender-Based Violence as a Weapon of War*, 4 U.C. DAVIS J. INT'L L & POL'Y 147, 154-55 (2000).
103. MacKinnon, *supra* note 7, at 13.
104. *See id*; *see also* Salzman, *supra* note 10, at 365.
105. Fisher, *supra* note 7, at 120-21.

devastated to bear children of her group in the future.[106] What is important then might not be the genetic reality that the children of forced pregnancy belong to both groups, but rather the perceptions of perpetrators and victims.[107]

This view has some support in the *Prosecutor v. Akayesu* decision before the International Criminal Tribunal for Rwanda (ICTR).[108] In dicta, the Tribunal wrote that forced pregnancy can be seen as genocide when it is intended to prevent births within a group.[109] The ICTR wrote:

> 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, during 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.[110]

The ICC, like the ICTR, considers the imposition of measures intended to prevent births to be genocide.[111] Forced pregnancy then, if performed with the requisite intent, could potentially be prosecuted as genocide under Article 6(d) of the Statute.[112]

Although the ICC may choose to read Article 6(d) to allow for the prosecution of forced pregnancy as genocide, there are strong reasons that it should not do so. The perpetrator of forced pregnancy is able to affect the ethnic composition of a particular group only if the group views the offspring as a product of "the other." Carpenter writes, "[t]o function as genocide, the children (and the mothers who bore children "of the enemy") must be seen by the group as alien to the group."[113] In other words, to treat forced pregnancy as genocide is to substantiate the myth that identity is determined solely by the ethnicity of the father; it is to accept the notion that the mother's ethnicity is erased from the

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106. *See* Buehler, *supra* note 26, at 165.

107. Salzman, *supra* note 10, at 365.

108. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

109. *Id.* ¶ 507.

110. *Id.*

111. ICC Statute, *supra* note 2, art. 6(d).

112. Buehler also speculates that forced pregnancy can be prosecuted as genocide under Article 6(b) – where the qualifying action is causing serious bodily or mental harm. *See generally* Buehler, *supra* note 27, at 165. While Buehler is undoubtedly correct that forced pregnancy causes bodily or mental harm, forced pregnancy is only the destruction of a group in so far as it is seen by the group as such. *See* discussion *infra*.

113. Carpenter, *Surfacing Children*, *supra* note 7, at 444.

offspring.[114] Such views have real consequences, most notably on the "children of the enemy," who inevitably end up alienated from both cultures.[115] The overall treatment of such children is of deep stigma,[116] and the women who give birth to them are often isolated from their own culture and community.[117] The preamble of the ICC Statute proclaims that the state parties are "conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage." Treating forced pregnancy as genocide is to validate the notion that a child must be ethnically and culturally pure to belong to a particular people. Paradoxically, those who advocate treating forced pregnancy as genocide operate from the same framework as those that perpetrate the crime.

The intent required to commit genocide also appears to be at odds with the intent required for forced pregnancy. To commit genocide, one must have the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group."[118] To commit forced pregnancy, however, the perpetrator must have the intention to affect the ethnic composition of a population or carry out other violations of international law by means of unlawful confinement.[119] The intent required for forced pregnancy is usually readily inferred from the facts of the confinement. When a pregnant woman is held until she gives birth to a "child of the enemy" and then let go, this would seem to suggest that the confinement was for the purpose of affecting the ethnic composition of her group. The same facts cannot also give rise to genocide unless having the intent to affect the ethnic composition of a group also means the perpetrator always has the intent to "destroy in whole or in part." Such an interpretation, however, would turn every war crime and crime against humanity of forced pregnancy into genocide. The framers of the ICC could not have intended such a result.

Moreover, the requisite intent to destroy in whole or in part is unlikely to be found from the facts of a forced pregnancy. If one group

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114. *See id.* at 443.

115. *See generally* Carpenter, *Forced Maternity*, *supra* note 4, at 228-32.

116. *Id.* at 228. Carpenter goes on to write with regards the children born in Bosnia: "The children who were born were nearly always rejected by their mothers and communities, killed, abandoned, or cared for by orphanages and in some cases denied citizenship." *Id.*

117. *See* Buehler, *supra* note 27, at 165; *see also* Nebesar, *supra* note 102, at 155 ("The woman's scar is not just her own, yet she alone is shunned for having it.").

118. ICC Statute, *supra* note 2, art. 6.

119. *See id.* arts. 7(2)f, 8(2)(b)(xxii).

wishes to destroy another, forced pregnancy would probably not be the weapon of choice. According to one account from a rape camp, women who were to bear "Chetnik babies" were segregated from the rest, received extra food and other privileges, and were examined by gynecologists.[120] Forced pregnancy is a horrible crime, but it is hard to read these facts as proof of genocide. Presumably a group intent on genocide would not confine women of the enemy group and let them go – they would kill them. MacKinnon has speculated that the idea of forced pregnancy is to create a "fifth column" in the enemy population, but the children of forced pregnancy can assimilate and are just as likely to be victims of murder and genocide as anyone else.[121] As Carpenter has argued, "[i]t seems conceptually meaningless to rely on the imagination of perpetrators to label a child's ethnicity when in fact the child's life experience and identity may be embedded in a different community."[122] While the ICC is not precluded from treating forced pregnancy as genocide, there are legal and practical considerations that justify the ICC Statute's position in not explicitly treating it as such. The Rome Statute is correct to view forced pregnancy as a war crime and crime against humanity and not genocide.

CONCLUSION

International courts are increasingly concerned with crimes committed against women such as forced pregnancy and forced marriage.[123] At the same time, the ICC and other institutions[124] have no

120. Salzman, *supra* note 10, at 359.

121. Carpenter, *Forced Maternity*, *supra* note 4, at 232.

122. *Id.*

123. For a discussion of "forced marriage" before the Special Court of Sierra Leone, see generally Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims*, 18 HARV. HUM. RTS. J. 85, 100-02 (2005). Forced marriages arguably qualify as "other inhumane acts" under the Crimes Against Humanity Provisions of the Special Court's Statute and have been charged as such. *See id.* at 102; *see also* Press Release, Special Court for Sierra Leone, Office of the Prosecutor, Prosecutor Welcomes Arraignment of RUF and AFRC Indictees on Charges Related to Forced Marriage (May 17, 2004), *available at* http://www.sc-sl.org/prosecutor-051704.html.

124. A Trial Chamber of the Special Court of Sierra Leone recently acquitted several defendants of the charge of forced marriage on the grounds that the crime is subsumed by the crime of sexual slavery, labeling the forced marriage charge as redundant. *See* Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Judgment, ¶¶713-14 (June 20, 2007). The ICC may likewise choose to treat forced pregnancy charges as subsumed by charges of rape and unlawful confinement but given that the Statute specifically prohibits forced pregnancy, this would be

body of law upon which to draw in considering these crimes. Although it is a welcome development that the rights of women are no longer of secondary concern to international law, we cannot be sure how courts will treat these crimes. The ICC will have substantial discretion in analyzing forced pregnancy because the work of the *ad hoc* tribunals and domestic jurisprudence is of limited use in dealing with a crime that has only recently been recognized.

In this Article, I have attempted to demonstrate some of the potential flaws in the ICC's treatment of forced pregnancy. In Part I, I focused on ambiguities in the definition, particularly with regards the *actus reus* and *mens rea* of the crime. Forced pregnancy is not actually one crime, but two: There must both be a forcible impregnation and an unlawful confinement. The perpetrator of forced pregnancy is the one who commits the latter crime. However, since one cannot be convicted of forced pregnancy without the impregnation occurring, the prosecution will also have to prove that the former crime occurred. This is potentially worrisome since the rights of third-parties may be implicated in the proceeding, and it is unclear how much knowledge the perpetrator of forced pregnancy must have as to the origins of the pregnancy. We also have every reason to question whether the Statute's deference to national abortion laws is appropriate given that the criminalization of forced pregnancy protects a woman's right to not be pregnant against her will.

In Part II of this paper, I emphasized the difficulties posed in prosecuting forced pregnancy as a crime against humanity and war crime. Given the special nature of forced pregnancy, it will be hard to prove that the crime was committed as part of a "widespread or systematic" attack. The perpetrator who confines the victim may have a credible argument that he is unaware of the particulars of any attack, let alone that his action was pursuant to any organizational policy. Indeed, treating forced pregnancy as a crime against humanity moves the inquiry away from the harm done to an individual woman to an inquiry into an individual's complicity in a larger unlawful scheme. Prosecuting forced pregnancy as a war crime is not as problematic since the perpetrator need not be furthering some governmental policy – his conduct simply needs to be loosely associated with an armed conflict.

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problematic. During the drafting process, many delegates believed that there was a sufficient basis through rape and unlawful confinement provisions to prosecute forced pregnancy. Buehler, *supra* note 27, at 162.

We can expect to see most prosecutions of forced pregnancy to be under the war crimes provisions of the ICC Statute.

Lastly, I argued that while forced pregnancy can potentially be read as genocide under Article 6(d) of the ICC Statute (i.e., as a measure intended to prevent births in another group), the ICC should be reluctant to treat forced pregnancy as genocide. Forced pregnancy contributes to the destruction of a group only to the extent that we accept the notion that children must belong to one group or another. While forced pregnancy is a horrible crime, the action of detaining a woman so she can be forced to give birth does not rise to the level of genocide, and courts will be unlikely to infer genocidal intent from the facts of a forced pregnancy. Forced pregnancy inflicts very real pain on individual women, but it is only genocide to the extent courts wish to endorse the flawed patriarchal assumptions of the attacking population.

In criminalizing forced pregnancy, the ICC is sending a clear message to the world that women cannot be treated as mere "vessel[s] of reproduction."[125] At the same time, many challenges await the court as it begins to prosecute forced pregnancy. The ICC must strike a delicate balance between vindicating victims and respecting the rights of suspects accused of this new crime.

125. *See* Carpenter, *Surfacing Children*, *supra* note 7, at 443.