
BOSNIA V. SERBIA AND THE STATUS OF RAPE AS GENOCIDE UNDER INTERNATIONAL LAW

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ABSTRACT

The women and children were separated into four groups at the police station and taken to separate houses confiscated from Muslim owners. The witness was placed with a group of 28 women. One of the soldiers told her that women, children, and old people were being taken to these homes because they were “not worth a bullet.” They were kept in this house for 27 days.

Day and night, soldiers came to the house taking two to three women at a time. There were four to five guards at all times, all local Foca Serbs. The women knew the rapes would begin when “Mars Na Drinu” was played over the loudspeaker of the main mosque. (“Mars Na Drinu”, or “March on the Drina,” is reportedly a former “Chetnik” fighting song that was banned during the Tito years.)

While “Mars Na Drinu” was playing, the women were ordered to strip and soldiers entered the homes, taking away the ones they wanted. The ages of women taken ranged from 12 to 60. Frequently the soldiers would seek out mother and daughter combinations. Many of the women were severely beaten during the rapes.

The witness was selected twice. The first time, soldiers had entered and grabbed an 18-year-old girl, asking her if she were a virgin. She said she was. Licking his knife, one of the soldiers said that if they found she was not, he would butcher her. The witness pleaded with them not [to] take the girl but to take her instead. “We’ll take you, too,” they said.

While the witness was being raped, her rapist told her, “You should have already left this town. We’ll make you have Serbian babies who

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will be Christians.” Two soldiers raped her at that time; five soldiers raped the 18-year-old girl in full view of the witness.¹

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I. INTRODUCTION

On March 20, 1993, Bosnia and Herzegovina (Bosnia) filed suit in the International Court of Justice (ICJ) against what was then the Federal Republic of Yugoslavia (FRY),² alleging the latter’s participation in a

¹ Permanent Representative of the U.S. to the U.N., *Supplemental United States Submission of Information to the United Nations Security Council In Accordance with Paragraph 5 of Resolution 771 (1992) and Paragraph 1 of Resolution 780 (1992)*, Annex, submitted to the Security Council, U.N. Doc. S/25586 (Apr. 13, 1993), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/215/15/img/N9321515.pdf?OpenElement> [hereinafter *Submission*].

² Regarding the identity of the Respondent State, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 91, ¶¶ 67-139 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf> [hereinafter *Genocide Case*]. The parties accepted that Serbia and Montenegro was the successor of the Federal Republic of Yugoslavia (“FRY”), and that the Republic of Serbia was continuator of Serbia and Montenegro. However, one of the most contentious issues in the case was the jurisdictional question of whether the FRY was the continuator in legal personality of the Socialist Federal Republic of Yugoslavia (“SFRY”), which would determine whether it was a member of the United Nations (U.N.) and a party to the Genocide Convention, and so subject to ICJ jurisdiction for the period 1992-2000. A decision of the Court in 1996 rejected the Respondent’s jurisdictional objections and held it did have jurisdiction under the Genocide Convention. See Application of the

campaign of genocide against the non-Serb population of Bosnia and Herzegovina and seeking provisional measures to halt the continued atrocities (“the Genocide Case”). On April 8, 1993, the Court handed down provisional measures ordering the FRY to “ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence” not commit, conspire to commit, incite, or be complicit in genocide.³ It would take almost fourteen more years for the court to rule on whether the atrocities committed against non-Serbs in Bosnia amounted to genocide, and if so, whether such acts or complicity in them could be attributed to the FRY and its successor.⁴ Among the issues the Court had to decide was whether systematic rape and sexual violence, as alleged by Bosnia, was carried out as a part of the genocidal campaign.

As Alexandra Stiglmayer pointed out in her piece, *The Rapes in Bosnia-Herzegovina*, “[w]omen have always been raped in wartime, of course. There were mass rapes even in wars that were not wars of expulsion. Rapes seem to be part and parcel of a soldier’s life, a ‘normal’ accompaniment to war.”⁵ But Stiglmayer tacitly acknowledges that there was something different about the rapes carried out by Serbian forces in Bosnia-Herzegovina, because, as she put it, “dispersion [was] precisely the goal.”⁶

The widespread and systematic rape of women in Bosnia-Herzegovina led to a divide in feminist scholarship on whether rape by one side in the conflict could, or should, be classified as “genocidal,” thereby signaling a matter of heightened international concern. Karen Engle summarizes the competing views in this debate:

Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), Preliminary Objections, Judgment, 1996 I.C.J. 595 (July 11). The Respondent later objected to the Court’s assertion of jurisdiction in light of FRY’s admission to the U.N. in 2000, suggesting it had not prior to that time been a member, as well as seemingly inconsistent holdings in the *Use of Force* cases filed by Serbia and Montenegro against various NATO countries. See *Genocide Case*, 2007 I.C.J. at ¶ 132. Ultimately, the Court held that the 1996 decision was *res judicata* and so affirmed its jurisdiction. *Id.* at 53. This matter is far beyond the scope of this Note, which will simply refer to the states interchangeably, assuming each successive state as a continuator in legal personality of the former.

³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Provisional Measures, 1993 I.C.J. 3, 24 (Apr. 8), available at <http://www.icj-cij.org/docket/files/91/7305.pdf>.

⁴ The Court issued its ruling in the *Genocide Case* on February 26, 2007. See *Genocide Case*, 2007 I.C.J. at ¶ 140.

⁵ Alexandra Stiglmayer, *The Rapes in Bosnia-Herzegovina*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 82, 84 (1994).

⁶ *Id.* at 85.

If women were raped on all sides of the war and the feminist goal was to stop all rapes, then how could one choose sides in the conflict? Some feminists did choose sides, seeing the rapes by Serbian men as genocidal and therefore calling for extraordinary attention. Others disagreed, arguing that such a position would deny the extent to which women were always harmed in war, and were specifically harmed on all sides of the Balkan conflict. The latter position did not deny that rapes were hideous; far from it, those who expressed this view often argued that rapes on all sides might be considered “genocidal,” but because of their effect on women as a group, not on Bosnian Muslim women in particular.⁷

The outcome of the *Genocide Case* then could have had profound implications for this debate and might have helped to clarify when and how a campaign of rape and sexual violence targeted at a specific population would constitute genocide. Unfortunately, the Court did not address the issue of rape and sexual violence in any systematic way, and in the end, left the legal status of “rape as genocide” arguments more convoluted than before. In doing so, the Court disregarded or denied the existence of readily available evidence (in many cases, evidence from sources on which the Court relied heavily elsewhere in its decision) and rested on a questionable reading of the Convention, confounding specific intent with an act’s success in achieving that intent. The purpose of this Note is to raise questions concerning the court’s treatment of Bosnia’s allegations that Serbia committed acts of genocide through rape and other sexual and reproductive violence, and to evaluate how its decision impacts the status of such violence as violations of international law relating to genocide.

Part II of this Note will give a brief summary of the Genocide Convention, the elements required to prove a breach of the Convention, and the ways in which rape may constitute an act of genocide according to the court. Part III will discuss the Court’s decision regarding Bosnia’s allegations of rape and sexual violence as part of a larger pattern of acts causing serious bodily and mental harm in violation of Article II(b) of the Convention. Part III will also address the Court’s line of analysis and standard of proof requirements for finding the specific intent of genocide. Part IV analyzes the Court’s decision regarding Bosnia’s argument that acts of rape constituted measures imposed to prevent births in violation of Article II(d) of the Genocide Convention. Part IV also addresses various evidentiary materials that the court failed to consider and which appear to undermine its ultimate decision. Part V considers Bosnia’s argument that a policy of rape was used to forcibly transfer Muslim children to the Serbs in violation of the Convention. Again, the Court did

⁷ Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778, 785 (2005).

not mention highly relevant evidentiary material in its decision; most importantly, the Court did not consider evidence of forced impregnation, which would have been relevant to its analysis under both Article II(d) and (e). Finally, Part VI of this Note will consider the consequences of the Court's incomplete treatment of the allegations relating to rape and sexual violence, its failure to consider relevant evidence, and the questionable conclusions that it reaches as a result.

II. THE GENOCIDE CONVENTION

The Convention on the Prevention and Punishment of the Crime of Genocide arose in response to the atrocities committed during World War II, though similar ideas for establishing an international law on genocide had been floated at least as far back as World War I.⁸ The term "genocide" itself was coined by a Polish lawyer who needed a term to describe the particular type of atrocity that the Third Reich had committed.⁹ The term is derived from the Greek "*genos*," meaning "people," and the Latin "*cida*," meaning "kill."¹⁰ The General Assembly opened the final draft of the Convention for ratification at the end of 1948.¹¹ Today, 140 states are party to it.¹²

Given that the Convention was a response to the atrocities of the Holocaust, it is hardly surprising that individual liability was the Convention drafters' primary concern.¹³ Nonetheless, both conventional (treaties) and customary international law largely recognize its terms as binding on states.¹⁴ In its decision in the *Genocide Case*, the ICJ determined that states can be held responsible for the commission of acts prohibited

⁸ JOHN B. QUIGLEY, *THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS* 3-4 (2006).

⁹ *Id.* at 4-5.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² Convention on the Prevention and Punishment of the Crime of Genocide, IV Multilateral Treaties Deposited with the Secretary-General 1, available at <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-1.en.pdf> (last visited Jan. 31, 2008).

¹³ QUIGLEY, *supra* note 8, at 56 ("The impetus behind the drafting of the Genocide Convention was for a treaty that would ensure the liability of individuals.").

¹⁴ *Id.* ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . genocide." (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987)); "In 1951, the International Court of Justice said that the prohibition against genocide was 'recognized by civilized nations as binding on States, even without any conventional obligation.'" *Id.* (quoting Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28))).

under Article III of the Convention,¹⁵ namely: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.¹⁶

A. *The Specific Intent Requirement*

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) defines “genocide” as:

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

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.¹⁷

The acts listed in (a) through (e) have their own mental elements, whether implicit or explicit,¹⁸ but such acts do not rise to the level of genocide unless committed with the specific intent of destroying a protected group in whole or in part.¹⁹ As will be discussed below, most of the judgment in the *Genocide Case* turned largely on the question of whether there was sufficient evidence of this specific intent, even where the Court determined that the enumerated acts had occurred. However, with regard to Bosnia’s allegations under (d) and (e), which relied primarily on accusations of rape, sexual violence, and acts intended to impact reproductive capacity, the Court denied that acts falling under the purview of the Convention had even occurred, and so never reached the question of specific intent²⁰ As this Note will show, had the Court recognized that the acts of sexual violence and reproductive interference con-

¹⁵ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 91, ¶ 167 (Feb. 26).

¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide art. III, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

¹⁷ *Id.* at art. II.

¹⁸ See *Genocide Case*, 2007 I.C.J. at ¶ 186 (“It is well established that the acts [(a)-(e)] themselves include mental elements. ‘Killing’ must be intentional, as must ‘causing serious bodily or mental harm’. Mental elements are made explicit in paragraphs (c) and (d) . . . and forcible transfer too requires deliberate intentional acts.”). However, the court largely discarded the mental element under paragraph (d), as is discussed *infra* Part IV.

¹⁹ *Id.* at ¶ 187.

²⁰ See *infra* Part IV.

stituted prohibited acts under Article II, it would have been much more difficult to deny evidence of specific intent.

B. *Rape as an Act of Genocide Under the Convention*

In its judgment in the *Genocide Case*, the ICJ addressed three primary instances in which rape and sexual violence may constitute acts of genocide under Article II. First, and most explicitly, under paragraph (b), rape and sexual violence may cause serious bodily or mental harm.²¹ Second, the Court addressed allegations that rape and sexual violence were measures intended to prevent births within the protected group under Article II(d).²² Third, the Court briefly considered Bosnia's argument that rape and forced impregnation were used as a means of forcibly transferring the children of one group to another group under Article II(e).²³

From a legal standpoint, finding that rape constitutes genocide under Article II(b) as a result of having caused serious bodily or mental harm is relatively straightforward and uncontroversial. The Court acknowledged that acts of rape and sexual violence causing serious bodily and mental harm had occurred and that such acts accompanied by the required specific intent would, as a matter of law, constitute genocide.²⁴ The Court decided, however, that the evidence did not establish the specific intent element.²⁵ This line of analysis was consistent with the rest of the judgment. The Court's decision was less clear, though, regarding the legal status of the arguments that rape and sexual violence were intended to prevent births and transfer children under Article II(d) and (e). The Court dismissed these arguments with vague assertions that the evidence did not "enable" the Court to draw a conclusion that the acts had even occurred, and further, the Court did not address whether such acts could legally constitute genocide.²⁶ By disregarding a considerable amount of readily available evidence, the Court avoided these issues and instead relied on questionable legal conclusions, creating additional confusion in an already ambiguous area of international law.

III. ARTICLE II(B): CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE GROUP

Bosnia asserted that the systematic rape carried out by Serb forces against Muslim women constituted an act of genocide under Article II(b) of the Convention, that is, acts: "causing serious bodily or mental harm to members of the protected group."²⁷ Bosnia contended that Serb forces

²¹ See *Genocide Case*, 2007 I.C.J. at ¶ 300.

²² *Id.* ¶ 356.

²³ *Id.* ¶¶ 362-67.

²⁴ *Id.* ¶ 319.

²⁵ *Id.*

²⁶ *Id.* ¶¶ 361, 367.

²⁷ *Id.* ¶¶ 298-319.

had caused serious bodily and mental harm by terrorizing Muslim populations, inflicting pain, and administering torture, but placed “particular emphasis on the issue of systematic rapes of Muslim women.”²⁸ Serbia conceded that systematic rape may constitute an act of genocide under Article II(b), but argued that the rapes in this particular case were committed without the required specific intent.²⁹ The Court cited the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v. Akayesu* as support for the proposition that rape could constitute genocide under Article II(b) if carried out with the intent to destroy the group in whole or in part: “rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of [sic] inflict harm on the victim as he or she suffers both bodily and mental harm.”³⁰

Relying on General Assembly and Security Council resolutions, the findings of the Commission of Experts, government hearings, findings by the U.S. State Department, as well as several judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Court determined “by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps.”³¹ Interestingly, the Court considered evidence of rapes as violations of Article II(b) together with evidence of “massive mistreatment, beatings, . . . and torture causing serious bodily and mental harm.”³² The Court did not consider rape separately from other mistreatment or discuss how the motivation to commit rape may differ from other forms of harm.

Although the Court found that acts had been committed under Article II(b) that, if accompanied by the specific intent requirement, would constitute genocide, the Court held that there was insufficient evidence to find the specific intent to destroy the protected group in whole or in part, and thus failed to find that genocide had occurred. Bosnia asserted that “the very pattern of the atrocities committed over many communities, over a lengthy period, focussed [sic] on Bosnian Muslims and also Croats, demonstrates the necessary intent.”³³ The Court, however, cryptically rejected this argument, requiring that the specific intent be “convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist.”³⁴

²⁸ *Id.* ¶ 298.

²⁹ *Id.*

³⁰ *Id.* ¶ 300 (citing *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1998)).

³¹ *Id.* ¶ 315.

³² *Id.*

³³ *Id.* ¶ 373.

³⁴ *Id.*

Based on this statement alone, it would appear that evidence of either particular circumstances or circumstantial evidence of a general plan would be sufficient to establish “convincingly” that the specific intent existed. The Court explicitly stated, however, that “for a pattern of conduct to be accepted as evidence” of specific intent, the pattern “would have to be such that it could only point to the existence of such intent.”³⁵ The requirement that the evidence be such that it could *only* point to the existence of the specific intent is a higher standard than requiring that the evidence be “convincing,” and is closer to the “proof beyond a reasonable doubt” standard.³⁶ Nonetheless, had the Court considered the genocidal nature of rape and sexual violence apart from other forms of mistreatment, this higher burden would have been more easily satisfied. As will be discussed in Part VI below, while Bosnia and the FRY both conceded that rape may constitute an act of genocide, the decision by the Court to consider rape only as a part of a larger context of inflicting harm - that is, to deny that there was anything genocidal about the rapes *themselves* - was instrumental in its finding that there was no genocidal intent.³⁷

In evaluating Bosnia’s claims under Article II(b), as well as the claims not involving allegations of rape and sexual violence³⁸, the Court used the following line of analysis to determine that genocide had not occurred (the notable exception being in regard to the Srebrenica massacre³⁹): While recognizing that acts had occurred that would constitute genocide if accompanied by the specific intent to destroy the protected group in whole or in part, the Court decided it had insufficient evidence to find the

³⁵ *Id.*

³⁶ See Andrea Gattini, *Evidentiary Issues in the ICJ’s Genocide Judgment*, 5 J. INT’L CRIM. JUST. 889, 903 (2007) (“With regard to Bosnia’s main argument of the opportunity to consider the whole pattern of acts as evidence of the intent to commit genocide, the Court agreed that the intent to commit genocide must not be shown by reference to particular circumstances, if ‘a general plan [. . .] can be convincingly demonstrated to exist’ (citation omitted). But, so runs the argument, for the demonstration of such general plan, the pattern of conduct must have been conducive to only that solution. This is but another way to express the same standard of ‘proof beyond any reasonable doubt’, which the Court constantly applied throughout the case when dealing with Articles II and III of the Genocide Convention.”).

³⁷ See *infra* Part IV.

³⁸ See *Genocide Case*, 2007 I.C.J. at ¶¶ 245-77, 320-54. The Court did not address rape or sexual violence in response to allegations under Article II(a), “killing members of the group,” and Article II(c), “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”

³⁹ *Id.* ¶¶ 297, 413-15. With regard to the Srebrenica massacre, the Court did find that genocide had occurred, but held the acts could not be attributed to the Federal Republic of Yugoslavia or Serbia and Montenegro. *Id.* ¶¶ 416-24.

specific intent of genocide.⁴⁰ When addressing acts of rape or sexual violence with respect to Article II(d) and (e), however, the Court applied a different line of analysis, as outlined in the sections below.

IV. ARTICLE II(D): IMPOSING MEASURES (INTENDED) TO PREVENT BIRTHS IN THE PROTECTED GROUP

Unlike the rest of the decision, with regard to the allegations under sections (d) and (e) of Article II, the Court did not acknowledge that the *actus reus* of genocide had been committed, after which it would have to turn to the question of *mens rea* and the specific intent requirement. With respect to Article II(d), which prohibits measures intended to prevent births within a group, the Court found that “the evidence placed before it by the Applicant [did] not enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II(d) of the Convention.”⁴¹ In so concluding, the Court disregarded highly relevant evidence. Further, the Court either based its finding on a mistaken reading of the Convention or read Article II(d) in a manner inconsistent with its plain language and failed to explain why.

The ICTR had previously addressed the argument that rape, sexual violence, and reproductive interference constitute measures intended to prevent births under section (d). In *Akayesu*, the ICTR held that “the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”⁴² Forced pregnancy may also be construed as a measure intended to prevent births “[i]n patriarchal societies, where membership of a group is determined by the identity of the father,” and “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.”⁴³ As discussed below, forced pregnancy may also implicate forcible transfer of children under Article II(e) for many of the same reasons. For purposes of section (d), forced pregnancy by a man of “another group” can be said to prevent the birth of children within the group. Finally, the *Akayesu* tribunal pointed out that measures intended to prevent births can be mental as well as physical: “[f]or instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”⁴⁴

⁴⁰ *Id.* ¶¶ 277, 354.

⁴¹ *Id.* ¶ 361.

⁴² Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 507 (Sept. 2, 1998).

⁴³ *Id.*

⁴⁴ *Id.* ¶ 508.

A. Forced Separation

Bosnia's arguments under Article II(d) largely followed the legal determination of *Akayesu*. Bosnia first argued that Serbs violated section (d) by forcibly separating male and female Muslims.⁴⁵ Forced separation, Bosnia argued, "in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months."⁴⁶ The Court summarily responded that "no evidence was provided in support of this statement"⁴⁷ and gave no further discussion. This holding either denies there was evidence of forced separation, or denies evidence of a decline in birth rates.

With regard to the first possibility, there was considerable evidence of the forced separation of males and females of reproductive age that the Court failed to address. With respect to Bosnian Serb detention camps the Commission of Experts noted: "After a village, town, or city is conquered, the local population is rounded up *en masse*"⁴⁸ and, "[w]omen, children and men over 60 years of age are usually separated from others and taken to separate camps."⁴⁹ According to the Commission, these camps were "ultimately intended to achieve 'ethnic cleansing.'"⁵⁰ Multiple findings of the ICTY also cited the regular separation of Muslim men and women of reproductive age:

Once towns and villages [in the Foca region] were securely in their hands, the Serb forces - the military, the police, the paramilitaries and, sometimes, even Serb villagers - applied the same pattern: Muslim houses and apartments were systematically ransacked or burnt down, Muslim villagers were rounded up or captured, and sometimes beaten or killed in the process. Men and women were separated, with many of the men detained in the former KP Dom prison.⁵¹

The policy of separating men and women was not limited to Foca:

On arrival, [Emir Beganovic, a former detainee witness,] joined a group of an estimated 2000 people, mainly Muslim but also containing some Croats, gathered in front of some high rise buildings. This group was separated into two subgroups: men 15-65 years of age in

⁴⁵ *Genocide Case*, 2007 I.C.J. at ¶ 355.

⁴⁶ *Id.*

⁴⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 355 (Sept. 2, 1998).

⁴⁸ The Commission of Experts, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, ¶ 230(e), delivered to the Security Council, U.N. Doc. S/1994/674 (May 27, 1994) [hereinafter Commission of Experts].

⁴⁹ *Id.* ¶ 230(n).

⁵⁰ *Id.* ¶ 230(a).

⁵¹ *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 573 (Feb. 22, 2001).

one group, and women, children, and elderly men in the second group. . . .

All non-Serb men arrested. . . were then bussed to either the Omar-ska camp or the Keraterm camp. Women, children, and the elderly tended to be taken to the Trnopolje camp.⁵²

The U.S. submission to the Security Council, which Bosnia often cited in support of its allegations under Art. II(b), also contained accounts of the regular separation of men and women for detainment: “After separating the men from the women and children, they took the latter group to the police station. . . .The women and children were separated into four groups at the police station and taken to separate houses confiscated from Muslim owners.”⁵³ Based on these sources, there was certainly at least some evidence of “forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces,” as Bosnia claimed.⁵⁴

Alternatively, the Court’s finding may have meant that no evidence supported Bosnia’s contention that the forced separation “in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months.”⁵⁵ The implication of resting on such a finding would seem to be that even if forced separation were established, it would not constitute a measure intended to prevent births under Article II(d) unless evidence demonstrated the separation had been *effective* in preventing births.

Nothing in *Akayesu* suggests such a requirement. Instead, the tribunal held that forced separation of the sexes should be construed as an act intended to prevent births.⁵⁶ Further, the language of the Convention itself refers only to methods *intended* to prevent births, not those that actually have that effect. Nonetheless, the language the ICJ chose, especially in light of other international law developments relating to the wording of Article II(d), suggests that the court was requiring a showing

⁵² Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶¶ 14-15 (Nov. 2, 2001).*Id.* Other ICTY findings document similar systematic separation of men and women. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 342-350 (May 7, 1997); Prosecutor v. Mrda, Case No. IT-02-59-S, Sentencing Judgment, ¶ 10 (Mar. 31, 2004); Prosecutor v. Krnojelac, Case No. IT-97-25T, Judgment, ¶ 39 (Mar. 15, 2002). While there may have been a non-genocidal, military purpose to separating military-aged men in order to be killed, there is still considerable evidentiary support for the contention that men and women of reproductive age were systematically separated, whether to be killed, detained, or released.

⁵³ *Submission, supra* note 1.

⁵⁴ *Genocide Case*, 2007 I.C.J. at ¶ 355.

⁵⁵ *Id.*

⁵⁶ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 507 (Sept. 2, 1998).

of success in preventing births in order to establish the *actus reus* of genocide under II(d).

Under Article II(d) of the Convention, “[i]mposing measures *intended* to prevent births within the group”⁵⁷ constitutes genocide if “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁵⁸ The ICJ modified this language. While it quoted the whole of Article II correctly,⁵⁹ it evaluated Bosnia’s specific Article II(d) arguments under the heading “Article II(d): Imposing measures to prevent births within the protected group.”⁶⁰

The removal of the word “intended” from the language of the Convention is not a distinction without a difference. The Preparatory Committee that drafted the Rome Statute establishing the permanent International Criminal Court considered a similar modification when drafting the provisions of the statute relating to criminal punishment for genocide:

An alteration to the text of this section of the Genocide Convention was suggested in the 1996 Preparatory Committee meetings by replacing ‘measures intended to prevent births’, with ‘measures preventing births’. However, rather than clarifying the section, this would have been an alteration so that any measures taken to prevent births would, in fact, have to have been effective, before the offence of genocide was committed.⁶¹

The change was eventually abandoned by the third Preparatory Committee, and the language of Article 6 of the Rome Statute, which brings the crime of genocide under the jurisdiction of the International Criminal Court, was copied verbatim from Article II of the Genocide Convention.⁶² This original wording does not suggest any requirement that the act must be effective in preventing births.

In her article on genocide, Christine Byron notes:

[U]nder Article 6(d), in the words of Amnesty International, there is no requirement ‘that the accused have *succeeded* in preventing births’ . . .

The proposed Elements of Crimes set out this type of genocide relatively clearly. They state that the accused must have ‘imposed certain measures upon one or more persons’ belonging to one of the specified groups and that the measures were ‘intended to prevent births within that group’

⁵⁷ Genocide Convention, *supra* note 17, at Art. II(d) (emphasis added).

⁵⁸ *Id.* at art. II.

⁵⁹ *Genocide Case*, 2007 I.C.J. at ¶ 143.

⁶⁰ *Id.* ¶¶ 355-61.

⁶¹ Christine Byron, *The Crime of Genocide*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 143, 173 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004) (citation omitted).

⁶² *Id.* at 173-74; Rome Statute of the International Criminal Court art. 6, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3.

Therefore before the International Criminal Court, ‘imposing measures to prevent births’ should be read widely. It should include compulsory physical measures such as sterilisation, abortion, sexual mutilation, enforced pregnancy, birth control, separation of sexes, and prohibition of marriage. Measures to produce the same effect mentally such as threats, trauma and rape should be included. Provided that measures are taken with the intention of preventing births in all or part of the group, they need not actually be successful for the *actus reus* of genocide to be committed.⁶³

Byron’s broad analysis of section (d) is nearly identical to the *Akayesu* court’s reading of “measures intended to prevent births.”⁶⁴ The ICJ, however, deviated from the plain reading of the Convention and from the analysis of the ICTR and changed the wording of the very Convention to which it purported to apply, all without any discussion of its reasoning or policy.

B. *Sexual Violence Against Men*

Bosnia also asserted that Serbian acts of violence against Bosnian men prevented them from procreating subsequently.⁶⁵ As evidence, the Court referred only to the judgment in the *Tadic* case and a newspaper article, both of which the Court found unpersuasive.⁶⁶ Again, the Court seemed to disregard a considerable amount of evidence from other sources and focused on the success, rather than the existence, of acts of violence against men intended to prevent births.

While the Court considered only limited evidence of sexual violence committed against men, considerable evidence was available from multiple reliable sources. The Commission of Experts found that in Bosnian Serb detention camps “[t]here [had] . . . been instances of sexual abuse of men as well as castration and mutilation of male sexual organs.”⁶⁷ The U.S. submission to the Security Council also cites regular acts of sexual violence against male prisoners: “Most other guards at Luka were also visibly afraid of the knife-wielding guards, who were regularly seen castrating male prisoners.”⁶⁸ One witness “observed a Serbian woman in her 20’s . . . beat ‘handsome’ male prisoners, aged 20 to 30, on the genitals repeatedly and for extended periods of time.”⁶⁹

Judgments of the ICTY made similar findings regarding this type of violence directed toward male Muslims. In one sentencing judgment, the accused acknowledged that “on one occasion between 10 June and 3 July

⁶³ Byron, note 61, at 173-74 (citations omitted).

⁶⁴ See *supra* note 49 and accompanying text.

⁶⁵ *Genocide Case*, 2007 I.C.J. at ¶ 357.

⁶⁶ *Id.*

⁶⁷ Commission of Experts, *supra* note 49, at ¶ 230(o).

⁶⁸ *Submission*, *supra* note 1, at 7.

⁶⁹ *Id.* at 17.

1992, four non-Serb prisoners at the primary school . . . were attacked, brutally beaten and kicked by Milan Simic and the men accompanying him, on various parts of their bodies, and especially in the genitals.”⁷⁰ These statements were included in the judgment as facts undisputed by the accused and which the prosecutor and accused acknowledged “would be proven beyond a reasonable doubt.”⁷¹ The sentencing judgment further described how:

the victims were beaten with fists, the leg of a chair, a rod or bar, the butt of a rifle, and were kicked, on various parts of their bodies and especially in the genitals. It further provides that the victims were forced to stand with their arms outstretched, and were ordered to stand with their legs apart in order to receive forceful kicks to their genitals. Safet Hadzialagic, the victim of torture charged in count 7, in addition to being severely beaten, had to face threats that his penis would be cut off.⁷²

In another sentencing judgment, a witness “described how he was taken to the police station in Bosanski Samac, where [the accused] began to beat him and kick him in the genital area. [The witness] was then taken over to another man and ordered by [the accused] to ‘bit [sic] into his penis.’”⁷³

Even disregarding the additional evidence listed above, the Court failed to explain why the evidence from the *Tadic* case was not acceptable as evidence of sexual violence. Again, the answer lies in the Court’s interpretation of the Convention to require *success* in preventing births in order for an act to fall under section (d). In the words of the Court, “the Applicant referred to sexual violence against men *which prevented them from procreating subsequently*.”⁷⁴

In the *Tadic* case, the ICTY made findings of fact regarding a particularly brutal act of sexual mutilation in which guards forced one prisoner to bite off the testicle of another prisoner.⁷⁵ Such an act could be “intended to prevent births” within the meaning of Article II(d),⁷⁶ though there was no evidence that the victim would otherwise have reproduced and was subsequently unable to do so. The same can be said for the evidence available to the ICJ but which it did not consider in its decision. Judgments from the ICTY recount multiple acts of sexual vio-

⁷⁰ Prosecutor v. Simic, Case No. IT-95-9/2-S, Sentencing Judgment, ¶ 11 (Oct. 17, 2002).

⁷¹ *Id.*

⁷² *Id.* at ¶ 63 (citation omitted).

⁷³ Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Sentencing Judgment, ¶ 38 (July 31, 2001).

⁷⁴ *Genocide Case*, 2007 I.C.J. at ¶ 357 (emphasis added).

⁷⁵ Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 238 (May 7, 1997).

⁷⁶ Genocide Convention, *supra* note 17, at art. II(d).

lence towards men and violence that would likely result in preventing births, but those judgments did not find that these men subsequently tried and were unable to procreate.⁷⁷ Unfortunately, the ICJ gave no explanation for its apparent understanding that the language of the Convention requires proof of future inability to procreate.

C. *Physical and Psychological Trauma*

Bosnia also argued that rape and sexual violence carried out by Serbian forces against non-Serbs “led to physical trauma which interfered with victims’ reproductive functions and in some cases resulted in infertility.”⁷⁸ The Court wrote that “the only evidence adduced by the Applicant was the indictment in the *Gagovic* case before the ICTY in which the Prosecutor stated that one witness could no longer give birth to children as a result of the sexual abuse she suffered.”⁷⁹ The Court found this evidence unpersuasive because it was contained in an indictment as opposed to adjudicative findings and because the case never went to trial.⁸⁰ Similarly, Bosnia asserted that “rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family.”⁸¹ This line of argument is consistent with the decision in *Akayesu*, which held that “rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate.”⁸²

Again, the Court, Bosnia, and even the ICTR in *Akayesu*, appear to have compounded the issues of the commission of certain acts with the relative *success* of those acts in preventing births. The fact that rape and sexual violence may cause both physical and psychological trauma that prevents victims from procreating subsequently is one reason advanced for classifying rape as a measure “intended to prevent births.” Whether or not such trauma actually occurred is relevant only to the question of whether the acts were successful. Rather than asking whether the use of rape by Serbs against Bosnian Muslims succeeded in preventing births, the Court should have focused on the subjective intent of the perpetrators and what the perpetrators might have understood about Muslim culture.

With regard to psychological trauma, Siobhán K. Fisher articulates a typical understanding of how rape may cause psychological harm precluding formation of family relationships:

⁷⁷ See *Prosecutor v. Simic*, Case No. IT-95-9/1-5, Sentencing Judgment (Oct. 17, 2002); *Prosecutor v. Todorovic*, Case No. IT-95-9/1-5, Sentencing Judgment (July 31, 2001).

⁷⁸ *Genocide Case*, 2007 I.C.J. at ¶ 356.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 508 (Sept. 2, 1998).

A policy of rape is particularly damaging in the Bosnian Muslim culture, where a woman may not be marriageable if she has been raped or carried the child of another man, because “the religion emphasizes virginity and chastity before marriage.” According to traditional Islamic culture, victims of rape “have been spoiled for marriage and motherhood [because they are] no longer virgins in a culture that condemns premarital sex and ostracizes even those women who have been [forcibly raped or assaulted].”⁸³

Engle is critical of this view, explaining that scholars often apply a highly stereotypical view of Bosnian Muslims and fail to consider the possibility “[t]hat the Muslim communities might respond differently from the ways suggested by this stereotype, even with acceptance. . . .”⁸⁴ As a result “[t]he cultural effects—and therefore the intended effects—of rape are overdetermined in this argument.”⁸⁵ Regardless of the veracity of these assumptions, it only matters whether the rapist held those views and based on this stereotype intended his act to prevent births. Because the Court must determine the mental state of the perpetrator in order to determine whether genocide is committed, it should not matter that the community refuses to live up to the rapist’s image.

D. *Forced Impregnation*

The strongest support for Bosnia’s assertions that Serbian rapists intended to prevent births within the Bosnian Muslim group came from the evidence of forced impregnation by Serbians whose goal was to make their victims have “Serb” babies.⁸⁶ To consider a child resulting from a rape, “Serb,” the rapist would have to completely disregard the identity of the mother and believe that only his own ethnicity would pass on to the child. Such a belief, however misguided, would be evidence that the rapists intended that the women not have Muslim babies for at least as long as they were pregnant with the child that resulted from the rape. Nonetheless, the Court did not even consider the accusations of forced impregnation as measures intended to prevent births, and instead addressed the accusations only in regard to Article II(e): “forcibly transferring children of the group to another group.”

⁸³ Siobhán K. Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 123-24 (1996) (citations omitted).

⁸⁴ Engle, *supra* note 7, at 792.

⁸⁵ *Id.*

⁸⁶ See *infra* Part V.B.

V. ARTICLE II(E): FORCIBLY TRANSFERRING CHILDREN OF THE GROUP TO ANOTHER GROUP

A. *Can Forced Impregnation Constitute Forced Transfer?*

The *Akayesu* case recognized that rape and forced impregnation may be a method of forcibly transferring children of a protected group to another group under Article II(e) of the Convention.⁸⁷ The ICTR in *Akayesu* said very little on forcible transfer of children, except to note that “the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children. . . .”⁸⁸ In her 1996 book, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Beverly Allen documents how rape and forced pregnancy were a means of transferring children in the Yugoslav conflict: “Pregnant victims are raped consistently until such time as their pregnancies have progressed beyond the possibility of a safe abortion and are then released.”⁸⁹ The genocidal goal is furthered because “the perpetrator—or the policy according to which he is acting—considers this child to be only Serb and to have none of the identity of the mother.”⁹⁰

Of course, classifying rape and forced impregnation as genocide in this way relies on some problematic assumptions. Engle again provides a useful summary of these assumptions:

According to Kalosieh, for example, “Rape was the genocidal strategy”; “forced impregnation at rape camps would serve to increase the Serbian population because ‘[u]nder Islamic and Muslim law, a child’s ethnicity is determined by that of the father.’” Askin makes virtually the same point in her discussion of ethnic cleansing, described above, about forcible impregnation with a “different ethnic gene”: “[T]he children of non-Muslim Serbian rapists are not considered to be Muslims.”

In this narrative, forced impregnation would function to create Serbian babies who, by populating otherwise Muslim territory, would effectively take it over. Rather than forcibly removing the population, Serbs would *change* the Muslim population by ensuring that the next generation was composed of Serbs. MacKinnon stated early on in the war that such was the goal of Serbian rapists of both Croats and Muslims: “Croatian and Muslim women are raped to help make a Serbian state by making Serbian babies.”⁹¹

⁸⁷ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 509 (Sept. 2, 1998).

⁸⁸ *Id.*

⁸⁹ BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA vii (1996).

⁹⁰ *Id.* at viii.

⁹¹ Engle, *supra* note 7, at 792-93 (citations omitted).

Siobhán K. Fisher agrees: “For Serbs and Muslims, unlike Jews, the ethnicity of the father is decisive in determining the ethnicity of the child.”⁹² Allen acknowledges the problematic nature of these assumptions, noting that from a biological standpoint, a zygote resulting from a rape “will contain an equal amount of genetic material from its non-Chetnik, non-Serb mother as it will from its Chetnik or Serb father.”⁹³ The assumption is equally problematic from a cultural standpoint: “Any child produced by such forced impregnation, unless that child is raised by its Serb father in a Serb community, will be assimilated to the cultural, ethnic, religious, national identity of the mother. To call such children ‘Chetniks’ or ‘little Serb soldiers’ is clearly a blatant, though highly motivated, stupidity.”⁹⁴ To say that forced impregnation could in no circumstance result in at least the partial transfer intended by the perpetrators, however, is to deny the biological reality that resulting children take half their genetic material from those perpetrators.

Regardless of the extent to which a rapist’s assumptions about identity and genetics are ill-informed, however, what matters from a legal perspective, at least according to the language of the Convention, is the *intent* of the perpetrator. The question, then, is whether the rapist relied on these problematic assumptions in aiming to destroy the group. The fact that such beliefs by “would-be genocidaires” is “blatant, though highly motivated, stupidity”⁹⁵ does not remove their actions from the application of the Convention. Unfortunately, this is not the matter the Court addressed. Instead, as it did in addressing claims under section (d), the Court focused on the success of the genocidal design rather than the intent of the perpetrator.

B. *Evidence of Forced Impregnation*

Ultimately, the ICJ settled the matter of forced transfer by finding that the evidence “does not establish that there was any form of policy of forced pregnancy, nor that there was any aim to transfer children of the protected group to another group within the meaning of Article II(e) of the Convention.”⁹⁶ Here again, the Court missed or disregarded considerable evidence of forced impregnation. The Court itself acknowledged evidence from *Prosecutor v Kunarac*, in which the ICTY found that, “after raping one of the witnesses, the accused had told her that ‘she would now carry a Serb baby and would not know who the father would be.’”⁹⁷ The Court left out the context in which that statement was made. The ICTY also had found that Kunarac “expressed with verbal and physi-

⁹² Fisher, *supra* note 83, at 114.

⁹³ ALLEN, *supra* note 89, at 96-97.

⁹⁴ *Id.* at 97.

⁹⁵ *Id.*

⁹⁶ *Genocide Case*, 2007 I.C.J. at ¶ 367.

⁹⁷ *Id.* (internal citation omitted)

cal aggression his view that the rapes against the Muslim women were one of the many ways in which the Serbs could assert their superiority and victory over the Muslims.”⁹⁸ Additionally, the ICTY found that “[t]he treatment reserved by Dragoljub Kunarac for his victims was motivated by their being Muslims, as is evidenced by the occasions when the accused told women, that they would give birth to Serb babies.”⁹⁹ The Court failed to address the evidence from the U.S. submission to the U.N. as well, which quoted another witness as stating that while she was being raped, she was told “You should have already left this town. We’ll make you have Serbian babies who will be Christians.”¹⁰⁰

The Special Rapporteur of the U.N. Commission on Human Rights endorsed the findings of a special team of medical experts that issued the Mazowiecki Report, finding early in the conflict that “[t]here is clear evidence that Croat, Muslim, and Serb women have been detained for extended periods of time and repeatedly raped.”¹⁰¹ Furthermore, the team found that “[i]n Bosnia and Herzegovina and in Croatia, rape has been used as an instrument of ethnic cleansing.”¹⁰² The Special Rapporteur expressed a clear expectation that such rapes would result in pregnancies and birth, stating that a “particular problem arises with regard to the children who have been born, or are expected to be born in the near future, as a result of rape.”¹⁰³ The Rapporteur went on to discuss necessary measures to provide for the adoption of such children.

The report by the Commission of Experts (as distinguished from the team of medical experts) provides possibly the most concrete evidence of forced impregnation in the context of detention camps:

[One] pattern of rape involves individuals or groups committing sexual assaults against women for the purpose of terrorizing and humiliating them often as part of the policy of “ethnic cleansing”. Survivors of some camps report that they believe they were detained for the purpose of rape. In those camps, all of the women are raped quite frequently, often in front of other internees, and usually accompanied by beatings and torture. Some captors also state that they are trying to impregnate the women. Pregnant women are

⁹⁸ Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 583 (Feb. 22, 2001).

⁹⁹ *Id.* ¶ 654.

¹⁰⁰ *Submission, supra* note 1, at 20.

¹⁰¹ Special Rapporteur of the Commission on Human Rights, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992*, ¶ 84, delivered to the Security Council and the General Assembly, U.N. Doc. A/48/92 and S/25341 (Feb. 26, 1993) [hereinafter *The Mazowiecki Report*].

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 92.

detained until it is too late for them to obtain an abortion. One woman was detained by her neighbour (who was a soldier) near her village for six months. She was raped almost daily by three or four soldiers. She was told that she would give birth to a chetnik boy who would kill Muslims when he grew up. They repeatedly said their President had ordered them to do this.¹⁰⁴

Like the team of medical experts, the Commission explained that these patterns seemed to emerge without regard to ethnicity, stating that “[p]erpetrators 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.”¹⁰⁵ However, “the largest number of alleged perpetrators have [sic] been Bosnian Serbs.”¹⁰⁶ Further, while the Commission found that *some* rape and sexual assaults in Bosnia (mostly committed by Serbs against Muslims) were not conducted under “command direction or an overall policy. . . many more seem to be a part of an overall pattern.”¹⁰⁷ The Commission found that the evidence of a “large numbers of rapes which occurred in detention centers” especially supported its conclusion that there existed an “overall pattern” if not a policy of rape committed by Serbs against Muslims: “These rapes in detention do not appear to be random, and they indicate at least a policy of encouraging rape.”¹⁰⁸

The evidence above can be summarized as follows: Serbs raped Muslim women with the intent that they become pregnant. At least some of these women were detained in order to force them to carry the pregnancy until it was too late to obtain an abortion. While there is evidence of forced impregnation on all sides of the conflict, only the rape and sexual assault by Serbs against Muslims has been found to be part of an overall pattern, especially with respect to rapes in detention centers. Finally, the ultimate purpose of Serbian detention camps in Bosnia, according to the Commission of Experts, was ethnic cleansing,¹⁰⁹ and the ultimate purpose of many of the rapes, according to the team of medical experts, also was ethnic cleansing.¹¹⁰

The relevant question, then, is how forced impregnation can further the goal of “ethnic cleansing” and whether that amounts to a “forcible transfer” under Article II(e)? It would appear that the only way forced impregnation can be classified as ethnic cleansing is if the resulting child is of a different “ethnicity” as that term is defined in reference to “ethnic cleansing.” In this case, the evidence points to a policy, or at least a pat-

¹⁰⁴ Commission of Experts, *supra* note 49, at ¶ 248.

¹⁰⁵ *Id.* ¶ 250(b).

¹⁰⁶ *Id.* ¶ 251.

¹⁰⁷ *Id.* ¶ 252.

¹⁰⁸ *Id.* (internal footnote omitted).

¹⁰⁹ *Id.* ¶ 230(a).

¹¹⁰ *The Mazowiecki Report, supra* note 101, at ¶ 82.

tern, designed to achieve that end, as well as an intent on the part of some Serbs to achieve that goal. Unfortunately, the Court gave no indication of why it might have found the evidence unpersuasive or, more importantly, whether the legal analysis based on Article II(e) may or may not be sound and why.

VI. WHAT DIFFERENCE WOULD IT MAKE? A POLICY OF RAPE EVINCING THE SPECIFIC INTENT OF GENOCIDE.

It is unfortunate that the Court disregarded the allegations that rape and sexual violence constituted acts of genocide, or decided not to acknowledge that acts of sexual violence were committed which could constitute acts of genocide if accompanied by the required specific intent. The Court may have feared the controversy of actually finding a state responsible for such atrocities, recognizing the threat of an international backlash that could have been damaging to the Court. If the Court had acknowledged the occurrence of sexually violent acts that could constitute genocide, it would have had a much harder time denying the evidence of specific intent. Because the evidence demonstrated both a policy of rape and the ultimate aim of ethnic cleansing within Serb detention camps, the Court would have found it difficult to deny the overall pattern evincing the specific intent to destroy the Muslim population. To understand this contention, it is first necessary to consider the Court's discussion of ethnic cleansing as distinct from genocide, and second, to apply the Court's evidentiary standard to evaluate why the policy of ethnic cleansing is "indicative of the presence of a specific intent."¹¹¹

As noted earlier, the Commission of Experts determined that ethnic cleansing was the ultimate purpose behind the Bosnian Serb detention camps.¹¹² According to the Court, "the term 'ethnic cleansing' has no legal significance of its own."¹¹³ Ethnic cleansing is the process of "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area."¹¹⁴ In this sense, ethnic cleansing is not necessarily the same as genocide. For example, government forces may post notices threatening to punish all members of an ethnic minority (or other protected group) who do not leave a specific region within a given timeframe. The forces may even commit random acts of violence against the civilian population in order to terrorize the

¹¹¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 91, ¶ 190 (Feb. 26).

¹¹² Commission of Experts, *supra* note 49, at ¶ 230(a).

¹¹³ *Genocide Case*, 2007 I.C.J. at ¶ 190 (emphasis added).

¹¹⁴ *Id.* (citing The Commission of Experts, *Interim Report of the Commission of Experts Establish Pursuant to Security Council Resolution 780*, ¶ 55, delivered to the Security Council, U.N. Doc. S/25274 (Jan. 26, 1993) [the court cites the document number as "S/35374"]).

minority group enough so that they will leave. If, however, the government forces permit the minority group to leave and evince no intent to destroy, but only to relocate the group, the acts do not constitute genocide, although they may violate other international norms. As the Court noted, however, “[t]his is not to say that acts described as ‘ethnic cleansing’ may never constitute genocide, if they are such as to be characterized as [among the categories of acts prohibited by Article II] of the Convention, provided such action is carried out with the necessary specific intent”¹¹⁵ Most importantly, the Court declared that “it is clear that acts of ‘ethnic cleansing’ may occur in parallel to acts prohibited by Article II of the Convention, and *may be significant as indicative of the presence of a specific intent . . . inspiring those acts.*”¹¹⁶

Recalling the evidence of a policy of rape within Bosnian Serb detention camps,¹¹⁷ Bosnia could have argued that the policy of rape in the context of a campaign of ethnic cleansing constituted a pattern of acts that together indicated the specific intent of genocide. The Court held that in order for a pattern of acts to indicate specific intent, the pattern “would have to be such that it could only point to the existence of such intent.”¹¹⁸ Where the court found that the *actus reus* of genocide had occurred, it also found that Bosnia had “not established the existence of [specific intent] on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed. . . reveal a consistent pattern of conduct *which could only point to the existence of such intent.*”¹¹⁹

In the case of rape, it is hard to see what intent, other than destruction, the policy could implicate. It might be argued that rape is often an incident of war. A canvassing of academic literature would provide multiple psychological and sociological explanations for individual instances of rape revolving around issues of power and organized violence. However, such explanations would not fit within the evidence of a calculated *policy* of rape, particularly as part of an ethnic cleansing goal. . . In addressing ethnic cleansing in Bosnia, Allen proposes that that rape was used as a method of terrorizing populations into leaving:

Chetniks or other Serb forces enter a Bosnian-Herzegovinian or Croatian village, take several women of varying ages from their homes, rape them in public view, and depart. The news of this atrocious event spreads rapidly through the village. Several days later, regular Bosnian Serb soldiers or Serb soldiers from the Yugoslav

¹¹⁵ *Id.*

¹¹⁶ *Id.* (emphasis added).

¹¹⁷ *See supra* Part V.B.

¹¹⁸ *Genocide Case*, 2007 I.C.J. at ¶ 367.

¹¹⁹ *Id.* at 134 (emphasis added).

Army arrive and offer the now-terrified residents safe passage away from the village on the condition they never return.”¹²⁰

This provides an example of how rape may be used in a campaign of non-genocidal ethnic cleansing. However, this explanation fails to account for the policy of rape in detention camps in which the targeted population is deliberately prevented from leaving.

The evidence of forced impregnation, with the intent of some to force Muslim women to have “Serbian” babies, in an environment of detention centers where the ultimate purpose was to bring about ethnic cleansing, can only point to the existence of an intent to destroy Muslims. Rape was used with the intent of achieving “ethnic cleansing” by destroying the Muslim population. By preventing births of Muslim children and forcing the births of (in the opinion of the attacker) non-Muslim children, the regions were to be “cleansed” of Muslims. No matter how unlikely the attackers’ ultimate success would prove to be, the evidence shows that the rapes were prohibited by multiple sections of Article II of the Convention, and that, in committing these acts, at least some of the attackers had a specific intent to destroy the group. In this regard, Serb forces used the rape of Muslims in Bosnia as a tool of genocide. However, even if the Court had made such a determination, there still would remain the issue of attribution. The Court’s refusal to identify the *actus reus* of genocide based on a policy of rape and ethnic cleansing, along with its refusal to recognize the genocidal intent that necessarily follows, creates considerable ambiguity concerning the status of sexual violence, forced impregnation, and the prevention of births under the Convention.

VII. CONCLUSION

The ICJ simply was not willing to foreclose the *possibility* of holding a state responsible for genocide. At the same time, however, it was not prepared to attribute responsibility to Serbia. In general, the Court recognized ongoing state responsibility under the Convention as a matter of international law while setting a high standard of proof for establishing genocidal intent, thus avoiding a holding that Serbia was responsible by holding that the burden had not been satisfied. . This was possible because most acts in war that could constitute the *actus reus* of genocide can fairly easily be attributed to non-genocidal intent. For example, a belligerent in war may justify killing or causing bodily and mental harm through means such as torture by reference to some military objective. For rape and other sexual and reproductive violent acts performed as part of a policy of ethnic cleansing in Bosnia, however, it would have been far more difficult to find a non-genocidal intent, particularly with regard to those camps established for the sole purpose of holding women for rape and sexual violence. Because the mental element could not be easily

¹²⁰ ALLEN, *supra* note 89, at vii.

denied, and because the Court wanted to avoid finding an occurrence of genocide possibly attributable to Serbia, the Court had to avoid the mental question altogether. This could only be accomplished by disregarding the evidence of rape and sexual violence, which alone may constitute the *actus reus* of genocide. In the end, this led the Court to ignore considerable evidence of such acts and resulted in a further muddling of the already unclear legal status of rape as genocide under international law.

