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Note: Aimed at Protecting Ethnic Groups or Women? A Look at Forced Pregnancy under the Rome Statute

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AIMED AT PROTECTING ETHNIC GROUPS OR WOMEN?
A LOOK AT FORCED PREGNANCY UNDER THE
ROME STATUTE

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INTRODUCTION

In 1998, the International Criminal Court (ICC) became the first international criminal tribunal ever officially to criminalize forced pregnancy.¹ Atrocities in the former Yugoslavia and Rwanda were the impetus for promoting better protection of women in conflict zones. With the passing of the Rome Statute, a range of gender-related crimes were specifically enumerated as crimes against humanity and war crimes, including rape, sexual slavery, trafficking, forced prostitution, forced pregnancy, enforced sterilization, and “any other form of sexual violence.”² The criminalization of forced pregnancy was one piece of this effort to provide greater protection to

1. Rome Statute of the International Criminal Court arts. 5(1), 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(v), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>; see also Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 630 (2001) (heralding the Rome Statute as the first international instrument to codify forced pregnancy).

2. Rome Statute, *supra* note 1, arts. 7(1)(g), 7(2)(c), 8(2)(b)(xxii).

women.³ Following the conflict in Bosnia between 1992 and 1995, it was alleged that the Serbs impregnated Croat and Muslim women and forced them to bear Serb children as part of a systematic plan.⁴ Following Rwanda's genocide in 1994, the National Population Office estimated that "victims of rape gave birth to an estimated 2,000–5,000 'children of hate.'"⁵ It was with these cruelties in mind that the Rome Statute was formed.⁶ The Statute, which creates substantially greater protection for women, represents a significant departure from the general prohibition against sexual violence that preceded its enactment.⁷

Although the inclusion of forced pregnancy as a crime under international criminal law was seen as a positive step for the protection of women in conflict zones, the high level of intent that is required in order to demonstrate that forced pregnancy has occurred seems to indicate that the crime will be difficult to prosecute successfully should a case eventually come before the ICC.⁸ Indeed, it may be that the high level of intent needed to prove the crime is the reason the crime of forced pregnancy has yet to be charged. Furthermore, the multiple levels of intent seem to suggest that the crime of forced pregnancy is targeted more at preventing the perpetration of ethnic crimes than at preventing crimes aimed at violating women.⁹ This is particularly evident when one compares the elements of forced pregnancy under the Rome Statute against those for rape.¹⁰

3. See Joshua H. Joseph, *Gender and International Law: How the International Criminal Court Can Bring Justice to Victims of Sexual Violence*, 18 TEX. J. WOMEN & L. 61, 63 (2008) ("Nearly all of the gender-related provisions of the Statute are exclusive to the ICC and/or represent a reformulation of previously non-codified law.").

4. U.N. Secretary-General, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, ¶ 248, U.N. Doc. S/1994/674 (May 27, 1994) [hereinafter *Report of the Commission of Experts for Yugoslavia*]. Bosnia was unable, however, to establish that there was a Serbian policy of forced pregnancy before the International Court of Justice. *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶¶ 362–67 (Feb. 26); see also *infra* Part II.C (describing the findings of the Commission).

5. Robyn Charli Carpenter, *Forced Maternity, Children's Rights and the Genocide Convention: A Theoretical Analysis*, 2 J. GENOCIDE RES. 213, 223 (2000).

6. See *id.* at 241 n.2 (noting that "forced impregnation" was considered in the creation of the Rome Statute).

7. See Boon, *supra* note 1, at 630; see also *infra* Part II (explaining the evolution of sexual crimes in international law).

8. See *infra* Part III (discussing the intent requirements for forced pregnancy as genocide, as a crime against humanity and as a war crime).

9. See *infra* Part IV.A (describing how the forced pregnancy provision is seemingly aimed more at preventing crimes against ethnic groups as a whole from being committed than at protecting individual women).

10. See *infra* Part IV.B (comparing the ICC's forced pregnancy and rape provisions).

This Note will look closely at the intent elements for forced pregnancy under the ICC and then point out two central flaws: 1) the high level of intent, which makes it difficult to prosecute the crime, and 2) that one of the elements that must be found to prosecute forced pregnancy suggests that the aim of forced pregnancy under the Rome Statute is less concerned with preventing crimes against women than with preventing crimes against a certain ethnicity. Part I of this Note will examine the Statute itself and its elements as listed in the Elements of Crimes.¹¹ Part II will provide a short history of forced pregnancy and how it has evolved from an unenumerated crime under the broad category of “acts of sexual violence” to a specific, individualized crime. Part III will discuss the intent problems that have emerged as a result of the language of the Rome Statute. Part IV will compare the Rome Statute’s forced pregnancy prohibition against its rape provision to demonstrate that the way forced pregnancy is defined under the ICC Charter is aimed more towards protecting ethnic groups as a whole than protecting individual women from sexual violence. Finally, Part V will suggest a few ways that the forced pregnancy provision might be revised to make it both more likely to be prosecuted successfully, and to have a better likelihood of protecting the women it was designed to protect. Making the proposed changes to the provision would finally fulfill the goal of the attendees of the Rome Conference—to help protect women from violence in conflict zones.

I. THE STATUTE AND THE ELEMENTS OF FORCED PREGNANCY

A. *The Statute*

Forced pregnancy under the Rome Statute is defined as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”¹² It further adds

11. Addendum Part II, Finalized Draft Text of the Elements of Crimes, Preparatory Comm’n for the Int’l Crim. Court, Mar. 3–13, June 12–30, 2000, arts. 7(1)(g)-4, 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter Elements].

12. Rome Statute, *supra* note 1, art. 7(2)(f). This note focuses primarily with the added intent of “affecting the ethnic composition of any population,” largely setting aside the second option for additional intent: “carrying out other grave violations of international law.” This choice is based largely on the fact that the ICC does not explain or define what it means by “grave violations.” See Milan Markovic, *Vessels of Reproduction: Forced Pregnancy and the ICC*, 16 MICH. ST. J. INT’L L. 439, 443 & n.32 (2007). Undoubtedly, this second option for additional intent broadens the scope of which instances of forced pregnancy could be brought under the forced pregnancy provision, but it remains unclear what “grave violations” would qualify.

that the definition “shall not in any way be interpreted as affecting national laws relating to pregnancy.”¹³

Forced pregnancy falls under at least two of the three categories of crimes that fall within the jurisdiction of the ICC: crimes against humanity and war crimes.¹⁴ According to some scholars, forced pregnancy could qualify as genocide under the Rome Statute as well.¹⁵

B. The Elements

The Rome Statute’s Elements of Crimes for forced pregnancy sets out precisely what must be proven for a defendant to be prosecuted successfully under the Statute.¹⁶ The elements for establishing forced pregnancy as a crime against humanity differ only slightly from those constituting a war crime.

For forced pregnancy as a crime against humanity, three elements must be met:

1. The perpetrator 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[;]
2. [t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population[; and]
3. [t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.¹⁷

Likewise, three elements must also be proven to prosecute forced pregnancy as a war crime successfully:

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of

13. Rome Statute, *supra* note 1, art. 7(2)(f). This addition was an effort to appease government leaders, the Catholic Church, and NGOs who were concerned that the provision would legalize abortion and that it could be used to circumvent anti-abortion laws. *See infra* note 81 and accompanying text. The language about not affecting national laws demonstrated that the ICC did not recognize a general right to abortion. Markovic, *supra* note 12, at 445–48 (discussing at length the problems involved in including the abortion language); *see also* Cate Steains, *Gender Issues, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 357, 366–67 (Roy S. Lee ed., 1999) (describing how Catholic and Arab delegates were concerned that the provision on forced pregnancy could be used to coerce states into allowing abortions).

14. Rome Statute, *supra* note 1, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

15. For arguments on why forced pregnancy is an act of genocide, see Boon, *supra* note 1, *passim* and Siobhan K. Fisher, Note, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91 *passim* (1996). *But see* Markovic, *supra* note 12, at 454–56 (discussing the problems with including forced pregnancy as genocide).

16. Elements, *supra* note 11, arts. 7(1)(g)-4, 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4.

17. *Id.* art. 7(1)(g)-4.

any population or carrying out other grave violations of international law[.] 2. [t]he conduct took place in the context of and was associated with an international armed conflict[; and] 3. [t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹⁸

The first element of the crime, whether the charge is for a war crime or a crime against humanity, is simply the definition of forced pregnancy,¹⁹ whereas the other two elements are the requirements for the offense to fall under the category of either crimes against humanity or war crimes.²⁰

II. HISTORY OF FORCED PREGNANCY

A. *Before the World Wars*

Although the Rome Statute marked the first time that forced pregnancy was criminalized under international law, scholars often presumed that forced pregnancy could be grouped together with other acts of sexual violence and that crimes of forced pregnancy could have been prosecuted as a member of that category. As early as 1646, acts of sexual violence were condemned as being offenses against the Law of Nations.²¹ Grotius wrote that acts that violate women should “be no more unpunished in peace than in war: and this latter rule is the Law of Nations.”²² Furthermore, in 1863, sexual violence against women was prohibited in the Lieber Code.²³ Article 37 of the Lieber Code states that the United States “acknowledge[s] and protect[s] . . . the persons of the inhabitants, especially those of women: and the sacredness of domestic relations.”²⁴ Additionally, Article 44 specifically

18. *Id.* art. 8(2)(b)(xxii)-4. The second element varies depending on which section of the Rome Statute is being charged. A defendant can be charged under Article 8(2)(b)(xxii)-4 if the conduct took place during an international conflict, *id.*, whereas a defendant can be charged under Article 8(2)(e)(vi)-4 if “[t]he conduct took place in the context of and was associated with an armed conflict not of an international character.” *Id.* art. 8(2)(e)(vi)-4.

19. Rome Statute, *supra* note 1, art. 7(2)(f).

20. *See id.* arts. 7(1), 8(1). A crime against humanity is defined as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population.” *Id.* art. 7(1). Additionally, the ICC has jurisdiction over war crimes “when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” *Id.* art. 8(1).

21. CHRISTINE BYRON, WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 144 (2009).

22. *Id.* (quoting H. GROTIUS, ON THE RIGHTS OF WAR AND PEACE: AN ABRIDGED TRANSLATION 330 (William Whewell trans., 1853)).

23. *General Orders No. 100: The Lieber Code*, AVALON PROJECT, arts. 37, 44, http://avalon.law.yale.edu/19th_century/lieber.asp (last visited Mar. 30, 2012).

24. *Id.* art. 37.

recognizes rape as a crime, one severe enough to be punishable by the death penalty.²⁵

The recognition of acts of sexual violence as specific offenses under international law altered with the passing of the 1899 and 1907 Hague Regulations, which did not expressly prohibit sexual offenses like the Lieber Code.²⁶ Such offenses could, however, potentially fall under Article 46 of the Hague Regulations, which stated that “[f]amily honor and rights . . . must be respected.”²⁷ Without a direct prohibition against acts of sexual violence against women in times of war, sexual violence occurred during both world wars, but in particular during the Second World War.²⁸ Neither the Tokyo tribunal nor its counterpart in Nuremberg, both set up to prosecute war crimes of the Second World War, recognized the crime of sexual violence in their charters.²⁹ Without a documented prohibition against acts of violence, and despite their prominence during World War II, the word rape—the most prominent kind of sexual violence—did not even appear in the judgment of the Tribunal at Nuremberg.³⁰

B. Post-World War II

Following the Second World War, and perhaps in response to the widespread sexual violence during the War,³¹ the 1949 Geneva Conference prohibited crimes of sexual violence against women in two articles.³² Article 14 of the Third Geneva Convention vaguely sets out a prohibition against acts of sexual violence, stating that prisoners

25. *Id.* art. 44.

26. BYRON, *supra* note 21, at 144.

27. *Id.* (alteration in original) (internal quotation marks omitted); *see also* Convention Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277, available at http://avalon.law.yale.edu/20th_century/hague04.asp; Convention with Respect to the Laws and Customs of War on Land art. 46, July 29, 1899, 32 Stat. 1803, available at http://avalon.law.yale.edu/20th_century/hague02.asp.

28. BYRON, *supra* note 21, at 144.

29. *See* Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 279; DEP'T OF STATE, TRIAL OF JAPANESE WAR CRIMINALS 39–44 (1946) (containing the complete charter of the Tokyo tribunal).

30. BYRON, *supra* note 21, at 144.

31. *See id.* at 144–45 (describing the widespread violence during World War II). Indeed, the 1949 Geneva Convention was adopted because the earlier Geneva Conventions were considered inadequate. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 303 (2003).

32. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 art. 14, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 art. 27, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

of war are entitled to “respect for their persons and their honour”³³ and that “[w]omen shall be treated with all the regard due to their sex.”³⁴ A bigger problem, however, was that the elements of the offenses were not developed by the Convention: “it [was] left to the commentary . . . to spell out that ‘the main intention [of the provision was] to defend women prisoners against rape, forced prostitution and any form of indecent assault.’”³⁵

Article 27 of the Fourth Geneva Convention put forth a more explicit prohibition against violence directed at women.³⁶ It states that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”³⁷ The violation was, however, still presented as an attack against a person’s honor rather than an attack on their physical integrity.³⁸ Article 27 included that all people had the right “to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.”³⁹ One scholar noted that framing sexual violence as a crime against honor or modesty is “an inadequate description of the suffering caused by the offence.”⁴⁰ Another adds that it is problematic to consider rape “as a mere injury to honor or reputation appear[ing] less worthy of prosecution than injuries to the person.”⁴¹

The 1977 Additional Protocols I and II to the Geneva Conventions took several more steps towards protecting women from acts of sexual violence.⁴² Foremost, Article 75(2)(b) of Protocol I expressly prohibits enforced prostitution and “any form of indecent assault,” at any time or place.⁴³ Article 76 reiterated the Article 75 provision by expressly prohibiting rape, stating that “[w]omen shall be the object of special respect and shall be protected in particular against rape,

33. Third Geneva Convention, *supra* note 32, art. 14.

34. *Id.*

35. BYRON, *supra* note 21, at 145.

36. *See* Fourth Geneva Convention, *supra* note 32, art. 27.

37. *Id.*

38. BYRON, *supra* note 21, at 145.

39. Fourth Geneva Convention, *supra* note 32, art. 27.

40. BYRON, *supra* note 21, at 145.

41. Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649, 674 (1995).

42. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 75(2)(b), 76(1), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4(2)(e), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

43. Additional Protocol I, *supra* note 42, art. 75(2)(b).

forced prostitution and any other form of indecent assault.”⁴⁴ “[A]ny form of indecent assault” was not defined, however, and its vagueness permits the possibility that forced pregnancy and other crimes of sexual violence could fall within its parameters.⁴⁵

C. Reactions to Yugoslavia and Rwanda

Awareness of the act of forced pregnancy first came into the public sphere as an offense separate from other acts of sexual violence after the atrocities in Bosnia between 1992 and 1995 and Rwanda in 1994, as the crime was discussed in the adjudication of those conflicts. Forced pregnancy, however, had yet to be criminalized.⁴⁶ As such, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) had a difficult time finding that forced pregnancy had taken place.

For example, in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Bosnians and Croats alleged that rape was used as a means of affecting “the demographic balance by impregnating Muslim women with the sperm of Serb males.”⁴⁷ Despite express evidence to the contrary, the International Court of Justice (ICJ) found that the Serb leaders did not have a systematic policy of forced impregnation.⁴⁸

In the judgment, the court referenced numerous incidents that seem to indicate that the Serbs did, in fact, implement a policy of raping women with the goal of impregnating them.⁴⁹ For example, one woman raped by two Serb soldiers was told that “she would now give birth to Serb babies.”⁵⁰ The judgment also looked to the findings in the Final Report of the Commission of Experts regarding the conflict

44. *Id.* art. 76(1); see also Additional Protocol II, *supra* note 42, art. 4(2)(e) (listing rape, enforced prostitution and indecent assault as “[o]utrages upon personal dignity,” which shall be prohibited under all circumstances).

45. BYRON, *supra* note 21, at 145.

46. Neither the ICTY Statute nor the ICTR Statute criminalized forced pregnancy. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (amended Sept. 29, 2008), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf; Statute of the International Criminal Tribunal for Rwanda (amended Jan. 31, 2012), available at <http://www.unictcr.org/Portals/0/English/Legal/Statute/2010.pdf>.

47. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 362 (Feb. 26).

48. *Id.* ¶¶ 362–67. According to the court, the evidence did “not establish that there was any form of policy of forced pregnancy.” *Id.* ¶ 367.

49. *Id.* ¶¶ 363–65.

50. *Id.* ¶ 363 (quoting Prosecutor v. Gagovic, Case No. IT-96-23, Initial Indictment, ¶ 9.3 (Int’l Crim. Trib. for the Former Yugoslavia June 26, 1996)).

in Yugoslavia.⁵¹ The Final Report described five distinct patterns of rape, one of which was for the purpose of forced pregnancy as later defined by the Rome Statute.⁵² The Commission wrote:

The fourth 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 Some captors also state that they are trying to impregnate the women. Pregnant women are 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.⁵³

The Commission concluded that one commonality amongst the reported cases was that “[p]erpetrators tell female victims that they will bear children of the perpetrator’s ethnicity, [and] that the perpetrators were ordered to rape and sexually assault them.”⁵⁴ Additionally, “[p]erpetrators tell victims that they must become pregnant and hold them in custody until it is too late for the victims to get an abortion.”⁵⁵

The *Bosnia v. Serbia* decision described part of the Review of the Indictment for the *Karadzic* case, where the Trial Chamber stated that “[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion”⁵⁶ and that “the aim of many rapes was enforced impregnation.”⁵⁷ The court also noted that “[s]everal witnesses also said that the perpetrators of sexual assault, often soldiers, had been given orders to that effect and that the camp commanders and officers had been informed thereof and

51. *Id.* ¶ 363.

52. *Report of the Commission of Experts for Yugoslavia*, *supra* note 4, ¶¶ 245–49.

53. *Id.* ¶ 248.

54. Chairman and Rapporteur on the Gathering and Analysis of the Facts, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)—Annex Summaries and Conclusion*, ¶ 489(e), U.N. Doc. S/1994/674/Annexes (Dec. 28, 1994) (by M. Cherif Bassiouni), available at http://www.law.depaul.edu/centers_institutes/ihrl/downloads/Annex_Summaries_and_Conclusions.pdf.

55. *Id.* ¶ 489(h).

56. *Application of Convention on Prevention and Punishment of Crime of Genocide*, 2007 I.C.J. 43, ¶ 364 (alternation in original) (quoting *Prosecutor v. Karadzic*, Case No. IT-95-5/18-I (Int’l Crim. Trib. for the Former Yugoslavia July 11, 1996)).

57. *Id.*

participated therein.”⁵⁸ Despite the evidence that forced pregnancy took place in the conflict, the ICJ found that “the evidence placed before it by the Applicant does not establish that there was any form of policy of forced pregnancy.”⁵⁹ It is plausible that the court was not really focusing on the crime of forced pregnancy in this judgment; indeed, the crime of forced pregnancy was analyzed solely as part of the analysis for another charge—forcibly transferring children of the protected group to another group.⁶⁰

Forced pregnancy also emerged as an issue in the adjudications of the ICTR. In *Prosecutor v. Akayesu*, the court noted as dicta that certain measures intended to prevent births within the group could be construed as genocide.⁶¹ The ICTR included “deliberate impregnation” in this list of acts⁶² when it was committed against a member of a patriarchal society where membership of a group is recognized by paternal identity:

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.⁶³

Following the atrocities in Bosnia, the United Nations began to take note of the need to take substantial steps to protect women from such violence. In 1993, the United Nations released the Vienna Declaration, which required that “[g]ender-based violence . . . , including [acts] resulting from cultural prejudice . . . must be eliminated.”⁶⁴ It noted that “legal measures” were one way to achieve this goal.⁶⁵ Later in the Declaration, violations of women’s human rights during armed conflicts were specifically recognized as “violations of the fundamental principles of international human rights and humanitarian law.”⁶⁶ Additionally, forced pregnancy was

58. Karadzic, Case No. IT-95-5/18-I, at 960.

59. *Application of Convention on Prevention and Punishment of Crime of Genocide*, 2007 I.C.J. 43, ¶ 367.

60. *Id.* ¶ 362.

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

62. *Id.*

63. *Id.*

64. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, pt. 1, ¶ 18, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*].

65. *Id.*

66. *Id.* pt. 2, ¶ 38.

singled out, along with murder, systematic rape, and sexual slavery, as a violation needing a “particularly effective response.”⁶⁷

In 1995, in the wake of the Rwandan genocide, the Fourth World Conference on Women in Beijing was held. It recognized the same human rights as the Vienna Declaration and also specifically listed forced pregnancy as a crime against women that violated human rights in situations of armed conflict.⁶⁸ Finally, in 1998, the United Nations Commission on Human Rights made a resolution on the elimination of violence against women.⁶⁹ Like the Vienna Declaration and Beijing Declaration, it specifically enumerated forced pregnancy as a human rights violation, stating:

[The Commission] condemns all violations of the human rights of women in situations of armed conflict, recognizes them to be violations of international human rights and humanitarian law and calls for a particularly effective response to violations of this kind, including in particular murder, rape, including systematic rape, sexual slavery and forced pregnancy.⁷⁰

The resolution also called on governments “to refrain from engaging in violence against women and to exercise due diligence to prevent, investigate and . . . punish” these acts, regardless of whether the perpetrator is the State or a private person.⁷¹

It is worth noting that the United Nations, in each of these declarations/resolutions, continually framed forced pregnancy as an act of violence targeted at women specifically—*not* as a crime against an ethnic group.⁷² It is only with the debate during the meetings on what to include in the Rome Statute that the emphasis on the wrongdoing in situations of forced pregnancy shifted away from women and towards ethnicity.⁷³

67. *Id.*

68. Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, ¶ 114, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995) [hereinafter *Beijing Declaration*].

69. Comm. on Human Rights Res. 1998/52, The Elimination of Violence Against Women, 52d Sess., Supp. No. 3, E/CN.4/1998/52, at 171 (Apr. 17, 1998).

70. *Id.* ¶ 4.

71. *Id.* ¶ 3.

72. See *id.* ¶ 4; *Beijing Declaration*, *supra* note 68, ¶ 114; *Vienna Declaration*, *supra* note 64, ¶ 38. All three of the resolutions/declarations included forced pregnancy as part of their discussion regarding the need for greater protection for women.

73. The exception to this is the dicta in *Akayesu*, in which forced pregnancy was framed as genocide—which by definition includes an intent to destroy a group based on some characteristic of that group. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 507 (Sept. 2, 1998); see also Rome Statute, *supra* note 1, art. 6 (defining genocide).

D. The Emergence of the Rome Statute

The Statute for the International Criminal Court was the result of a diplomatic conference.⁷⁴ According to the preamble of the Statute, the goal of the ICC is to “put an end to impunity for the perpetrators of these [most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes.”⁷⁵

In the series of meetings that took place in June and July of 1998 over the establishment of the ICC, the issue of how to frame the crime of forced pregnancy emerged as a major “sticking point” for the negotiations over the Rome Statute as a whole.⁷⁶ Multiple views emerged about how best to deal with the crime of forced pregnancy, including whether it should be a crime at all.⁷⁷ There was even disagreement about the correct name for the crime.⁷⁸ At different points during the discussions, delegates referred to the act as both forced pregnancy and enforced pregnancy.⁷⁹ One delegate, Mr. Hamdan, went so far as to suggest that “it might be better to refer to forcible pregnancies the purpose of which was to change the identity of a population group.”⁸⁰

74. *History of the ICC*, COALITION FOR INT’L CRIM. CT., <http://www.iccnw.org/?mod=icchistory> (last visited Mar. 30, 2012).

75. Rome Statute, *supra* note 1, pmb1.

76. *Summary Records of the 34th Meeting*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Court, Comm. of the Whole, 34th mtg., Agenda Item 11, ¶ 73, U.N. Doc. A/CONF.183/C.1/SR.34 (1998) [hereinafter *34th Meeting Summary Record*].

77. Multiple countries argued that it should not be a crime, largely because of their concerns that it would trump national abortion laws. *See infra* notes 81–82 and accompanying text.

78. Joseph, *supra* note 3, at 82 (noting the Catholic Church’s proposal to use the more limiting “forcible impregnation” instead of “forced pregnancy”). Other states argued that “forcible impregnation” would not encompass all the situations—like the one in Bosnia—that the provision was supposed to protect women against. *Id.* at 83.

79. *See, e.g., Summary Records of the 35th Meeting*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Court, Comm. of the Whole, 35th mtg., Agenda Item 11, ¶ 53, U.N. Doc. A/CONF.183/C.1/SR.35 (1998) (stating that the Liechtenstein delegation referred to the Act as forced pregnancy); *Summary Records of the 4th Meeting*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Court, Comm. of the Whole, 4th mtg., Agenda Item 11, ¶ 63, U.N. Doc. A/CONF.183/C.1/SR.4 (1998) [hereinafter *4th Meeting Summary Records*] (noting that the Libyan Arab Jamahiriya delegation referred to the act as enforced pregnancy).

80. *Summary Records of the 5th Meeting*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Court, Comm. of the Whole, 5th mtg., Agenda Item 11, ¶ 16, U.N. Doc. A/CONF.183/C.1/SR.5 (1998) [hereinafter *5th Meeting Summary Records*]. Hamdan’s suggested phrasing was his attempt to find a solution to the concerns of many delegates that the inclusion of forced pregnancy would allow abortions; his wording would not allow for abortions of women who were forcibly made pregnant unless the intent was to affect a population’s ethnic identity. *See id.* The definition of forced pregnancy ultimately included in the Rome Statute did end up including the requirement of the intent to alter the ethnic makeup, which, as I will argue,

There were two grounds upon which delegates argued that forced pregnancy should not be included as a crime under the jurisdiction of the ICC. The first was the issue of abortion. Numerous delegates opposed the inclusion of forced pregnancy based on the concern that it would allow women to abort pregnancies,⁸¹ an act that remains illegal in numerous countries around the world.⁸²

Other delegates argued that forced pregnancy should simply be encompassed under the prohibition against rape.⁸³ The records from the meetings summarize the view of Ms. Shahen from the Libyan delegation as follows: “[e]nforced pregnancy was the result of rape and it was the act itself[, the act of rape,] that should constitute a crime.”⁸⁴ Another delegate, Mr. Al Ansari from Kuwait, elaborated that “[t]he term ‘enforced pregnancy’ . . . should be reconsidered because rape was in any case criminalized and it might be considered that pregnancy was an aggravating circumstance of rape.”⁸⁵ Mr. Al Ansari suggested that the issue regarding “threats to the identity of the civilian population should be considered in a different context.”⁸⁶

Ultimately, the delegates in favor of the inclusion of forced pregnancy prevailed.⁸⁷ Concessions to the countries concerned about

is the very element that makes it so difficult to prosecute successfully and shifts the focus away from women to ethnic groups. See *infra* Part III (discussing the provision’s intent problems) and Part IV (arguing that the provision focuses more on preventing crimes against persons of a particular ethnicity than on protecting women from such violence).

81. See, e.g., *Summary Records of the 3rd Meeting*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Court, Comm. of the Whole, 3d mtg., Agenda Item 11, ¶ 32, U.N. Doc. A/CONF.183/C.1/SR.3 (1998). Mr. Madani of Saudi Arabia “opposed the reference to ‘enforced pregnancy’ . . . since his country was opposed to abortion.” *Id.* Ms. Shahen of the Libyan delegation stated that “[u]nder Libyan legislation, abortion, too, was a crime.” *4th Meeting Summary Records, supra* note 79, ¶ 63. Mr. Al Awadi of the United Arab Emirates “shared the Libyan delegation’s reservations about the inclusion of enforced pregnancy.” *Id.* ¶ 66. Mr. Madani of Saudi Arabia reaffirmed “his delegation’s view that references to enforced pregnancy should be deleted because the law in his country did not allow abortions, except for health reasons established by a doctor and in the event of danger to the mother.” *5th Meeting Summary Records, supra* note 80, ¶ 21.

82. See *Summary of Abortion Laws Around the World*, PREGNANT PAUSE (Apr. 15, 2002), <http://www.pregnantpause.org/lex/world02.jsp>.

83. See *5th Meeting Summary Records, supra* note 80, ¶ 11; *4th Meeting Summary Records, supra* note 79, ¶ 63.

84. *4th Meeting Summary Records, supra* note 79, ¶ 63.

85. *5th Meeting Summary Records, supra* note 80, ¶ 11.

86. *Id.*

87. Mr. Sadi’s statements on behalf of the Jordan delegation were summarized as “he understood that the sticking point in the negotiations concerned enforced pregnancy. In his delegation’s view, abortion was not the issue; to force a woman to bear the child of a rapist was torture in extreme form, and should be included as a crime against humanity.” *34th Meeting Summary Records, supra* note 76, ¶ 73; see also *Summary Records of the 36th Meeting*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Court, Comm. of the Whole, 36th mtg., Agenda Item 11, ¶ 30, U.N. Doc. A/CONF.183/C.1/SR.36 (1998) (summarizing Delegate Tomic’s view that her delegation

abortion were undoubtedly made, however, as indicated by the second sentence in the adopted definition of forced pregnancy: “This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”⁸⁸

Notably, the Special Court for Sierra Leone (SCSL), following in the ICC’s footsteps, chose to criminalize forced pregnancy as a crime against humanity only.⁸⁹ Article 2, dealing with crimes against humanity, states: “[t]he Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: . . . [r]ape, sexual slavery, enforced prostitution, *forced pregnancy* and any other form of sexual violence.”⁹⁰ There is, however, no clarifying language that would help interpret the crime and it seems likely the SCSL would follow the ICC’s definition of forced pregnancy and, as such, inherit its difficulties regarding intent. To date, however, the crime of forced pregnancy has not been charged at the SCSL or at the ICC.⁹¹

III. THE INTENT ELEMENT OF FORCED PREGNANCY

Each of the categories of international crimes under the Rome Statute—genocide, crimes against humanity, and war crimes—have their own intent problems with regard to forced pregnancy.⁹² It is these intent problems that are the primary reason why it will be a perhaps insurmountable task to prosecute forced pregnancy successfully as the Statute currently stands.

A. *Forced Pregnancy as Genocide*

Forced pregnancy as genocide is probably the least likely to be prosecuted successfully under the Rome Statute since, as previously mentioned, forced pregnancy is not specifically enumerated within the Rome Statute as a crime of genocide.⁹³ As such, for the crime of forced pregnancy to be brought forth as a crime of genocide, it will

“firmly supported inclusion of crimes of sexual violence in their various manifestations, including enforced pregnancies, both under war crimes and under crimes against humanity.” Forced pregnancy was ultimately included as a specific offense under both war crimes and crimes against humanity. Rome Statute, *supra* note 1, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

88. Rome Statute, *supra* note 1, art. 7(2)(f).

89. Statute of the Special Court for Sierra Leone art. 2, Jan. 16, 2002, 2178 U.N.T.S. 137.

90. *Id.* (emphasis added).

91. Valerie Oosterveld, *Gender-Based Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 78, 90 (Leila Nadya Sadat ed., 2011).

92. See Rome Statute, *supra* note 1, arts. 6, 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

93. See *id.* art. 6 (listing the five means by which a charge of genocide can be brought).

have to fit within the parameters of one of the acts listed as genocide under Article 6 of the Statute.⁹⁴ Article 6 lists five acts that could be considered genocide when “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”⁹⁵ Scholars have argued that forced pregnancy could potentially fall under two of the five acts listed: (1) “[c]ausing serious bodily or mental harm to members of the group” and (2) “[i]mposing measures intended to prevent births.”⁹⁶

For genocide defined in Article 6(b) as “causing serious bodily or mental harm,” four elements must be proven:

1. The perpetrator caused serious bodily or mental harm to one or more persons[;]
2. [s]uch person or persons belonged to a particular national, ethnical, racial or religious group[;]
3. [t]he perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group as such[; and]
4. [t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.⁹⁷

Even though there is little argument that the acts of forced pregnancy could cause serious harm, both mental and physical, it would be hard to prove that forced pregnancy could be used to destroy an ethnic group.⁹⁸ After all, if perpetrators really wanted to destroy a particular ethnic group, there are much more effective methods than impregnating the women of that group.⁹⁹ As Milan Markovic notes, “[p]resumably a group intent on genocide would not confine women of the enemy group and let them go—they would kill them.”¹⁰⁰ Additionally, there is some evidence that Croat and Muslim women

94. *Id.* (“For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”).

95. *Id.*

96. *Id.*; see, e.g., Carmela Buehler, *War Crimes, Crimes Against Humanity and Genocide: The Crime of Forced Pregnancy in the Nascent System of Supranational Criminal Law*, 18 NEMESIS 158, 165 (2002), available at http://www.iiav.nl/ezines/DivTs/Nemesis/2002/nemesis_2002_crimes.pdf (discussing the psychological harm to victims of forced pregnancy); Markovic, *supra* note 12, at 454 (stating that measures intended to prevent births are genocide).

97. Elements, *supra* note 11, art. 6(b) (footnote omitted).

98. See Markovic, *supra* note 12, at 455–56.

99. *Id.*

100. *Id.* at 456.

in Bosnia who were forced to bear Serbian offspring were treated with extreme care,¹⁰¹ although one might expect that the women were harmed psychologically simply by being impregnated by an unwelcome man and then forced to bear his child.¹⁰²

It will be especially difficult to demonstrate the intent element of genocide outlined in Article 6(d). Article 6(d) requires that the following elements be proven:

1. The perpetrator imposed certain measures upon one or more persons[;]
2. [s]uch person or persons belonged to a particular national, ethnical, racial or religious group[;]
3. [t]he perpetrator intended to destroy, in whole or part, that national, ethnical, racial or religious group as such[;]
4. [t]he measures imposed were intended to prevent births within that group [; and]
5. [t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹⁰³

Scholars have argued that by forcing women of one ethnicity to bear children of a different ethnicity, the perpetrators are acting in such a way as to prevent these women from bearing children of their own ethnic group, and therefore it qualifies as a genocidal act because it represents a measure intended to prevent the birth of a particular group.¹⁰⁴ In other words, while impregnated with a child of the “enemy” ethnic group, the woman is unable to give birth to children of her own ethnicity.¹⁰⁵

Since forced pregnancy results in the birth of children, however, it is difficult to show that these actions are technically preventing births.¹⁰⁶ As one scholar questioned, “How is it possible to view the creation of human life as genocidal?”¹⁰⁷ In *Akayesu*, however, the ICTR noted in dicta that forced pregnancy could be seen as genocide when intended to prevent births within a group, particularly within patriarchal societies.¹⁰⁸

101. *Id.* (citing 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)).

102. See Carpenter, *supra* note 5, at 223 (explaining the extra harm that victims of forced pregnancy must endure); Fisher, *supra* note 15, at 122.

103. Elements, *supra* note 11, art. 6(d).

104. See Fisher, *supra* note 15, at 120–21.

105. Markovic, *supra* note 12, at 453–54.

106. *Id.* at 453.

107. Carpenter, *supra* note 5, at 222.

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

Other commentators have noted that the very idea of forced pregnancy seems to be at odds with genocide.¹⁰⁹ Markovic wrote:

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.¹¹⁰

Although forced pregnancy could potentially be prosecuted as genocide, it seems much more likely that it would be prosecuted under the category of either crimes against humanity or war crimes, which both specifically list forced pregnancy as a prosecutable crime.¹¹¹

B. Forced Pregnancy as a Crime Against Humanity

As discussed in Part I, for forced pregnancy to be prosecuted successfully under the Rome Statute, three elements must be met:

1. The perpetrator 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[;]
2. [t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population[; and]
3. [t]he perpetrator knew that the conduct was part of or *intended* the conduct to be part of a widespread or systematic attack directed against a civilian population.¹¹²

The term “attack directed against any civilian population” is further defined as “a course of conduct involving the multiple commission[s] of [the act] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such

109. *E.g.*, Markovic, *supra* note 12, at 454–56; *see also* R. Charli Carpenter, *Surfacing Children: Limitations of Genocidal Rape Discourse*, 22 HUM. RTS. Q. 428, 443 (2000) (noting that for forced pregnancy to qualify as genocide, one must accept the idea that a child’s identity is based solely on the ethnicity of the father and that the mother’s ethnicity is completely disregarded).

110. Markovic, *supra* note 12, at 455.

111. Rome Statute, *supra* note 1, arts. 7(1)(g), 8(2)(b) (xxii), 8(2)(e)(vi).

112. Elements, *supra* note 11, art. 7(1)(g)-4 (emphasis added).

attack.”¹¹³ As is clear from the Elements, the perpetrator must satisfy two different levels of intents: (1) an intent to either affect the ethnic composition or to carry out other grave violations of international law, and (2) an intent for the conduct to be part of a widespread attack directed against civilians.¹¹⁴

In regard to the requirement of affecting the ethnic composition, it will be difficult to prove that the individual perpetrator acted with the intent of affecting the ethnic composition. It is entirely possible to argue that the individual was merely following orders or following the example of other perpetrators who he had seen commit similar acts.¹¹⁵ Furthermore, it is likely that those individuals who do have the intent of affecting the ethnic composition, those who are giving the orders, are not the same individuals who commit the actual conduct. As such, while those giving the orders might have the mens rea, they are not committing the acts, and thus, may lack the actus reus as they are not physically responsible for doing the actual confining of the woman who is forcibly made pregnant.¹¹⁶ Conversely, those following orders may lack the mens rea, but could potentially be found to have committed the act.¹¹⁷ In both cases, the elements are unfulfilled.

113. Rome Statute, *supra* note 1, art. 7(2)(a).

114. Elements, *supra* note 11, art. 7(1)(g)-4.

115. The Rome Statute does include a provision dealing with “[s]uperior orders and prescription of law”; it states:

The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.

Rome Statute, *supra* note 1, art. 33(1).

116. See Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT’L CRIM. JUST. 953, 968 (2007) (“Nevertheless, the person giving orders cannot be regarded as a perpetrator of the crime (not even under the concept of perpetration by means) if he or she does not fulfil [sic] all necessary mental elements him- or herself. Thus, ordering is particularly relevant to those cases in which the accused held a position in the mid-level of a hierarchy in which he or she both received and issued orders.”). Note that those ordering the acts could potentially be found guilty of committing the crime through the commission of another person or be liable as the person who ordered the crime. Rome Statute, *supra* note 1, art. 25(3)(a)–(b). “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) [c]ommits such a crime . . . through another person, regardless of whether that other person is criminally responsible; [or] (b) [o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted . . .” *Id.* To prove this, however, there must be records or some other reliable evidence of the order, which could prove difficult to produce.

117. *But see* Arthur Thomas O’Reilly, *Command Responsibility: A Call to Realign Doctrine with Principles*, 20 AM. U. INT’L L. REV. 71, 93 (2004) (noting that negligence, which arguably would be the level of intent for those committing forced pregnancy on the

The second intent requirement, that one is intending “the conduct to be part of a widespread or systematic attack directed against a civilian population,” could be equally hard to demonstrate.¹¹⁸ Again, the difficulties stem from the fact that the people doing the confining are likely different from those who organize the widespread attack.¹¹⁹ It will be extremely difficult to show that there was a single person responsible, a person who committed the requisite act with the necessary intent in mind.

Furthermore, the Statute as written would allow for “freelancers” to engage in the confinement of women and their enforced pregnancy with no fear of consequences.¹²⁰ If the goal is truly to protect women, a man taking advantage of the chaos of a conflict situation, forcibly impregnating a woman (or multiple women), and making her bear that child would be no less guilty than the man who commits forced pregnancy under orders as part of a widespread or systematic attack. As the elements of forced pregnancy are currently written, the freelancer likely has a double defense to forced pregnancy as a crime against humanity: (1) that he did not know there was a plan to affect the ethnic composition, and (2) that he did not know a widespread or systematic attack was taking place.¹²¹ The question must be asked: is this man’s act of forced pregnancy any less criminal than the man who is following orders?¹²²

orders of a superior, is probably a “basis for imposing criminal liability”).

118. Elements, *supra* note 11, art. 7(1)(g)-4. Knowing an act is part of a widespread attack is enough. *Id.* It seems likely, however, if one is acting and knows that he is acting as part of a widespread attack, that he would not also have the intent that his action be part of the attack.

119. See Werle, *supra* note 116, at 963–64; see also Markovic, *supra* note 12, at 450 (asking the question, “how can forced pregnancy be part of this attack unless there is at least implicit state approval of the crime?” and noting that prosecutors have traditionally had a difficult time proving that there was a state or organizational policy sanctioning such acts).

120. Markovic, *supra* note 12, at 452.

121. *But see id.* (explaining that, based on precedent in *Prosecutor v. Tadic*, even those “tangentially connected” with a conflict—like freelancers—are likely to be considered “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”).

122. There is debate amongst scholars about whether following orders in this sort of situation makes the perpetrator less culpable than someone acting of their own accord. Since Nuremberg, the defense of obedience to superior orders has only been permitted in limited circumstances. See, e.g., Jeanne L. Bakker, Note, *The Defense of Obedience to Superior Orders: The Mens Rea Requirement*, 17 AM. J. CRIM. L. 55, 63–64, 66–67 (1989). The absolute liability theory “take[s] the extreme position that obedience to superior orders has no role in the determination of criminal culpability.” *Id.* at 63. “Under the ‘manifest illegality’ principle, . . . [o]bedience to superior orders is allowed as a defense only where orders are not so manifestly illegal that subordinates did not know or could not have known them to be unlawful.” *Id.* at 66.

Finally, the fact that forced pregnancy is often an act that takes place in isolation causes problems.¹²³ Scholars question whether an act committed in isolation can even be considered part of an attack.¹²⁴ Even if such an isolated act theoretically could be considered part of a widespread attack, it will be difficult to prove in court that an isolated act was, beyond a reasonable doubt, part of a widespread attack and, furthermore, that the perpetrator intended it to be part of a widespread attack.¹²⁵

C. Forced Pregnancy as a War Crime

Similar to forced pregnancy as a crime against humanity, the successful prosecution of forced pregnancy as a war crime requires that three elements be met:

1. The perpetrator 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[;]
2. [t]he conduct took place in the context of and was associated with an international [or non-international] armed conflict[, depending upon which section of the Rome Statute is being prosecuted; and]
3. [t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹²⁶

To prosecute forced pregnancy as a war crime successfully, the prosecutor must overcome one of the same difficult *mens rea* barriers as discussed with regard to crimes against humanity.¹²⁷ The perpetrator must intend to affect the ethnic composition of a population or intend to carry out other grave violations.¹²⁸ To prove this crime, the prosecutor is faced with the same difficulties of showing that the perpetrator doing the confining had the actual intent to affect the ethnic composition or to carry out other grave violations of international law.¹²⁹ That is, they face the difficulty of proving a particular mindset and must demonstrate that the perpetrator was not

123. Markovic, *supra* note 12, at 450 (citing Brook Sari Moshan, Comment, *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)).

124. *Id.*

125. *See id.*

126. Elements, *supra* note 11, art. 8(2)(b)(xxii)-4 (emphasis added); *see also id.* art. 8(2)(e)(vi)-4 (enumerating the elements of the war crime of forced pregnancy when occurring during non-international conflict).

127. *See supra* notes 115–18 and accompanying text (discussing the intent difficulties with the Rome Statute's forced pregnancy provision).

128. Elements, *supra* note 11, arts. 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4.

129. *See supra* notes 115–18 and accompanying text (explaining how it will be difficult to find that a single perpetrator has both the necessary *mens rea* and *actus reus*).

just following orders or the actions of those around him. In other words, just as for crimes against humanity, it will be hard to show that the same person had both the *actus reus* and the *mens rea* to prosecute forced pregnancy successfully as a war crime.¹³⁰

Unlike forced pregnancy as a crime against humanity, the intent to affect the ethnic composition or carry out other grave violations of international law is the only intent the prosecutor must prove for forced pregnancy as a war crime.¹³¹ The perpetrator does not need to intend that the conduct take place as part of an international or non-international conflict.¹³² Rather, the prosecutor must show that the perpetrator was simply “*aware of factual circumstances that established the existence of an armed conflict.*”¹³³ Additionally, the prosecutor must show that an armed conflict of either an international or non-international scope was taking place.¹³⁴

Although the testimony of others can serve as proof of an armed conflict that was commonly known about, it is harder—though not impossible—to prove that a man intended his actions to be part of a widespread or systematic attack.¹³⁵ Prosecuting forced pregnancy as a war crime would seem to be the easiest on the prosecutors; rather than having to prove multiple levels of intent, he need only prove the *actus reus* of forced pregnancy and one intent element.¹³⁶ Awareness of a conflict should be easier to demonstrate in court; particularly in a situation where there is widespread violence, a prosecutor should be able to make the case that the perpetrator was aware of the circumstances, thus fulfilling the elements for forced pregnancy as a war crime.¹³⁷

D. Intent Problem with the Definition of Forced Pregnancy

The main intent problem found in both the crimes against humanity and the war crimes provisions against forced pregnancy stems initially from the definition of forced pregnancy itself.¹³⁸ The

130. See *supra* notes 115–19 and accompanying text (noting the difficulties surrounding the intent element for forced pregnancy as a crime against humanity).

131. See *Elements*, *supra* note 11, arts. 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4.

132. See *id.*

133. *Id.* (emphasis added).

134. *Id.*

135. The person could be acting as a freelancer or merely following the actions of people around him. See *supra* notes 120–21 and accompanying text (explaining the difficulties in proving that an accused perpetrator intended his acts as part of a widespread or systematic attack).

136. See *Elements*, *supra* note 11, arts. 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4.

137. See *id.*

138. Again, the definition is “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.” Rome Statute, *supra* note 1, art. 7(2)(f).

requirement that the perpetrator must intend to affect the ethnic composition of a population or commit a grave violation of international law is found there.¹³⁹ As stated at length above, it will be difficult to show that perpetrators committing the acts have the intent of affecting the ethnic composition and those that do have such intent will rarely be the ones actually committing the actions needed to prosecute forced pregnancy.¹⁴⁰

IV. A CRIME TARGETING GENDER OR ETHNICITY?

A. A Language Problem

As previously noted, the Rome Statute was hailed as a significant step in the protection of women under international law, and the prohibition against forced pregnancy was enacted as part of this initiative. The language in the forced pregnancy provision,¹⁴¹ however, seems less targeted at protecting an individual woman and more aimed at shielding ethnic groups.

The definition of forced pregnancy is the root of the problem. As stated above, the term is defined as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”¹⁴² Though it happens to involve the confinement of an individual woman, the importance is laid on the intent of affecting the ethnic composition. Even if a woman is forcibly made pregnant, under no circumstances will it qualify as a criminal act under the Rome Statute if there is no intent either to affect the ethnic composition or to commit a grave violation against international law.¹⁴³

For forced pregnancy as a crime against humanity, even if the prosecutor shows that the perpetrator did confine a victim forcibly made pregnant, that the perpetrator intended that act to be part of a widespread or systematic attack, and that there was in fact a widespread or systematic attack, the perpetrator will not be found guilty if the prosecutor is unable to show this further intent.¹⁴⁴ Likewise,

139. *Id.*

140. See *supra* notes 115–19 and accompanying text (describing the difficulties of showing that a single individual both has the requisite mens rea and committed the actus reus).

141. Rome Statute, *supra* note 1, art. 7(2)(f).

142. *Id.*

143. See *id.*; Elements, *supra* note 11, arts. 7(1)(g)-4, 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4 (making it clear that all three elements, including this special intent, are necessary to prosecute the crime successfully).

144. See Elements, *supra* note 11, art. 7(1)(g)-4 (listing explicitly that all three of the elements are needed to prosecute forced pregnancy as a crime against humanity).

for forced pregnancy as a war crime, the perpetrator will not be found guilty even if the prosecutor demonstrates that the perpetrator confined a woman forcibly made pregnant, that the act “took place in the context of or was associated with” either an international or non-international conflict, and that the perpetrator was aware of said conflict, unless he also proves the additional intent element.¹⁴⁵

The bottom line of the forced pregnancy provisions, then, is this intent to affect the ethnic composition of a population or carry out additional violations of international war. The language as it currently stands establishes forced pregnancy as a crime of an individual or individuals against a different ethnic group—rather than a crime against an individual woman. The wrong is clearly focused on the perpetrator’s intent to have a harmful effect on the victim’s ethnic group, not on the harm the woman will suffer from the confinement itself and the result of the confinement—bearing a rapist’s offspring.

B. Comparing Provisions

Comparing the definition of forced pregnancy against the Rome Statute’s definition of the crime of rape only serves to reinforce this idea. Like forced pregnancy, rape is listed as an act that qualifies as both a crime against humanity and a war crime.¹⁴⁶ The elements for rape as a crime against humanity are as follows:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body[;]
2. [t]he invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent[;]
3. [t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population[; and]
4. [t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.¹⁴⁷

Several things become clear when these elements are compared against the elements of forced pregnancy as a crime against humanity.

145. *Id.* arts. 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4.

146. Rome Statute, *supra* note 1, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

147. Elements, *supra* note 11, art. 7(1)(g)-1 (footnotes omitted).

In both, a woman is forced to take part in sexual activity without her consent. For the woman in a rape scenario, she is forced to endure “[t]he invasion” of her body by force or threat of force against herself or another person.¹⁴⁸ For the woman in a forced pregnancy scenario, she is forced to engage in intercourse, such that she becomes pregnant;¹⁴⁹ additionally, the victim of forced pregnancy is confined and forced to carry her pregnancy to term.¹⁵⁰ Elements (3) and (4) of rape are identical to elements (2) and (3) of forced pregnancy.¹⁵¹ For both, the perpetrator must know or intend the conduct to be part of a widespread or systematic attack, and it must actually be part of a widespread or systematic attack.¹⁵²

Where the two crimes really differ, then, is that to prosecute forced pregnancy successfully, there must be evidence of an additional intent that the perpetrator acts “with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”¹⁵³ Rape, on the other hand, seems to be punishing only the action of violating the bodily integrity of the woman. Comparatively, then, it seems that the crime of forced pregnancy is not a crime of a man violating an individual woman’s body, but an attack against the ethnic group of which she is a member. It does nothing to protect the woman who is not targeted as a member of a particular ethnic group; even a woman who *is* part of a different ethnic group than her perpetrator but was not *targeted* as such would find herself unprotected by this provision.

In fact, forced pregnancy is the only sexual crime provision within the Rome Statute that requires specific intent. The elements for

148. *Id.*

149. In many cases, the woman who is a victim of forced pregnancy has been forced to undergo multiple sexual encounters. *See, e.g., Report of the Commission of Experts for Yugoslavia, supra* note 4, ¶ 248 (describing the camps where women were repeatedly raped until they were impregnated).

150. Elements, *supra* note 11, art. 7(1)(g)-4. Scholars note that the legal harm is really just the confinement. *See Markovic, supra* note 12, at 457. A woman could potentially be raped and become pregnant by one man, and then be confined so as to keep that pregnancy by another. It is only the man who does the confining that can be prosecuted under the forced pregnancy provision. *Id.*

151. Elements, *supra* note 11, arts. 7(1)(g)-1, 7(1)(g)-4.

152. *Id.*

153. Rome Statute, *supra* note 1, art. 7(2)(f). Markovic suggests that a textual reading of the definition could mean that the prosecutor will not have to explore the reasons underlying a rape. Markovic, *supra* note 12, at 444. However, this seems unlikely given that the Elements include it. If a prosecutor must show that a woman was forcibly made pregnant, it stands to reason that he will also have to show the intent behind that pregnancy—whether it be to affect the ethnic composition or to carry out other grave violations of international law.

sexual slavery,¹⁵⁴ enforced prostitution,¹⁵⁵ enforced sterilization,¹⁵⁶ and sexual violence,¹⁵⁷ like the elements for rape,¹⁵⁸ lack the additional layer of intent that forced pregnancy requires—that the perpetrator acts “with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”¹⁵⁹

A specific intent to affect an ethnic group is, however, found within the Rome Statute, but not as a crime against humanity or a war crime. Rather, it is in the elements for genocide.¹⁶⁰ Regardless of which section of Article 6 genocide is being charged, the prosecutor must demonstrate that “[t]he perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group.”¹⁶¹ Forced pregnancy is the only sexual crime that requires this additional level of intent, making it harder to prove than the other crimes of sexual violence. One of the ideas behind crimes against humanity and war crimes is that they can be charged when the prosecutor will not be able to prove this greater—and much more difficult to prove—additional level of intent that would elevate a crime to an act of genocide.¹⁶² Forced pregnancy, though classified as a crime against humanity or as a war crime, requires a level of intent greater than those classes of crimes generally need.

V. REVISING THE STATUTE

Despite the views of some, it matters greatly that there be a separate crime of forced pregnancy. As the discussions at the Rome Conference suggested, many consider that the “wrong” involved in forced pregnancy is the rape alone and suggest that the pregnancy is merely an “aggravating circumstance.”¹⁶³ This conceptualization fails to consider that the harm of forced pregnancy goes far beyond the

154. Elements, *supra* note 11, arts. 7(1)(g)-2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2.

155. *Id.* arts. 7(1)(g)-3, 8(2)(b)(xxii)-3, 8(2)(e)(vi)-3.

156. *Id.* arts. 7(1)(g)-5, 8(2)(b)(xxii)-5, 8(2)(e)(vi)-5.

157. *Id.* arts. 7(1)(g)-6, 8(2)(b)(xxii)-6, 8(2)(e)(vi)-6.

158. *Id.* arts. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1.

159. *Id.* arts. 7(1)(g)-4, 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4.

160. Elements, *supra* note 11, art. 6(a)–(e).

161. *Id.*

162. See William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide*, 27 CARDOZO L. REV. 1703, 1716–17 (2006) (“Crimes against humanity can be used to describe a much broader range of atrocities, involving violence against the person and persecution, that fall short of physical destruction of a group. Moreover, a discriminatory intent or motive is only required for the crime against humanity of persecution, whereas it informs the whole concept of specific intent that is an element of the crime of genocide.”).

163. *5th Meeting Summary Records*, *supra* note 80, ¶ 11.

consequences of the rape. As Robyn Charli Carpenter noted, “Where forced impregnation is an intentional aim of such rapes it exacerbates the impact of rape by making it more visible and explicit, precluding victims from protecting themselves and their community through silence or denials, and symbolically branding the victims with the mark of the rapes.”¹⁶⁴

Notably, the victimization of a woman who is forcibly impregnated lasts long beyond the rape. She must undergo nine months of confinement and bodily turmoil as she watches her body change as a result of the trauma to which she was subjected. Additionally, the crime of forced pregnancy includes a constant reminder of the woman’s victimization—the child resulting from the crime—that women who were raped, but do not become pregnant, do not have.¹⁶⁵ The harm is much greater than that of the woman who is raped; the woman is given the responsibility of giving birth to and often caring for a child that is the product of a bodily invasion and is meant to remind the target community of their victimization.¹⁶⁶ Unlike the victim of rape, she cannot just keep silent and hide her humiliation; the evidence of the intrusion of her bodily integrity and the sexual violence against her is on display as her body changes.¹⁶⁷ Not to recognize the additional harm is to minimize the woman’s worth in the eyes of the law.

There are several changes that could be made in the language of the Statute to solve the difficulties prosecutors will face in successfully bringing a charge of forced pregnancy. The first is to change the definition of forced pregnancy itself by removing “the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”¹⁶⁸ This would leave the definition as “the unlawful confinement of a woman forcibly made pregnant.”¹⁶⁹

Without this extra level of intent, forced pregnancy would be on an even playing field with the other crimes of sexual violence. For crimes against humanity, the perpetrator would need to intend to “confine[] one or more women forcibly made pregnant” and either

164. Carpenter, *supra* note 5, at 223.

165. See *id.* (explaining that those women who raise the children of their rapists do so without “the support of their families or communities, who view the children as members of the ethnic group who perpetrated the genocide”).

166. *Id.* at 230. The child that results from the rape and forced pregnancy will face stigmas from birth; these stigma will likewise attach to the mother. See *id.* at 223, 230. “Children of forced maternity are born—and are expected to be born—into a situation where they will certainly face chronic discrimination. This is the intent of forced maternity[,] . . . that they symbolize to the target group biological domination and ruin . . .” *Id.* at 230.

167. *Id.* at 223.

168. Rome Statute, *supra* note 1, art. 7(2)(f).

169. *Id.*

know or intend that act to be “part of a widespread or systematic attack directed against a civilian population.”¹⁷⁰ Although it could still be difficult to show that a lower-level soldier/actor intended the conduct to be part of a widespread or systematic attack, circumstantial evidence could be used to show that the perpetrator most likely had knowledge that the act was part of a widespread or systematic attack against a civilian population.¹⁷¹ It is seemingly much simpler to prove that someone intended his actions to be part of an attack, even if he were following orders, than it is to show that the individual had a particular goal of affecting the ethnic composition of the victimized group.

For forced pregnancy as a war crime, the prosecutor would have even less to prove. In such cases, the prosecution would have to show that the perpetrator intended to confine a woman forcibly made pregnant, and that the perpetrator was aware of the “factual circumstances” of the armed conflict.¹⁷²

This does not mean that the ICC should not criminalize the acts of a perpetrator who does have the greater intent of affecting the ethnic composition. Rather, where this greater intent is present, the crime of forced pregnancy should rise to the level of genocide. The current language in the definition of forced pregnancy in the Rome Statute as compared to its other crimes of sexual violence, numerous scholars’ arguments, and the dicta in *Akayesu* all point to the fact that forced pregnancy can rise to the level of genocide.¹⁷³ In situations in which the prosecutor can prove that the perpetrator had this additional intent of affecting the ethnic composition, he should do so. Where the prosecutor cannot, however, he should be able to charge the perpetrator with forced pregnancy as a crime against humanity or a war crime, depending on the circumstances surrounding the crime and the perpetrator’s level of awareness of those circumstances.

170. Elements, *supra* note 11, art. 7(1)(g)-4. The prosecutor would, of course, also have to prove the non-intent element that the conduct was actually committed as part of a widespread or systematic attack directed against a civilian population. *Id.*

171. See *supra* notes 118–19 and accompanying text (explaining the difficulty in proving knowledge of a widespread or systematic attack).

172. Elements, *supra* note 11, arts. 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4. Again, the prosecutor would have to demonstrate that the confinement actually “took place in the context of and was associated with” an armed conflict. *Id.*

173. Compare Rome Statute, *supra* note 1, art. 7(2)(f) (defining forced pregnancy to include a perpetrator’s intent to affect ethnic composition), Prosecutor v. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 507 (Sept. 2, 1998) (stating that forced pregnancy committed with the intent to prevent births within a group could be considered genocide), Boon, *supra* note 1, *passim* (arguing that forced pregnancy could be considered a genocidal act), and Fisher, *supra* note 15, *passim* (arguing that forced pregnancy is a crime of genocide), with Elements, *supra* note 11, art. 7(1)(g)-1–3, 5–6 (listing the elements for rape, sexual slavery, enforced prostitution, enforced sterilization, and sexual violence, which do not include a perpetrator’s intent to affect ethnic composition as an element).

From the victim's perspective, the crime is likely no less harmful simply because the perpetrator did not intend to affect the composition of her ethnic group. As a woman and as an individual, she has been violated. International law should not punish the victim by requiring that her perpetrator have this additional mindset. To do so is to ignore the harm to the woman and to allow the wrongful actor to go free after committing an act that is no less atrocious for the lack of additional intent.

CONCLUSION

Forced pregnancy was included in the Rome Statute as part of a greater initiative to protect women from violence.¹⁷⁴ Unfortunately, the language in the Rome Statute undermines this laudable goal. The provision for forced pregnancy in the Rome Statute for the ICC will prove difficult to prosecute due to the high level of intent found in the Statute's definition of forced pregnancy and the elements of forced pregnancy as both a crime against humanity and a war crime. An additional special intent of "affecting the ethnic composition of any population or carrying out other grave violations of international law" is found only in the crime of forced pregnancy,¹⁷⁵ distinguishing it from all the other crimes of sexual violence found in the Statute.¹⁷⁶ This suggests that the crime is, unlike the other crimes of sexual violence enumerated in the Rome Statute, geared at protecting ethnic groups rather than women.¹⁷⁷ As such, in addition to the difficulties that will likely arise in prosecuting the crime, the provision actually fails to do what it was implemented to do—protect women.

The simple change of removing the language "with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law"¹⁷⁸ from the definition of forced pregnancy would alleviate the greatest intent problems and allow prosecutors to bring the charge with a significantly better chance of proving their case. Without this added level of intent, prosecutors would only need to show that the perpetrator intended to commit the act of confinement to a woman who had been forcibly impregnated

174. See *supra* Part II (explaining the evolution of crimes of sexual violence under international law and the events that led to the realization that there was a need for greater protection for women).

175. Rome Statute, *supra* note 1, art. 7(2)(f).

176. See *supra* Part IV.B (comparing the Rome Statute's provisions for rape and forced pregnancy).

177. See *supra* Part IV (demonstrating how forced pregnancy fails to protect women, as its focus is on ethnic groups).

178. Rome Statute, *supra* note 1, art. 7(2)(f).

with the circumstances necessary to make it a crime against humanity or a war crime. Until this change is made, the Rome Statute will likely protect no one, whether it be ethnic groups or women, because the level of intent is too difficult to prove.

It would also be sensible to include forced pregnancy under the genocide provisions of the Rome Statute to be used in those situations where the prosecutor will be able to show that the perpetrator did have the additional intent of affecting the ethnic composition of a population when he committed an act of forced pregnancy. This would allow the ICC to punish defendants who do hold this greater level of intent without leaving women unprotected from acts of forced pregnancy when the defendant lacks the additional intent. Most importantly, the change in language and addition of forced pregnancy as a genocide where the additional level of intent exists would finally be a step towards protecting women from such acts of violence, the primary purported goal of including forced pregnancy in the Rome Statute. Removal of the “affecting the ethnic composition”¹⁷⁹ language would transfer the benefits of the provision’s protection from ethnic groups to women. This would finally provide women in conflict situations with the protections that the Rome Statute intended when it initiated its provisions against female-targeted violence.

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179. *Id.*

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