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# Establishing the Mens Rea of Genocide within "Sub-Intentions": A Study of Systematic Sexual Violence in Myanmar and Bosnia

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Establishing the *Mens Rea* of Genocide within “Sub-Intentions”: A Study of Systematic Sexual  
Violence in Myanmar and Bosnia

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**Abstract**

The aim of this study is to investigate how sexual violence rises to the level of genocide. The thesis puts the ongoing conflict in Myanmar between the Rohingya and Buddhist majority into discussion with the Bosnian conflict between Serbs and Bosnian Muslims during the Yugoslav Wars. In discussing the nature of these two conflicts, this thesis will provide evidence that sexual violence can rise to the level of genocide when it is used to interfere with the free reproduction of a group. The thesis will demonstrate that sexual violence was perpetrated in these conflicts with overall intent to homogenize the region by carrying out two “sub-intention”: by forcibly transferring children through forced impregnation and by placing limits on child birth through forced displacement and humiliation/victimization. These two “sub-intentions” demonstrate ways in which sexual violence can be found to have been perpetrated with the *mens rea*, intent to commit, and *dolus specialis*, special intent to commit harm, of genocide.

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## I. Introduction

Throughout history sexual violence has been perpetrated across conflict areas. It is an established reality. While the occurrence of the crime is often underreported, the presence of the crime, or *actus reus*, is not often hard to establish.<sup>1</sup> It is however difficult to determine how the crime should be prosecuted, as it can be categorized as individual cases, as a war crime, as a crime against humanity, or, with hesitance, as genocide. This being the case, the goal of this thesis is to establish that in some cases sexual violence can include the *mens rea*, guilt, and *dolus specialis*, special intent to commit harm, necessary to be prosecuted as genocide.<sup>2</sup> There has previously been a reluctance to prosecute sexual violence as genocide and even, in my opinion, a failure to do so in the case of the Bosnian conflict. This paper will provide evidence that sexual violence was used systematically by Serbian leadership in Bosnia during the Yugoslav Wars and is being used by Buddhist leadership in Myanmar in their conflict with the Rohingya to carry out policies of regional homogenization in both states. In each of these cases, the perpetrating group demonstrates a “sub-intent” of the overarching intent/policy to destroy the targeted group,

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<sup>1</sup> *Actus reus* and *mens rea* are two legal terms used in criminal law. *Actus reus* is defined as “...the act or omission that comprise the physical elements of a crime...”, meaning it refers to the fact that the crime occurred (LII Staff, “Actus Reus,” LII/ Legal Information Institute, Retrieved from: [https://www.law.cornell.edu/wex/actus\\_reus](https://www.law.cornell.edu/wex/actus_reus).) *Mens rea* is defined as “...the state of mind statutorily required in order to convict a particular defendant of a particular crime...establishing the *mens rea* of an offender is usually necessary to prove guilt in a criminal trial”, meaning it refers to the intent of the offender, that the person knew they were committing the act (LII Staff, “Mens Rea,” LII/ Legal Information Institute, Retrieved from: [https://www.law.cornell.edu/wex/mens\\_rea](https://www.law.cornell.edu/wex/mens_rea).)

<sup>2</sup> *Mens rea* is used in conjunction with the term *dolus specialis* in this thesis. *Dolus specialis* is defined by the trial judgement in *Prosecutor v. Jean-Paul Akayesu* of the International Criminal Tribunal for Rwanda, stating: “Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in ‘the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as’” (“*Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, Case No. ICTR-96-4-T” (2 September 1998), para. 498.).

utilizing sexual violence to carry out the overall policy of homogenization.<sup>3</sup> In Bosnia, rape was committed with the intent to forcibly impregnate Muslim women in order to change the ethnicity of the next generation, while in Myanmar, rape is being committed with the intent to forcibly displace and interfere with autonomous reproduction, thereby changing the demographic of the region.

The working definition of sexual violence for this thesis will be borrowed from a report by the Secretary General of the United Nations on conflict-related sexual violence. Sexual violence is therefore defined herein as, "...rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys..."<sup>4</sup> The thesis will hone in on acts specific to the violent conflicts in the study, most notably rape, forced pregnancies, and other forms of violence of comparable gravity.

Sexual violence, a heinous crime regardless of how it is characterized in terms of international law, used with the intention to homogenize a region is a clear breach of Article 2 of the *Convention on the Prevention and Punishment of the Crime of Genocide* (the Genocide Convention). In 1951, Article 2 of the Genocide Convention established the definition of genocide used in this thesis. The definition is as follows:

"...genocide means any of the following acts committed with intent to destroy, in whole

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<sup>3</sup> In this thesis, I will make use of a paradigm which I call "sub-intent". "Sub-intent", in the context of this thesis, is what sexual violence is used to do, namely to forcibly impregnate, displace, or reduce marriageability of women in the group. These "sub-intents", however, are used to further policies which are genocidal, making the acts genocidal by nature. For example: The Bosnian Serbs used rape to forcibly impregnate Muslim women in order to carry out their policy of homogenization since children are passed ethnicity patrilineally in these groups. Therefore, the sexual violence itself was committed with genocidal intent.

<sup>4</sup> UN Security Council, "Report of the Secretary-General on conflict-related sexual violence," (United Nations, 2018), 3.

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.”<sup>5</sup>

This definition has been adopted by other statutes and publications by international organizations. It has also been adopted as the definition of genocide by the International Criminal Court’s *Rome Statute* which has been adopted by the international criminal tribunals referred to in this study.<sup>6</sup> The Genocide Convention provides the foundation for the definition of genocide for the international community and its prosecution and judicial proceedings regarding the crime, during which it has been interpreted and elaborated on.

Sexual violence has been prosecuted against on the international level in a myriad of contexts with varying outcomes when the definition of the Genocide Convention has been applied to it by prosecutors. The aim of this thesis is not to suggest a kind of uniformity with which prosecutors may approach sexual violence as genocide, rather the goal of this thesis is to demonstrate that sexual violence with a “sub-intent” that interferes with reproduction within ethnic groups is evidence of genocidal intent, as those in Bosnia and Myanmar are.

In order to attain this goal, several steps must be taken first in the course of this thesis. First, the thesis will begin with a discussion of the literature surrounding how sexual violence has

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<sup>5</sup> UN General Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide” (United Nations, 1948).

<sup>6</sup> See Article 6 of the Rome Statute.

traditionally been categorized and the failures of international bodies to properly apply the definition of genocide to acts which suggest the presence of the crime. Then, I will establish my argument for why the “sub-intents” present in Bosnia and Myanmar are genocidal. Following the presentation of my argument, I will explain how this research was performed, the literature covered, cases investigated, and its limitations. Each of the cases involving these “sub-intents” will then be presented with a discussion of how these groups were mobilized to commit such violence, a historical overview of the individual conflicts, and a discussion of the scope of sexual violence and genocide in each conflict. Finally, I will conclude with an analysis of the cases in light of my argument that certain “sub-intents” of sexual violence can be determined to be genocidal.

## **II. Literature Review**

This section will discuss the schools of thought surrounding sexual violence in conflict areas. It will begin with a discussion of how sexual violence has been traditionally categorized in conflicts as a war crime, crime against humanity, and simply a part of war. It will then discuss how sexual violence has become a tactic within conflicts and has even been prosecuted as genocide.

### **A. Traditional Conception of Sexual Violence**

How a crime is interpreted and defined plays a large role in how it is responded to. A crime which is thought to be very serious will elicit a more immediate response as well as a more serious one. How sexual violence has been interpreted in the past, has had a direct effect on how it has been responded to by the international community. Sexual violence, for much of history,

has been interpreted by scholars as simply a part of war, "...a tragic but inevitable outcome...".<sup>7</sup> This seems to be a logical assumption which the prevalence of sexual violence in war and intergroup conflict supports. However, until recently, scholars had not begun to interpret the intention behind sexual violence, that it could be used as a tactic. The "new" definitions of sexual violence provided by international governing bodies have begun to interpret the crime not as an inevitable outcome, but rather a war tactic, a crime against humanity/war crime. The history of sexual violence in the 20th century alone is indicative that this interpretation by scholars and the international community is justified. Violence in Rwanda and Sudan are other examples of conflicts in which these crimes have been present.

Nicola Henry states that the "selective memory" of international institutions, which may also be interpreted as their "selective lens" for interpreting crimes, is rooted in the definitions provided for the crimes by international bodies like the United Nations and the International Criminal Court.<sup>8</sup> It is because of these definitions that scholars and humanitarians have largely interpreted sexual violence as war crimes and crimes against humanity. These are the ways it has been explicitly described by, interpreted, and prosecuted as under international law.

According to these definitions and how they have been interpreted in some cases, sexual violence may constitute an act of genocide but may not be genocidal in nature or a breach of the definition provided by the Genocide Convention and used to prosecute genocide by ad hoc tribunals. Rather since sexual violence is not an inevitable consequence of war but instead a

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<sup>7</sup> Maria Eriksson Baaz and Maria Stern, *Sexual Violence As a Weapon of War? : Perceptions, Prescriptions, Problems in the Congo and Beyond* (London: Zed Books, 2013), 42.

<sup>8</sup> Nicola Henry, *War and Rape: Law, Memory and Justice*, (Abingdon, Oxon: Routledge, 2011), 117.

strategy, Kerry Crawford suggests that it is within the power of the international community and reasonable for them to condemn and mitigate the effects of wartime sexual assault.<sup>9</sup>

Crawford explains the motivations behind sexual violence, many of which contributed to a school of interpretation used by the International Criminal Tribunal of Yugoslavia, which prosecuted the war crimes of the Bosnian conflict. She states that while motivations are particular to each conflict, common explanations for sexual violence include revenge, frustration, and attempts to bolster morale and foster cohesion among the militant group.<sup>10</sup> An example of this is when the Imperial Japanese Army produced a system of forced prostitution of 50,000 to 410,000 women to improve the morale and discipline of troops.<sup>11</sup> Other explanations include its use as a weapon of degradation/humiliation and use to demonstrate the power of one group over another, as was done by the Pakistani army against Bengali women in order to crush an independence movement in 1971.<sup>12</sup>

### **B. Sexual violence as a constituent act of genocide**

Towards the end of the twentieth century the majority of scholars began to agree that at a certain point sexual violence can escalate to the level of genocide.<sup>13</sup> When sexual violence is or is not genocide, for many scholars, depends on two points, the act and the intention.<sup>14</sup> The intention of the perpetrating group, which may be difficult to know in actuality without documentation, is essential in qualifying sexual violence as genocide. Shayna Rogers provides insight into what the international community has used to interpret sexual violence as genocide.

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<sup>9</sup> Kerry F. Crawford, *Wartime Sexual Violence : From Silence to Condemnation of a Weapon of War* (Washington DC: Georgetown University Press, 2017), 16.

<sup>10</sup> *Ibid.*, 11.

<sup>11</sup> *Ibid.*, 13.

<sup>12</sup> *Ibid.*, 13-14.

<sup>13</sup> Scholars like Jamille Bigio, Rachel Vogelstein, and Kerry Crawford agree with Rogers that sexual violence can be genocidal.

<sup>14</sup> Rogers, "Sexual Violence or Rape as a Constituent Act of Genocide," 270.

In her piece comparing the decisions of the International Criminal Tribunal of Yugoslavia and the International Criminal Tribunal of Rwanda, Rogers determines that under certain conditions sexual violence is not simply an element of the genocide, but is genocide in and of itself. She explains why the International Criminal Tribunal of Rwanda was able to prosecute sexual violence as genocide, stating that the *actus rea* (the criminal act) and the *mens rea* (the mental intent) were present in Rwanda, "...the [International Criminal Tribunal of Rwanda] went beyond the textual confines of its statute when it recognized sexual violence as a constituent act of genocide in *Prosecutor v. Akayesu*" which was the first prosecution of sexual violence as genocide.<sup>15</sup>

Often when scholars write about sexual violence as genocide, they hone in on certain aspects of the definition of genocide provided by the United Nations in the Genocide Convention. They argue that sexual violence fulfills some of the aspects of the definition included in Article 2 of the convention. The three which are most popularly used in arguing that sexual violence is a constituent act of genocide are that it (1) causes physical and psychological damage, (2) is a tool of cultural and community destruction, and (3) forced pregnancy is an instrument of genocidal violence.<sup>16</sup> Scholars of this interpretation point out that genocide does not necessarily mean that murder occurred, rather it can take place in the absence of deaths.<sup>17</sup> In order for the attacks to be genocidal, the act must be used to instill terror in an ethnic, racial, national, or religious group, force dislocation, or force pregnancy in order to proliferate the

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<sup>15</sup> *Ibid.*, 273.

<sup>16</sup> *Ibid.*, 272-3.

<sup>17</sup> Jamille Bigio and Rachel Vogelstein, *Countering Sexual Violence in Conflict* (Council on Foreign Relations, September 2017), 6.

attacker's identity group (be it racial, national, ethnic, or religious).<sup>18</sup> Many scholars are in agreement that sexual violence can rise to a level in which it constitutes genocide when perpetrated systematically against a group with the intent of destroy it in whole or in part.

This study will look to join the side of the debate that argues that sexual violence can rise to the level of genocide under certain conditions. It will also add to the body of research done on this subject by exploring how the *mens rea* and *dolus specialis* of genocide can be found within two "sub-intents" of sexual violence present in the cases of Bosnia and Myanmar. It will also join the work of Shanya Rogers in arguing for the application of the jurisprudence and interpretation of the definition of genocide applied by the International Criminal Tribunal for Rwanda.

### **III. Methods and Limitations**

This section will discuss the methods used and limitations experienced in conducting this research project. In terms of methods, the section will discuss the types of sources, both primary and secondary, used in the research and those that have informed it. It will also discuss why these cases have been chosen in relation to this project and to each other. Lastly, the limitations of this research will be divulged.

#### **A. Methods**

##### *1. Sources*

Primary sources have played a large role in establishing an understanding of how sexual violence is approached by the international community and how it has been prosecuted by international tribunals. Court and tribunal records as well as documents published by

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<sup>18</sup> *Ibid.*, 6-7.; The jurisprudence of the International Criminal Tribunal of Rwanda was the first to include in the conviction of a war criminal, Jean-Paul Akayesu, rape as an act of genocide (Bigio, *Countering Sexual Violence in Conflict*, 21.)

international organizations like the United Nations (UN), International Criminal Court (ICC), and the International Court of Justice (ICJ) have been useful in gathering this information. The testimonies of victims in the tribunal records have been especially useful, since they are an invaluable resource to the tribunals during their processes. How the testimonies are interpreted directly influences the conclusions brought about by the individual tribunals regarding crimes specific to their conflicts. These in turn help to establish precedent for future prosecution.

Records from the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have been utilized in this research. Reports and conventions published by the United Nations have also played a role in the establishment of the definitions of genocide and sexual violence as well as how the international community has viewed and reacted to the perpetration of the crimes. Documents from the ICC and ICJ have been used to understand how these definitions have been used by each court. Another kind of primary source that has been used are news articles. These have been used to understand the history of the conflicts but also how they have been responded to and approached by the international community while the conflict was ongoing.

The secondary sources utilized have provided a historical understand and analysis of the situation in each conflict region. They also offer insight on how sexual violence in conflict areas has been studied in the past in the cases studied, as well as other ones. These sources are also being used to understand how genocide has been viewed and responded to by the international community. Scholarly articles have been influential in informing this study's understanding of how genocide is prosecuted and approached from a legal standpoint. They have also shed light on the debate over genocidal sexual violence and the dangers of labeling sexual violence this way.

## *2. The Cases*

The cases involved in this study are the Bosnian conflict between Serbs and Bosnian Muslims and the ongoing conflict in Myanmar between the Buddhist majority and the Rohingya. The study will focus primarily on the persecution of the Muslim minority groups in each of these regions as they have been the primary groups targeted by the majority groups. These cases have been chosen for a number of reasons. First, both of these cases have either been condemned by the international community as having involved or are widely considered to involve the crime of genocide. Secondly, sexual violence has been widely perpetrated during these conflicts. There is evidence that it has been done systematically with the intent to change or eradicate a portion the demography of each region. This will be discussed further later. Thirdly, both involve conflicts which are being fought due in part to the religious differences of the groups, which make up a significant part of the groups' identity. The strength of this identity type has allowed for the groups to be easily motivated to perpetrate violence against one another. Lastly, the cases present "sub-intents" which are evidence of situations in which sexual violence has been used with a genocidal intent.

### **B. Limitations**

#### *1. Temporal Limits*

The conflict in Myanmar is currently ongoing. This means that it is a situation that was prone to changes during the course of this research. Also, new investigations by international bodies were underway when this research began and have been included limitedly in this research. Therefore, in order to establish the scope of the research on Myanmar, the study has been limited to include investigations, studies, articles, and news reports about the conflict within a set temporal limit, i.e. through August 2018. Any evolution in conflict or theory since then has

not been considered in the scope of this thesis. Since the conflict in Myanmar is ongoing, the conclusions and analysis of the conflict and sexual violence could be subject to changes as the conflict evolves.

Another limitation of my research is source availability. Since the Bosnian conflict occurred over a decade ago, there are more sources regarding the subject. Also, in terms of testimonies, more women have come forward to tell their accounts of sexual violence as time has passed since the conflict. Therefore, in my conclusions I have taken into account testimonies that may not have been available to the ICTY at the time of their decision. The ongoing nature of Myanmar's conflict also means that there are less sources about the situation there, outside of news articles and official documents from international organizations like the UN.

## *2. Scope of Sexual Violence in Conflict Areas*

The scope of sexual violence can be difficult to determine in conflict areas. The numbers in this thesis are therefore estimates provided by scholars or international organizations which were made on the basis of available data. Sexual violence is often unreported or underreported and can therefore be miscalculated. One such reason why women do not come forward to report the violence committed against them is because there is a history of victims of sexual violence being "...marginalized, silenced and abandoned to their trauma, even by some members of their own community."<sup>19</sup> Women are stigmatized because they were made victims, through no fault of their own. It is no wonder, therefore, that many cases go unreported, as women try to protect themselves from the fates of those who previously came forward. The expectation that the numbers of reported cases of sexual violence is inaccurate has been considered when drawing

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<sup>19</sup> Riada Asimovic Akyol, "When Victims of Wartime Rape Are Scorned" (The New York Times, 2017).

my conclusions.

### **III. Argument**

#### **A. Introduction**

It will be established later that ethno-religious identity creates extremely tight bonds among people. It links people not only in common origin and blood, but in worship and belief. The bond and allegiance created by this form of identity can be stronger than the bond and allegiance between individuals and/or their state. It may even link people across state borders at times. An example of this is when peoples flee or are displaced from an area but are still able to identify with the group inhabiting that area because of common origin and religious belief. Their identity is not necessarily tied to the area, per se, but to the their religious group living there.

This kind of identity is easily mobilized to act in certain ways, for example violently against another identity as will be seen in the studies of Bosnia and Myanmar. It is the very strength of this identity that allowed for the mobilization of Bosnian Serbs against Bosnian Muslims and Barmar-Buddhists against the Rohingya. This is especially true, as will be seen within the cases, when these groups come under some sort of “threat”, whether it is actualized or not.

After careful review of the cases in Bosnia and Myanmar it is clear that the violence is not rooted or supported by their religious belief. A study of the individual religions of the perpetrators would demonstrate that neither Orthodox Christianity, which Bosnian Serbs identify with, nor Buddhism, which is the religious affiliation of the majority, the security forces, and the ruling government in Myanmar, are found to preach violence. Rather, their religious teaching proclaims non-violence and peace.

The root of the violence, as mentioned, is that the groups feel threatened. In Bosnia, Serbs feared losing power as the Bosnian Muslim population grew in the region. For this reason, Serbian President Slobodan Milosevic worked to incite fear into the Serb population that it was the Bosnian Muslims who were actually planning a genocide against the Serbian population.<sup>20</sup> Similarly, Rohingya in Myanmar, specifically the Rakhine State, are considered a threat by the Bamar-Buddhist population because of their occupation of valuable land in the Rakhine State.<sup>21</sup> In each conflict, the minority group has been portrayed as the aggressor, thereby “validating” the violent “response” of majority leadership in what would be considered defense of the majority group.

The “response” of Bosnian Serbs and Bamar-Buddhists to the “threats” ignited the conflicts in these regions. This violence escalated to the point of ethnic cleansing in both states. This is evidenced by the findings of both the International Criminal Tribunal for Yugoslavia (ICTY) and the Independent International Fact-Finding Mission to Myanmar mandated by the United Nations’ Human Rights Council, which took place over the course of the fifteen months. Both the ICTY and the Fact-Finding Mission found credible evidence of the perpetration of crimes against humanity and war crimes.

### **B. Genocidal “Sub-Intentions”**

The ICTY determined that genocide had been committed in the Bosnian conflict. It found that genocide had occurred only at Srebrenica where more than eight thousand Bosnian Muslims were massacred. This determination by the tribunal that genocide occurred only once during the

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<sup>20</sup> Tusty ten Bensel and Lisa L. Sample, “Collective Sexual Violence in Bosnia and Sierra Leone: A Comparative Case Study Analysis” (International Journal of Offender Therapy and Comparative Criminology, 2017), 1080.

<sup>21</sup> Joshua Kurlantzick, “The Threat to Myanmar’s Awakening,” (*The Council on Foreign Relations*, November 2013).

conflict is limited in scope as evidence of ethnic cleansing and other mass killings of Bosnian Muslims both publicly and in detention suggest genocide was perpetrated on a larger scale.

Several members of the international community, including the Fact-Finding Mission, have suggested that crimes, genocidal in nature, have been perpetrated against minority groups in Myanmar. The occurrence of clearance operations by the Tatmadaw, Myanmar security force, raises a “red-flag” and suspicion. The leadership of the Tatmadaw and Myanmar government have not been formally charged with genocide, however they have been suspected of it by United Nations’ investigators who suggest its systematic nature.<sup>22</sup>

Two elements must be proven present for acts to be prosecuted as genocide. In legal terms these are the *actus reus* and the *mens rea*. The *actus reus* is the presence of a criminal act. In the case of the Bosnian conflict and the ongoing conflict in Myanmar, the activities of the Bosnian and Barmar security forces have been determined as breaches of international law and thereby crimes. They have also been expressly labeled as both crimes against humanity and/or war crimes. The second element is more difficult to prove. The *mens rea* is the intent to commit the act, in this case genocide. Genocidal intent, taken from the Genocide Convention, can be understood to mean the intention to destroy or forcibly displace a group. Sherrie Russell-Brown states that the presence of this specific intent, or *dolus specialis*, to exterminate a group is the requirement which designates whether the crime is genocide or some other categorization like a crime against humanity/war crime.<sup>23</sup>

Genocide is popularly considered only in the terms of the destruction, by killing, of a

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<sup>22</sup> Laignee Barron, “The Myanmar Army Should Face Charges for Genocide, U.N. Investigators Say,” [www.time.com](http://www.time.com) (August 27, 2018).

<sup>23</sup> Sherrie L. Russell-Brown, “Rape as an Act of Genocide” (Berkeley Journal of International Law 2003), 361.

group. Looking at the cases in Bosnia and Myanmar, I suggest that both the *actus rea* and *mens rea* for the crime of genocide can be found in the perpetration of sexual violence, despite the conclusions drawn by the ICTY with regards to the Bosnian conflict. Sexual violence was clearly perpetrated across both conflicts, as the testimonies of victims suggest. The perpetration of this crime has also been verified as having been committed systematically, or as a tactic of war in each conflict. Reports for both conflicts, however, fail to designate the perpetration of sexual violence in the areas as constituent acts of genocide, or as having been genocidal in nature. According to Anthony Marino, the court did not indicate why it found the evidence of testimonies in Bosnia unpersuasive or why the analysis of the sexual violence in relation to Article 2 of the Genocide Convention was unsound.<sup>24</sup> He suggests that had the court found the acts to constitute genocide, it would have been harder for it to deny the evidence of the *dolus specialis*, or specific intent to commit harm.<sup>25</sup> This may have influenced their decision.

Despite this, the collection of testimonies and evidence from the conflict areas suggest otherwise. The argument lies within the definition of genocide provided by the Genocide Convention which states that genocide may involve an act intended to bring about the physical destruction of the group, an act used to cause serious mental or bodily harm, the act of forcibly transferring children from one group to another, or an act preventing births.<sup>26</sup> The interpretation of this clause of the Genocide Convention allows for sexual violence to be considered a constituent act of genocide with the requisite intent. The section describing the physical destruction of a group in whole or in part as genocide is interesting because it can be interpreted

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<sup>24</sup> Anthony Marino, “*Bosnia V. Serbia* and the Status of Rape as Genocide Under International Law” (Boston University International Law Journal, 2009), 226.

<sup>25</sup> *Ibid.*

<sup>26</sup> UN General Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide.” (United Nations, 1948), 1-2.

as determining that the destruction of a group includes its forced eradication, and therefore the “...eradication of its culture and identity,” from a region, thereby the destruction of its community (in part or in whole).<sup>27</sup>

I argue that when investigating the conflicts in Bosnia and Myanmar, two “sub-intents” of the perpetrators larger intent to homogenize the region, fall under the definition presented in Article 2 of the Genocide Convention. In Bosnia, the “sub-intent” of forced impregnation caused the forced transfer of children from one group to another thereby falling under Article 2(e).<sup>28</sup> Because of the patriarchal societies and notion that ethnicity was passed by the father, women who were raped by Serbs with the intent to impregnate them had their eventual children transferred to another ethnic group without their consent or intention. In Myanmar, sexual violence with the “sub-intent” to forcibly displace fell under Article 2, and is interpreted in my argument as falling under Article 2(d.), “imposing measure intended to prevent births within the group”. Sexual violence instilled not only fear but humiliation in the women who fell victim to it. Because of this many Rohingya fled the Rakhine state. In this sense, the destruction of a group from a region can be interpreted as falling within the definition in Article 2(d.) in that it limited the possibility for reproduction within the group by separating members. Also, victims of sexual violence in the Rohingya population would become unfit for marriage because they had been raped. The intent to rape women, with this effect in mind, imposes a measure on the Rohingya population which would prevent births, since women and girls would be unfit for marriage. There is evidence that sexual violence was used against the Bosnian Muslims and Rohingya with these intents and should have been/could be prosecuted as genocide in light of the precedence set by the ICTR as will be seen later in a discussion of testimonies from the conflicts.

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<sup>27</sup> Rogers, “Sexual Violence or Rape as a Constituent Act of Genocide,” 270-271.

<sup>28</sup> See the definition of genocide provided on pg. 5.

## **IV. Case Studies**

### **A. Introduction**

This section will begin with an overview of ethno-religious identity. An understanding of this identity type is pertinent to the case studies used in this thesis because it sheds light on the groups as well as how they were mobilized to perpetrate such violence. Then, an introduction to the two case studies relevant to this project will be done. Each case study will begin with a section discussing information relevant to the conflict. This includes primarily the parties involved in the conflict. Following this, a brief historical section outlining the events and policies which lead up to the conflicts in question, the Bosnian conflict and the ongoing conflict in Myanmar. The historical data will provide a clear picture of how the hostility towards minority groups developed. Following the historical sections, sections regarding the scope and nature of the genocides and of the sexual violence taking place in the regions will be discussed.

### **B. Ethno-Religious Identity Overview**

The Bosnian conflict and the ongoing conflict in Myanmar are connected by their conflict type. They both represent conflicts which are based on competition between ethno-religious groups. In Bosnia, the conflict was fought between Bosnian Serbs and Bosnian Muslims/Croats, while in Myanmar, the conflict is being fought between the Buddhist majority and the Muslim-Rohingya population in the Rakhine State. These cases can be better understood by investigating their historical backgrounds, which will come later. However, before attempting to unpack the histories of these two cases, an understanding of the identity-type being fought over is necessary as it helps to explain the sense of loyalty to the group which, in turn, helps to explain why these groups could be quickly mobilized towards a goal, unpacking how such violence could be perpetrated amongst the minority groups.

### *1. Defining Ethno-Religious Identity*

For the purpose of this paper, an ethno-religious identity is understood as a group of individuals with a shared sense of origin and religious background. It is a tying together of ethnic and religious identity, into a stronger sense of belonging. In regions where ethno-religious identity is particularly strong, like Myanmar and Bosnia, identity is defined by allegiance to religious and ethnic groups over of the state.<sup>29</sup> Religion is the identity marker for these groups, it is how the people go about perceiving themselves and others, defining them by religious affiliation instead of national allegiance or home.<sup>30</sup> According to scholars like Victoria Arakelova, this form of identity requires a dissociation from the other ethnic groups present as well as the “absence of another group with the same religious doctrine inside any other ethos” which may serve to contradict the aligning forces within the group or divide the religious group, thus weakening it.<sup>31</sup>

### *2. How and Why it works as a unifier*

Religion is a unifier quite unlike any other identity marker, offering groups unifying factors which are not offered all together by any other group-unifier.<sup>32</sup> First of all, religion offers a stabilization of individual and group identity.<sup>33</sup> There are norms and rules associated with religion that offer guiding principles for those who identify with it. As Georgina Blanco-Mancilla states, religion also offers an individual a sense of belonging to his or her society, a society that shares the same beliefs and values, which are inherent in the norms and rules found

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<sup>29</sup> Daniel Agbibo, “Ethno-Religious Conflicts and the Elusive Quest for National Identity in Nigeria” (Journal of Black Studies, 2013), 19.

<sup>30</sup> *Ibid.*, 20.

<sup>31</sup> Victoria, Arakelova, “Ethno-Religious Communities: To the Problem of Identity Markers” (Iran and the Caucasus, 2010), 6.

<sup>32</sup> Jeffrey R. Seul, “‘Ours is the Way of God’: Religious, Identity, and Intergroup Conflict” (Journal of Peace Research, 1999), 561.

<sup>33</sup> *Ibid.*, 558.

in the religious teaching or doctrine.<sup>34</sup> Because of the traditions of the group, the norms/customs/rules found within the religion, it has a means of determining boundaries.<sup>35</sup> These identities have a means of determining who belongs and who does not, be that by visual identifiers or rituals which denote inclusion, i.e. rites of initiation which Seul says allow an individual to move in terms of status or role within a group.<sup>36</sup> Religious identity also has a way of blurring other identities. Agbiboa and Arakelova agree that religion can serve to unite separate groups into one because they are “super-ethnic” in character, meaning that they can link those who may not claim common origin or background.<sup>37</sup> Ultimately, Seul attributes religion’s success as a unifier to its ability to “...answer the individual’s need for a sense of locatedness - socially, sometimes geographically, cosmologically, temporally, and metaphysically.”<sup>38</sup> Because of this, religion is considered by Seul to often be at the core of an individual’s identity and that of a group.<sup>39</sup>

It is precisely the cohesiveness that religious identity offers that makes it politically useful. As Blanco-Mancilla points out, religion can serve as both a strong bond of identity for a group and as a tool to legitimize power. This is one way that religion has been used in Myanmar and was used in Bosnia. It was used as the way to identify who has access to certain rights, opportunities, and resources provided by the ruling political actors.<sup>40</sup> Religion can be used by political actors to form national identities as well, which can then be factored into who is given

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<sup>34</sup> Georgina Blanco-Mancilla, “Citizenship and Religion in Nigeria: Comparative Perspectives of Islam and Christianity in Kaduna State” (Institute of Development Studies, 2003), 5.

<sup>35</sup> Seul, “Ours is the Way of God,” 560.

<sup>36</sup> *Ibid.*, 563

<sup>37</sup> Agbiboa, “Ethno-Religious Conflicts,” 18-19; Arakelova, “Ethno-Religious Communities,” 2.

<sup>38</sup> Seul, “Ours is the Way of God,” 558.

<sup>39</sup> *Ibid.*

<sup>40</sup> Agbiboa, “Ethno-Religious Conflicts,” 20.

citizenship and allocated access to services and goods which are provided only to said citizens.<sup>41</sup> Seul also notes that in times of crisis, religious norms and institutions can provide the framework for governance.<sup>42</sup> Religion may also offer support and justification for the leaders and institutions that are established with the appearance of new regimes that serve the religious group's "nationalist aspirations".<sup>43</sup>

### *3. Ethno-Religious Identity and Conflict*

Conflicts notoriously arise out of ethno-religious differences for a number of reasons. This usually occurs because the ethno-religious group may be trying to dominate the affairs of the country.<sup>44</sup> A group may also feel threatened and therefore act violently to assert itself as the dominant ethno-religious group in the region, as is suggested in Myanmar and Bosnia. Agbiboa suggests that violence also erupts in these scenarios as a result of one group desiring to bring about the "further homogenization" and emergence of a national identity.<sup>45</sup> The threat of "homogenization" rhetoric can incite violence from either the group or rival groups. This rhetoric lends itself easily to policies of ethnic cleansing and genocide.

### *4. Religion is not the Cause of the Violence*

Scholars are keen to point out in their studies that the violence which can arise in the presence of ethno-religious identity is not necessarily a result of the religion. In fact, where such violence does arise, Seul states, that most of the religious identities, which the perpetrating groups associate with, actually preach nonviolence.<sup>46</sup> This is exemplified in the case studies to follow as previously mentioned. Instead of a religious push to violence, violence is incited by the

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<sup>41</sup> Seul, "Ours is the Way of God," 565.

<sup>42</sup> *Ibid.*, 562.

<sup>43</sup> *Ibid.*

<sup>44</sup> Agbiboa, "Ethno-Religious Conflicts," 21.

<sup>45</sup> *Ibid.*, 22.

<sup>46</sup> Seul, "Ours is the Way of God," 563.

societal and material realities of the region, for example political competition or competition for resources.<sup>47</sup> These same factors incite violence among other identity groups, for example racial or purely ethnic ones.<sup>48</sup> Seul notes that sometimes, for example in Bosnia, it just so happens that religion is the only identifier which can separate groups, as Serbs, Croats, and Bosnian Muslims were practically indistinguishable aside from their religious affiliations.<sup>49</sup> As mentioned, violence easily arises among these groups because of the fierce commitment to their identity, which is linked in some way to their commitment to their god(s).<sup>50</sup> The link to the divine is also a way of justifying the actions of the leaders of the groups, be them violent or simply political, granting them more legitimate authority. The apparent correlation between ethno-religious identity and conflict arises according to Seul because of the strength of the identity type, “[t]he powerful ability of religion to serve the identity-related needs of individuals and groups and the special role identity dynamics play in the production and escalation of intergroup conflict together may help to explain why so many conflicts occur along religious fault lines”.<sup>51</sup> For this reason it is comprehensible that genocidal policies or policies of ethnic cleansing may be likely to occur in conflicts between groups with strong identities, like ethno-religious ones.

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, 564.

<sup>49</sup> *Ibid.*, 565.

<sup>50</sup> *Ibid.*, 559.

<sup>51</sup> *Ibid.*, 559, 563.

## C. Case Study 1: The Bosnian Conflict

### 1. Information Relevant to the Conflict

Map 1<sup>52</sup>



This case study is of the conflict occurring in present day Bosnia and Herzegovina (Bosnia). The area of the conflict was bordered by two key countries in the conflict, namely Serbia and Croatia, while Montenegro played a more minor role as well.

The parties involved in the Bosnian conflict included the Serb, Croat, and Muslim populations, as well as a few other minority groups which did not make up large portions of the population.<sup>53</sup> Interestingly, all three of the major ethno-religious groups in the region stem from a singular ethnic group. According to Cathcart, all three groups are Slavic, meaning they are of

<sup>52</sup> Central Intelligence Agency, *Bosnia and Herzegovina*, 1997, Perry-Castaneda Library Map Collection, University of Texas at Austin.

<sup>53</sup> The other groups of this population include those self-identifying as Ukrainians, Russians, and Italians according to a UN study done in 1994 (UN Security Council, "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)," (United Nations, 1994).).

Asian descent.<sup>54</sup> Despite their “common Asian origin”, in the twentieth century, each regarded itself as separate, providing evidence of deep historical tension, which ultimately lies in religious and ideological differences brought about through a history of influence and regime changes between multiple conquering powers, as well as differing allegiances to outside states.

The ethnic population identifying as Serbs has close allegiances with Serbia. In terms of religion, this population is regarded as primarily Orthodox Christian.<sup>55</sup> This is because a large Orthodox empire once controlled the Balkans, the region east of the Adriatic Sea.<sup>56</sup> The language of the Serbs is shared with the other groups in the region, however dialects differ as do the alphabets used. The Serbs use the Cyrillic alphabet which is also used by the Russians, highlighting another differing characteristic between the groups.<sup>57</sup>

Croats, which clearly have ties to the Croatian nation which borders Bosnia and Herzegovina, share a Christian religious affiliation with the Serb population, however they are primarily Roman Catholic.<sup>58</sup> This group was influenced by Catholic thought and belief because they were once ruled by the Austro-Hungarian empire.<sup>59</sup> As mentioned, the group shares its language with the Serb population, however instead of Cyrillic, the group uses the Roman alphabet, another influence of the Austro-Hungarian empire.<sup>60</sup>

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<sup>54</sup> Brian Cathcart, Christopher Bellamy, and Tony Barber. “Bosnia: Why are they killing each other? How did the crisis start? How will it all end?: A plain person’s guide to the new tragedy of the Balkans.” [www.independent.co.uk](http://www.independent.co.uk) (August 16, 1992).

<sup>55</sup> Tony Barber, “The Bosnian Crisis: Serbs, Croats and Muslims: who hates who and Why,” [www.independent.co.uk](http://www.independent.co.uk) (August 9, 1992).; While the inclusion of information regarding alphabet may seem arbitrary, it is important when considering the process taken by the ICTR in establishing that groups are actually separate ethnic, religious, etc. groups. According to

<sup>56</sup> Cathcart, “Bosnia.”

<sup>57</sup> *Ibid.*

<sup>58</sup> Barber, “The Bosnian Crisis.”

<sup>59</sup> Cathcart, “Bosnia.”

<sup>60</sup> *Ibid.*

The Muslim population in the region, sometimes referred to as Bosniaks, was also formed due to empirical rule, tracing its roots to the Middle Ages and rule under the Ottoman Empire.<sup>61</sup> The group was simply a sample of the Slavic population who welcomed the Turkish conquest and converted to Islam.<sup>62</sup> They would eventually make up the majority of the population in the region that would become Bosnia and Herzegovina.

## *2. Historical Background*

The conflict in Bosnia represents an ethno-religious war between three groups: Serbs, Croats, and Bosniaks. The tension escalated into a “civil war” of sorts, although it included participation from other countries like Serbia and Montenegro. The violence occurred between 1992 and 1995 and constituted the most deadly conflict on the European continent since World War II.<sup>63</sup>

The origins of the conflict spans centuries, as mentioned, and are a result of built up tensions. One example of where tension came from was the animosity towards the rule of another group, like in the first Yugoslav state during which there was a Serb king, political system, and army – which the Croats resented.<sup>64</sup> During World War II, Germans took control of the region and set up a fascist-puppet state, Croatia, whose borders spanned far from the present day borders, over Bosnia.<sup>65</sup> It was during this time that a repression of the Serbs began, which Cathcart says may have even been an attempt at extermination. This may have been a result of the resentment held against the Serbs because of their dominance during the first Yugoslav state.

After World War II, like much of eastern Europe, the Balkans came under a communist

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<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Barber, “The Bosnian Crisis.”

<sup>64</sup> *Ibid.*

<sup>65</sup> Cathcart, “Bosnia.”

regime, the Socialist Federal Republic of Yugoslavia. While communism repressed expressions of nationalism and the threat of attack by the Soviet Union provided a sense of unity to the region, clashes between militant nationalist groups persisted.<sup>66</sup> It was during this state that resentment towards the Muslim group arose. Tito recognized Muslims and Macedonians as distinct nationalities while Rodoljub Colakovic had said that Muslims were equal to Serbs and Croats, and could not be forced to declare as one or the other (or undetermined) on censuses as they had previously been required to do.<sup>67</sup> The Muslim group identity was even added to the census in 1971.<sup>68</sup> The recognition of the group, led to the conversion of many people to Islam, according to Tony Barber. Because of this “mass” conversion (which may have just been a result of more accurate census data) Serbs began to resent the population which was now the majority.<sup>69</sup>

When the Yugoslav Federation eventually collapsed in the early 1990s, the three major ethnic groups fell victim to their own fears while desires for independence arose, which was encouraged by the European community focused on democracy building.<sup>70</sup> Serbs in Bosnia wanted to link with Serbia because of the fear that a Muslim-Croat coalition would dominate the region. However, many thought that this desire of the Serbs would end in Bosnia being “swallowed up” into “Greater Serbia”.<sup>71</sup> The threat of domination by one or the other led each group to arm themselves.

In 1992, a referendum, encouraged by the European community, was held in Bosnia.

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<sup>66</sup> *Ibid.*; Barber, “The Bosnian Crisis.”

<sup>67</sup> Barber, “The Bosnian Crisis.”; Mark Pinson, *The Muslims of Bosnia-Herzegovina: Their Historic Development from the Middle Ages to the Dissolution of Yugoslavia* (Cambridge: Harvard University Press, 1996), 144.

<sup>68</sup> Noel Malcolm, *Bosnia: A Short History* (New York: New York University Press, 1996), 199.

<sup>69</sup> Barber, “The Bosnian Crisis.”

<sup>70</sup> Cathcart, “Bosnia.”

<sup>71</sup> *Ibid.*

Muslims and Croats supported the move for independence from Serbia, however Serbs boycotted the vote.<sup>72</sup> The threat of the Muslim and Croat desire for independence led to increased hostility from the Serbs who had control of the region. The Serbs at this time had the desire to purify “their” territory of other ethnic groups, which led to the expulsion of these groups from “their native areas” in order to make the territory purely Serbian.<sup>73</sup> The expulsion and subsequent systematic violence caused a mass exodus of Muslim refugees. The Serb goal in this was to purify a region consisting of approximately two thirds of Bosnia, in order to merge it with the autonomous Serbian regions of Croatia and Serbia, furthering the policy of a “Greater Serbia”.<sup>74</sup>

### *3. Scope of Sexual Violence in the Conflict*

Many forms of violence were implemented in the furtherance of the Serb goal for a homogenous, hegemonic “Greater Serbia” including sexual violence in the furtherance of the goal to ethnically cleanse Bosnia. According to Nicola Henry, most of the documented cases of rape occurred between the years of 1991 and 1993.<sup>75</sup> The United Nations, however, reported that most of the rapes that occurred during this time period actually occurred over the course of six months from April to November 1992.<sup>76</sup> However, as is regularly the case with sexual violence, much is left unreported. The majority of the reported rapes involved Muslim women by Serb forces, however there were some reports of other ethnic groups, like the Croats, being victimized.<sup>77</sup>

In the 1994 report, the United Nations recognized that there were five patterns which emerged from their study of sexual violence in the conflict. They were:

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<sup>72</sup> *Ibid.*

<sup>73</sup> Barber, “The Bosnian Crisis.”

<sup>74</sup> *Ibid.*

<sup>75</sup> Henry, *War and Rape*, 64.

<sup>76</sup> UN SG, “Final Report of the Commission of Experts,” 56.

<sup>77</sup> Henry, *War and Rape*, 64.

1. Individual and gang rapes in conjunction with looting and intimidation of the target ethnic group.
2. Individual and gang rapes in conjunction with fighting, including public rapes.
3. Rape in detention facilities or camps involving women being picked out by soldiers, camp guards, paramilitaries, and civilians for both individual and gang rapes, beatings and killings.
4. Women being detained for the purpose of terrorizing and humiliating them, including rape and impregnation in detention facilities in order to carry out a policy of ethnic cleansing.
5. Captivity of women in hotels and similar facilities for the purpose of providing sexual entertainment for soldiers.<sup>78</sup>

The findings of the UN report are indicative of sexual violence on a systematic level and could “...fall within the meaning of the Genocide Convention”.<sup>79</sup> Tusty ten Bensel and Lisa L. Sample estimate that there were between 20,000 and 40,000 rapes within a six month period by Serbian and Montenegrin soldiers in homes, brothels, and detention camps.<sup>80</sup>

#### 4. Scope and Nature of Genocide against Bosniaks

The International Court of Justice has determined that genocide was in fact perpetrated during the Bosnian conflict. However, their diagnosis of the scope of genocide is limited. The court determined that genocide was only committed at Srebrenica, where more than 8,000 Bosniaks were massacred. This may or may not be indicative of the true scope of genocide during the conflict, but is what has been officially charged by the international community. The total number of casualties and/or forced dislocations was clearly much higher, as is evident from

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<sup>78</sup> UN SG, “Final Report of the Commission of Experts,” 58-59.

<sup>79</sup> *Ibid.*, 33.

<sup>80</sup> ten Bensel, “Collective Sexual Violence in Bosnia and Sierra Leone,” 1076-1077.; The number of reported rapes and acts of sexual violence is an approximate number as is evidenced by the vast range. Scholars debate the precise number of crimes because of the inability to accurately gather data for crimes which have not been reported and largely go unreported due to the humiliation inflicted on the victims as a result of the nature of these crimes.

census data from Opstina Prijedor taken from the UN Commission of Experts, depicted below.<sup>81</sup>

	<u>1991</u>	<u>1993</u>	<u>Reduction</u>	<u>New arrivals</u>
Serbs	47 745	53 637	--	5 892
Muslims	49 454	6 124	43 330	--
Croats	6 300	3 169	3 131	--
Others	8 971	2 621	6 350	--

President Slobodan Milosevic is cited as having incited fear into the Serbian/Serb population that Bosnian Muslims were actually planning a genocide against the Serbian populations.<sup>82</sup> This united fear fostered a deeper sense of nationalism, and may have encouraged the mass killings of Muslims out of the fear that they themselves might otherwise be made victims.<sup>83</sup>

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<sup>81</sup> UN SG, "Final Report of the Commission of Experts," 37.

<sup>82</sup> ten Benschel, "Collective Sexual Violence in Bosnia and Sierra Leone," 1080.

<sup>83</sup> *Ibid.*

## C. Case Study 2: The Conflict in Myanmar

### 1. Information Relevant to the Conflict

Map 2<sup>84</sup>



This case study is of the conflict occurring in a region of south-east Asia, currently named Myanmar (or Burma depending on governmental policy towards the state).<sup>85</sup> The area of the conflict specific to this study is on the west coast of Myanmar, bordering Bangladesh in the north, and is called the Rakhine State.<sup>86</sup>

There are 135 recognized ethnic groups in Myanmar.<sup>87</sup> This study will focus on a group which is not recognized, the Rohingya, and the majority ethnic and politically dominant group,

<sup>84</sup> “Foreign travel advice - Burma,” GOV.UK. November 23, 2018. <https://www.gov.uk/foreign-travel-advice/burma>; Map is taken from the United Kingdom’s foreign travel advice website. The gold colored area of the western coast of Myanmar is the Rakhine state, which is one of the conflict regions and the region which is this study’s primary focus.

<sup>85</sup> This state will be referred to as Myanmar throughout this case study regardless of whether it was called by another name at the moment in history being discussed.

<sup>86</sup> This region of the state will be referred to as the Rakhine state throughout this case study regardless of whether it was called by another name at the moment in history being discussed.

<sup>87</sup> Data for number of recognized ethnic groups is from 1982; Shakeeb Asrar, “Rohingya crisis explained in maps,” [www.aljazeera.com](http://www.aljazeera.com) (October 28, 2017).

the Barmar Buddhists. The conflict between these two groups spans centuries and has been perpetuated due to the different governing groups and empirical rule by the British. This study will begin from British colonial rule in Myanmar, in order to condense the history.

The origins of both groups is unclear as sources propose multiple/disputed origins. The differences are primarily religious. Both claim to have ethnically originated in the region, however the multiple displacements of the Rohingya has cast an unclear history of their settlement and origin. Their identity “Rohingya” literally means “inhabitant of Rohang” which is the early Muslim name for the Arakan (Rakhine) region. They are a Muslim minority in the Rakhine State and, as mentioned, are not currently recognized by the government of Myanmar although they make up nearly four percent of the population.<sup>88</sup> The majority group in Myanmar are identified by their religious identity which is Buddhist.

## *2. Historical Background*

The tension between these two groups spans back to before 1785 when many of the Rohingya fled the Konbaung Dynasty, which was Buddhist, into present day Bangladesh. When the British eventually took control of the region in 1824, they welcomed and incentivized farmers from present day Bangladesh to migrate to the region which was fertile but underpopulated.<sup>89</sup> Many Rohingya families migrated “back” to the region because of this.<sup>90</sup>

The British favored the migrants from Bangladesh over the indigenous people of the

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<sup>88</sup> Gerry van Klinken and Su Mon Thazin Aung, “The Contentious Politics of Anti-Muslim Scapegoating in Myanmar,” (Journal of Contemporary Asia, 2017), 356.

<sup>89</sup> Saheli Naik, “Rohingya Crisis a Big Controversial Issue in Myanmar: An Overview” (IOSR Journal of Humanities and Social Sciences, 2018), 40.

<sup>90</sup> It is a point of contention whether the group ever left the region in the first place or originated in modern day Bangladesh.

Arakan region.<sup>91</sup> This favorable relationship led to increased migration to the region by Bengali migrants (Rohingya). Violence began to erupt in the early twentieth century because of the settlement of these people and the land granted them during British rule.<sup>92</sup> The British vacated the region due to Japanese occupation in the early twentieth century.<sup>93</sup> The Bengali Muslim migrants were supported by the British and the indigenous Buddhist population were supported by the Japanese. The back and forth displacement and preference of these groups led to escalated violence after Myanmar celebrated independence in 1948.<sup>94</sup> Because of their status as migrants, the Bengali Muslims, who claimed the region as their place of origin by using the name Rohingya, were treated as alien by the ruling Buddhist majority who controlled the country. This alienation reached its peak in 1982, when a Citizenship Law was passed which claimed that only ethnic groups present in Myanmar before the British occupation were citizens of the country.<sup>95</sup> This thereby stripped the migrants of their citizenship and the protection of their basic human rights because they were (and still are) seen as illegal migrants.<sup>96</sup>

The Rohingya are largely considered one of the world's most persecuted minorities in a state that according to 2014 census data is 87.9 percent Buddhist.<sup>97</sup> Since the 1970s, more than 1 million Rohingya have fled the Rakhine state because of persecution, which has included the burning of villages, killings, and rapes. Such violence has escalated in recent years, with military crackdowns having been reported in 2016 and 2017 which have caused the present day mass

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<sup>91</sup> Aye Chan, "The Development a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)" (SOAS Bulletin of Burma Research, 2005), 400.

<sup>92</sup> *Ibid.*, 403.

<sup>93</sup> *Ibid.*, 405-406.

<sup>94</sup> *Ibid.*, 410.

<sup>95</sup> *Ibid.*, 413.; Asrar, "Rohingya crisis explained in maps."

<sup>96</sup> *Ibid.*

<sup>97</sup> Asrar, "Rohingya crisis explained in maps."; Central Intelligence Agency, "The World Factbook: East Asia/Southeast Asia: Burma," Central Intelligence Agency, November 20, 2018.

exodus' of Rohingya refugees into Bangladesh, creating a refugee crisis for the country.

### *3. Scope of Sexual Violence in the Conflict*

Sexual violence has been perpetrated in a systematic fashion in Myanmar, stemming from the command of the Tatmadaw, the Myanmar security force. Not only does the UN fact finding mission attest to this, but the testimonies of victims and witnesses is overwhelming. Sexual violence has been used by Myanmar security forces in order to humiliate and intimidate the Rohingya people. This is done through the mass rape of Muslim women, which has often been perpetrated in public. Human Rights Watch has documented the testimonies of multiple cases of mass rape by the security forces.<sup>98</sup> Evidence of sexual violence is relatively well documented, while numbers vary due to the willingness of victims to come forward in refugee camps. In a Security Council report published in March 2018, Myanmar was added to the annual list of parties highlighted by the United Nations as perpetrating sexual violence in armed conflict.<sup>99</sup>

### *4. Scope of Genocide against Rohingya*

It should be noted that the violence perpetrated in Myanmar has not been officially labeled a genocide. However, the fact finding mission to Myanmar by the United Nations has found evidence to suggest that the nature of the crimes perpetrated in the state are genocidal, and display similar characteristics to crimes labeled as such in the past.<sup>100</sup> The mass killings and clearance operations reported by the UN fact finding mission are indicative of such crimes in and of themselves, as the mass exodus of over 700,000 Rohingya since August 2017 obviously raises

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<sup>98</sup> Skye Wheeler, "Sexual Violence by the Burmese Military Against Ethnic Minorities," [www.hrw.org](http://www.hrw.org) (July 25, 2018).

<sup>99</sup> Shayna Bauchner, "Rape Puts Myanmar Army on UN 'List of Shame,'" [www.hrw.org](http://www.hrw.org) (April 16, 2018).

<sup>100</sup> UN HRC, "Report of the independent international fact finding mission - Advanced Edited Version," 16.

suspicions.<sup>101</sup>

## **V. Analysis of the Cases**

### **A. Bosnia**

The International Criminal Tribunal of Yugoslavia's interpretation of how sexual violence was perpetrated is indicative of a certain school and method of interpretation. The tribunal declared that the mass rape of Bosniak women was a crime against humanity but did not rise to the level of genocide, despite evidence of forced pregnancy and breaches of the definition of genocide in Article 2 of the Genocide Convention; including causing serious bodily or mental harm to members of a group, forcibly transferring children, inflicting on a group the conditions of life calculated to bring about its physical destruction.<sup>102</sup> While the tribunal decided that genocide had occurred at Srebrenica, it did not determine that sexual violence in the conflict had been genocidal in nature, but rather was just a tool of war in the conflict. This determination relies on the interpretation of partly intentions and the effects of sexual violence on a group.

Sexual violence was used as a war tactic in Bosnia against the minority Muslim population as the tribunal determined. However, the tribunal failed to find the intent to use sexual violence was to alter the demography of the region. Sexual violence was used as part of the systematic policy of ethnic cleansing in this sense, through the forcible transfer of children to another group. The forced impregnation of Muslim women by the Serb security forces was a means by which this was done.

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<sup>101</sup> *Ibid.*, 8.; Roger Arnold, "Myanmar military leaders must face genocide charges – UN Report," [www.news.un.org](http://www.news.un.org) (August 27, 2018).; The number of refugees exiting Myanmar is up for debate and increasing.

<sup>102</sup> Shayna Rogers, "Sexual Violence or Rape as a Constituent Act of Genocide: Lessons from the Ad Hoc Tribunals and a Prescription for the International Criminal Court" (George Washington International Law Review, 2016), 286-287.

According to the testimonies gathered, it is clear that the former Yugoslavia was a society in which ethnicity was passed patrilineally, i.e. children belonged to the ethnic group of their father. By forcibly impregnating Bosniak women, Serbs were attempting to alter the ethno-religious demographic. Striking testimonies confirm this assertion: “When they noticed that I was pregnant, they told me that I must bear the little Chetnik”; “You’re going to bear Serb children, not Muslim anymore.”<sup>103</sup> Testimonies and evidence suggest that these pregnancies resulted from a policy of forced impregnation handed down from command: “She was told that she would give birth to a chetnik boy who would kill Muslims when he grew. They repeatedly said their President had ordered them to do this.”<sup>104</sup> Evidence of this come from testimonies of victims in the detention centers where women were raped. Once impregnated, women were treated substantially better in comparison to other women in the centers and even allowed to leave once they had carried the pregnancy for two trimesters. This was because the Serb forces wanted to ensure that the women would not get an abortion, “Perpetrators tell female victims that they will bear children of the perpetrator’s ethnicity, that they must become pregnant, and then hold them in custody until it is too late for the victims to get an abortion.”<sup>105</sup>

The systematic nature of forced impregnation in Bosnia perpetrated against/aimed at the Muslim population suggests there was evidence to prove that the *mens rea* of genocide was present according to testimonies regarding the perpetration of the “sub-intent”.<sup>106</sup> The occurrence of sexual violence in this way is just one example of sexual violence rising to the level of genocide. It also lends evidence that a policy of genocide was present outside of the massacre at

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<sup>103</sup> Seada Vranic, *Breaking the Wall of Silence: The Voices of Raped Bosnia* (Zabreb, 1996), 174-175.; ten Bensel, “Collective Sexual Violence in Bosnia and Sierra Leone,” 1084.

<sup>104</sup> UN SG, “Final Report of the Commission of Experts,” 59.

<sup>105</sup> *Ibid.*, 59-60.

<sup>106</sup> See Appendix I for a list of testimonies and experiences regarding forced impregnation furthering the policy of genocide.

Srebrenica, and that the ICTY failed to prosecute genocide to the extent the testimonies of survivors/victims implied it had occurred.

### **B. Myanmar**

While there is the presence of forced impregnations in Myanmar, there is not substantial evidence that it has been perpetrated at a systematic level. However, evidence does suggest that sexual violence has risen to the level of genocide though by a different means than forced impregnation. The “sub-intent” of genocidal sexual violence in Myanmar can be found under the “destruction in part or in whole” clause and Article 2(d.) of the Genocide Convention which is in regard to taking measures meant to limit or prevent births within a group.

Sexual violence has been directed towards the minority Rohingya populations. It has occurred in public, private homes, and in detention centers. Evidence from multiple Rohingya villages suggest that there was a pattern to the violence perpetrated. That there was a pattern to the violence and that it was not prevented by commanders is evidence of the systematic nature of the crimes perpetrated by the Tatmadaw security forces and ethnic Rakhines. These forces intended to destroy the community of Rohingya in western Myanmar through humiliation and degradation. The severe humiliation and violence inflicted upon victims of sexual violence encourages relocation. This can be interpreted as forced dislocation as these people are leaving as a result of the violence committed against them, not of their own volition. The intent to destroy (forcibly remove) of a group from an area through fear and to render members of that population unfit for marriage after having been victimized by sexual violence constitutes the “sub-intent” of the overall policy to homogenize this region of Myanmar, a genocidal policy.

Testimonies and evidence from the UN Fact-Finding mission sheds light on another intent of the perpetrators of sexual violence which falls within the definition of genocide. That is

sexual violence intended to commit bodily or mental harm. It goes without saying that sexual violence, rape, causes mental harm. Whether it was intended to do so, is less easily proven, but the UN Fact-Finding determined that a pattern of public rapes were used as a tactic to maximize humiliation and trauma.<sup>107</sup> This suggests intent. A testimony from the UN Fact-Finding mission suggests the perpetration of rape in order to cause bodily harm was also intended: “We are going to kill you this way, by raping you.”<sup>108</sup> Another victim is quoted as stating, “They wanted to wipe us out from the world...They tried very hard, but Allah saved us.”<sup>109</sup> Sexual violence was often accompanied by threats to life, and sometimes ended in death either by the violence or post violence murder.

The evidence of patterns in the violence perpetrated against the Rohingya by the Tatmadaw and the fact that it has not been condemned by the Myanmar government is what raises this crime to a systematic level. The testimonies recorded by the Fact-Finding Mission and from refugees who fled the region suggest the intent to destroy this ethnic community of Muslims, providing the *mens rea*, evidence that their “sub-intent” to homogenize the region is part of a larger policy of ethnic cleansing.

## VI. Conclusion

This form of “sexual genocide” perpetrated in Myanmar could be more pervasive than that which occurred in Bosnia. This is because forced impregnation can only be considered genocide in societies which consider ethnicity to be passed patrilineally. If the *actus reus* and

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<sup>107</sup> UN Human Rights Council, “Report of the independent international fact finding mission on Myanmar,” (United Nations, 2018), 9.

<sup>108</sup> *Ibid.*

<sup>109</sup> Akyol, "When Victims of Wartime Rape Are Scorned" (The New York Times, 2017).

*mens rea* of genocide can be proven in Myanmar through the perpetration of sexual violence as I have judged it, genocidal rape may be considered more pervasive than expected as typically conflicts are accompanied by the use of fear tactics with the intent to displace groups, of which sexual violence is a tool.

Testimonies from the cases of Myanmar and Bosnia provide the *dolus specialis/mens rea* necessary to prosecute the systematic sexual violence being perpetrated as a constituent act of genocide. It was used/is used as a tactic of the policy of genocide implemented by security forces in the conflict areas. There is enough substantial evidence to prove the *mens rea* to prosecute those responsible as having committed or been complicit to the crime of genocide found within the *Convention on the Prevention and Punishment of the Crime of Genocide*.

The potential that other conflicts could be condemned for genocide within the interpretation used herein suggests that the international community should discuss further the implications of sexual violence as a tactic of war, of genocide. This would provide evidence of the shift away from the notion that sexual violence is something which inevitably accompanies war and conflict. If genocidal sexual violence is interpreted as it was herein and is found to be present within other conflicts, a stronger response to such conflicts would be necessarily incited from the international community because of the weight naming the crime of genocide holds.

Legal scholars, as well as myself, recognize that there are certain dangers in establishing the precedence of treating sexual violence as genocide. Rhonda Copelon highlights four dangers in her study: that an emphasis on this form of genocide could result in a merging of rape and genocide; that it could obscure the nature of rape as a crime against women because of their gender; that a concern for the individual victims of genocidal rape, the individual women, would be shaded by a primary concern for the targeted group; and that genocidal rape would come to

the forefront of discussion about rape in conflict, hence diminishing the concern for the perpetration of rape in other conflict situations that do not rise to the level of genocide.<sup>110</sup> Also there is concern this focus might result in women in conflicts being objectified as a means through and by which genocide is committed.<sup>111</sup> It is important therefore, first, to stress that while the effects of genocidal rape may be more largely felt, the crime is complex, involving individuals who deserve the concern of the international community as well. Secondly, it is important that while the effects may seem more far reaching, that other sexual crimes against humanity and war crimes not be disregarded.

While this thesis has sought to establish that the *mens rea* and *dolus specialis* of genocide can be founded in cases of sexual violence, through an investigation of the “sub-intents” of groups in the cases of Bosnia and Myanmar on the basis of testimonies, this study has not addressed what this means for future prosecution. It is my opinion that future prosecution of sexual violence in conflict situations take into account the precedence set by the International Criminal Tribunal for Rwanda and investigate the ways someone may use sexual violence with a “sub-intent” to change, eradicate, or forcibly displace a group. I have not touched upon whether amendments to the definition of genocide to include forms of sexual violence or to other statutes to more clearly address that sexual violence can constitute a “grave breach” against protected groups are necessary. I leave this to future and further research as an investigation and discussion of the effects this would have on how sexual violence and genocide are treated by the international community would be necessary.

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<sup>110</sup> Rhonda Copelon, “Gendered War Crimes: Reconceptualizing Rape in Time of War,” (New York: Routledge, 1995), 197, 199.

<sup>111</sup> Russell-Brown, “Rape as an Act of Genocide,” 355.

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## Appendix I

Testimonies and Experiences of Victim/Accounts of Forced Impregnation in Bosnia

1. “When they noticed that I was pregnant, they told me that I must bear the little Chetnik”<sup>112</sup>
2. “You’re going to bear Serb children, not Muslim anymore.”<sup>113</sup>
3. “She was told that she would give birth to a chetnik boy who would kill Muslims when he grew. They repeatedly said their President had ordered them to do this.”<sup>114</sup>
4. “Perpetrators tell female victims that they will bear children of the perpetrator’s ethnicity, that they must become pregnant, and then hold them in custody until it is too late for the victims to get an abortion.”<sup>115</sup>
5. “Another young woman said her captors told her that “they wanted to ‘plant the seed of Serbs in Bosnia.””<sup>116</sup>
6. “When I was assaulted, [t]hey said I was an Ustasha and that I needed to give birth to a Serb – that I would then be different.”<sup>117</sup>
7. “[I]t was their aim to make a baby. They wanted to humiliate us. They would say directly, looking into your eyes, that they wanted to make a baby. They seemed to be men without souls and hearts. They are without mercy.”<sup>118</sup>
8. “We are seeing the same pattern repeatedly, of Chetniks telling women, ‘It is better to give birth to Chetniks than to Muslim filth””<sup>119</sup>
9. “As they raped me they said they’d make sure I gave birth to a Serbian baby, and they kept repeating that during the rest of the time that they kept me there.”<sup>120</sup>
10. “When we let you go home you’ll have to give birth to a Chetnik. We won’t let you go while you can have an abortion.”<sup>121</sup>

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<sup>112</sup> Seada Vranic, *Breaking the Wall of Silence: The Voices of Raped Bosnia* (Zabreb, 1996), 174-175.

<sup>113</sup> ten Bensele, “Collective Sexual Violence in Bosnia and Sierra Leone,” 1084.

<sup>114</sup> UN SG, “Final Report of the Commission of Experts,” 59.

<sup>115</sup> *Ibid.*, 59-60.

<sup>116</sup> Siobhan K. Fisher, “Occupation of the Womb: Forced Impregnation as Genocide” (Duke Law Journal, 1996), 111.

<sup>117</sup> *Ibid.*; The word “Ustasha refers to a Croatian nationalist, however, while the testimony does not regard a Muslim victim, it does demonstrate the intent of Serb forces to forcibly impregnate women to change the demographic of the region.

<sup>118</sup> *Ibid.*, 111-112.; The testimony highlights not only the forcible transfer of children through forced impregnation, but also the breach of Article 2(b.) of the Genocide Convention, causing mental harm through humiliation, leading to potential rejection from one’s community.

<sup>119</sup> John F. Burns, “150 Muslims Say Serbs Raped Them in Bosnia” (New York Times, 1992).

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*