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INTRODUCTION

The attack on a State motivated by genocidal intent began unfolding again on February 24, 2022, with the Russian Federation’s unprovoked invasion of Ukraine. Though the invasion is a continuation of Russia’s illegal annexation of Crimea in 2014,¹ the latest horrors employed by Russia to accomplish its domination and destruction of Ukraine include many of the hallmarks of past genocides. These hallmarks include targeted destruction of civilian infrastructure;² torture;³ removal of Ukrainian children, issuing them Russian passports, essentially changing their nationality;⁴ and sexual violence,⁵


including rape and forced pregnancy. Still, not since WWII has the world witnessed such a united front in opposition to Russia’s invasion.

A contemporaneous issue brewing in the background of this conflict attracts equal global attention: the restriction on abortion access to women all over the world, including refugee women. On its face, this issue may seem unrelated to the Russian genocide in Ukraine. However, the two issues are interconnected and at the heart of how the global community responds to international human rights violations. The recent Dobbs decision in the U.S.—overturning the right to abortion granted in Roe v. Wade—has renewed urgency for worldwide conversations about women’s reproductive rights.

Since the Russian invasion, acts of sexual violence toward women and girls in Ukraine has international human rights bodies and advocates concerned with the lack of abortion access. Reports from Ukraine, citing the use of widespread sexual violence, rape, and forced

11. See generally GLOBAL JUSTICE CENTER, THE RIGHT TO AN ABORTION FOR GIRLS AND WOMEN RAPED IN ARMED CONFLICT (2011) [hereinafter GJC Report].
pregnancies at the hands of Russian combatants, put a spotlight on identifying how to stop the violence and hold the perpetrators accountable. The reports state that rape is used as a weapon: specifically committed as an intentional act of genocide and, in some cases, with the intent of forcing pregnancy on Ukrainian women and girls. The intent behind the commission of these violations at the hands of Russian soldiers is critical when alleging genocide.

As the Russian invasion of Ukraine rages on into 2023, Poland, a neighboring country to Ukraine, in many ways, is best positioned to support and offer aid to those fleeing Ukraine. Among the growing

12. See infra Part IV(B).
13. Gall & Boushnak, supra note 5.
14. Id., See infra Part II & IV; Wayne Jordash, the managing partner and co-founder of Global Rights Compliance stated,

The abuse suggests that Russian President Vladimir Putin plans to extinguish Ukrainian identity . . . the range of crimes committed are ‘evocative of genocide.’ The pattern that we are observing is consistent with a cynical and calculated plan to humiliate and terror[iz]e millions of Ukrainian citizens in order to subjugate them to the diktat of the Kremlin.


One nonprofit organization found increased demand for the morning-after pill from women in areas that were recaptured from Russian forces…the coercive environment of the conflict zone was enough to establish lack of consent in cases of sexual violence…. [but] Ukraine need[s] more female investigators and more training in investigation and interviewing techniques to establish rapport and allow women to open up.

Carolotta Gall, Torture in Ukraine Points to Wider Russian Policy, GENOCIDE WATCH (Sept. 12, 2023), https://www.genocidewatch.com/single-post/torture-in-ukraine-points-to-wider-russian-policy (quoting Alice Jill Edwards, the U.N. Special Rapporteur on torture). The head of a Ukrainian organization who documents conflict related human rights violations reported that “several [rape] survivors reported that, after they were abused by Russian soldiers, they were told: ‘You will not be able to have children now,’ or ‘We’re doing this to stop Ukrainians from reproducing.’” Liz Cookman, Russian Crimes of Sexual Violence in Ukraine, GENOCIDE WATCH (Sept. 27, 2023), https://www.genocidewatch.com/single-post/ukrainians-face-war-crime-of-sexual-violence.

15. See infra Part II & III.
16. Proximity alone makes Poland one of the most likely options for many Ukrainians fleeing the Russian invasion. Transportation is convenient to the country, the lifestyle is similar to Ukraine, and the swift response and financial and infrastructural
The number of Ukrainian refugee women and girls pouring into Poland are many who carry the trauma of physical violence by way of unwanted pregnancy due to rape. The need for reproductive services, including access to safe abortions, has become a critical need and pressure point inside Poland. With the most restrictive abortion laws in Europe, Poland’s response to this urgent need remains dismal. International communities must consider the extent of State liability when a country fails to take action to prevent further harm from egregious international human rights violations. Russia’s invasion of Ukraine, and the global response, highlight the difficulties in allocating responsibility and liability to States.


18. Anna Pamula, 6 Stories Show the Human Toll of Poland’s Strict Abortion Laws, TIME (Oct. 13, 2023), https://time.com/6320172/poland-abortion-laws-maternal-health-care/, (“Abortion has been illegal in the country since 1993, but a 2020 ruling by Poland’s Constitutional Tribunal, which went into effect the next year, removed one of the exceptions to the law—fetal abnormalities—and imposed a near-total ban on abortion.”)


21. For example, member states agree to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, ¶ 4. One of the fundamental purposes of the U.N. is to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Id. art. 55(c).
international humanitarian law and treaty obligations, and the legal criminal definition falls under two universal categories of international law: *erga omnes* and *jus cogens*. The former are crimes that supersede any individual State’s borders and represent a threat to all humankind. The latter—*jus cogens*—are crimes that States or their nationals cannot commit under any circumstance and regardless of exigent circumstances. These crimes such as genocide, slavery, and piracy; constitute actions that threaten the welfare of all States. The international community has deemed these behaviors illegal and


23. Zachary A. Karazsia, *An Unfulfilled Promise: The Genocide Convention and the Obligation of Prevention*, J. STRATEGIC SEC., 2019, at 20, 21. The dicta of the ICJ in the Barcelona Traction Case provides four examples of obligations owed *erga omnes*—one being the outlawing of genocide. *See* Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5) Further *erga omnes* obligations may derive from the “principles and rules concerning the basic rights of the human person . . . .” *See id.*, “The list of kinds of state conduct that is regarded as so fundamentally unacceptable by the international society of states as to be contrary to rules of [j]us cogens and obligations *erga omnes* can be seen to be growing and to overlap substantially with the catalogue of acts prohibited by the customary international law of human rights.” DAVID JOHN HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 837 (5th ed., 1998).


26. *Id*.

27. *Id*.
immoral in perpetuity under every circumstance. In the case of genocide, liability also arises under the doctrine of complicity. Complicity is a complex theory of liability rooted in criminal law that is still developing in international jurisprudence; it is especially disputed when analyzing the liability of complicit States. However, the need to consider such liability is, and will, continue to be increasingly critical to ensuring justice and the prevention of impunity of States.

When considering State liability for complicity, identifying the original violation or crime is critical, then ascribing liability to that State as complicit to that crime or violation can follow. This paper will focus on the crime of genocidal rape and forced pregnancy, and how State liability for complicity is analyzed in relation to preventing access to abortions for these unwanted pregnancies. Part I of this paper outlines how States in conflict have historically used rape and forced pregnancy as war tactics. Part II shows how rape and forced pregnancy constitute genocide when perpetrated with specific intent. These acts are violations of international law, and thus, perpetrators—be it individuals or States—can be held liable for these acts.

Part III considers when and if States incur responsibility for their complicity in genocide and what existing laws and enforcement bodies are available to hold complicit States accountable. Part IV contends that Russia’s use of rape and forced pregnancy as a war tactic in Ukraine constitute genocide under international law. Additionally, when Poland—which is absorbing a large majority of Ukrainian refugee women and girls fleeing the war—denies abortions to victims of forced pregnancy, it violates their obligations under international law,

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28. Id.
29. See Genocide Convention, supra note 22, art. 3.
31. LANAVOY, supra note 30.
32. Rebecca Rosman, Poland Has Taken in More Ukrainian Refugees Than Any Other EU Country. Local Mayors Says They’re Running Out of Money, THE WORLD (Nov. 1, 2022, 1:00 PM), https://theworld.org/stories/2022-11-01/poland-has-taken-more-ukrainian-refugees-any-other-eu-country-local-mayors-say.
including the Genocide Convention.\(^{33}\) Poland should be held liable for its complicity in Russia’s genocide by failing to provide abortion access to Ukrainian victims in Poland.

\section*{I. RAPE & FORCED PREGNANCY AS TACTICS OF WAR}

Men have leveraged women’s and girls’ bodies\(^{34}\) in war for centuries with devastating consequences. Yet, the impact on survivors who become pregnant because of rape as an act of war only became a prevalent subject of public debate in the 1990s.\(^{35}\) Documented now in at least thirty-six recent armed conflicts, the widespread use of rape as a weapon of war has ratcheted up the urgency and concern amongst the global community.\(^{36}\) The United Nations (“U.N.”) has documented that over the

\begin{multicols}{2}

\footnotesize

\(^{33}\) See Genocide Convention, \textit{supra} note 22, art. 1; \textit{Ratification of the Genocide Convention}, U.N. Off. Genocide Prevention & Responsibility to Protect, https://www.un.org/en/genocideprevention/genocide-convention.shtml#:~:text=Importantly%2C%20the%20Convention%20establishes%20on,individuals%E2%80%9D%20(Article%20%20IV), (“Importantly, the Convention establishes on State Parties the obligation to take measures to prevent and to punish the crime of genocide, including by enacting relevant legislation and punishing perpetrators, “whether they are constitutionally responsible rulers, public officials, or private individuals” (Article IV)").

\(^{34}\) I acknowledge and respect that women and girls are not the only gender who experience sexual violence particularly rape, especially in armed conflicts. However, this Paper will only focus on the implications of rape and forced pregnancy as it pertains to women and girls. For the purpose of this paper the definition of rape is forced vaginal, anal, or oral sex, of either a female with either a person or an object, including the force used by a person to rape or sexually violate another person of the same or opposite sex. The definition assumes, rape as a weapon of war to include; single and multiple instances of rape, gang rape, and forced impregnation or forced pregnancy.


last three decades, there have been thousands of instances of forced pregnancy as a tactic of armed conflict by State and non-State actors.37

A. Global Case Studies

Globally, States involved in armed conflict and war have perpetrated conflict-related sexual violence as part of genocide, “ethnic cleansing,” war crimes, and crimes against humanity.38 Armed groups and forces use rape as a tactic of war to “dehumanize communities and forcibly impregnate women and girls.”39 Such strategies, motivated by genocidal intent, expand the trauma and pain into future generations, especially in predominantly patriarchal societies with entrenched gender inequality.40 Children born because of conflict-related rape are treated and viewed as “the next generation of an armed political, ethnic, or religious movement.”41 As a result, the impact of the initial violence never leaves survivors and their children born of rape. Instead, they are forever viewed as “affiliated with the parties to the conflict, provoking stigma and in some cases, further abuse, infanticide, rejection, or other grave violations.”42

The scale of this targeted violence against women and girls is staggering.43 For example, in 1971, the West Pakistan Army was responsible for the rapes of some 200,000 to 400,000 Bangladeshi women, resulting in approximately 25,000 children born as a result of the rapes.44 In the aftermath of the Rwandan genocide, between 250,00045

Congo (DRC), Rwanda, Sierra Leone, Nepal, Afghanistan, Burma, Haiti, Iraq, Kosovo, Liberia, Sudan, Chad, Timor-Leste, and Burundi. Id.
38. See id. ¶ 2. Countries include, Liberia, Rwanda, Sierra Leone, Uganda, and the former Yugoslavia. Id.
39. Id.
40. Id.
41. Id.
42. Id.
43. Rape is an underreported crime, making accurate statistics on the full extent of its use in conflict situations hard to quantify. See generally TARA GINGRICH & JENNIFER LEANING, THE USE OF RAPE AS A WEAPON OF WAR IN THE CONFLICT IN DARFUR, SUDAN 6 (Oct. 2004).
44. GJC Report, supra note 11, at 2.
45. SHIVA EFTKHARI, HUMAN RIGHTS WATCH, STRUGGLING TO SURVIVE: BARRIERS TO JUSTICE FOR RAPE VICTIMS IN RWANDA 7 (2004).
and 500,000 women reported being raped during the genocide in just 100 days, resulting in close to 20,000 births. One of the hallmarks of the Bosnian genocide in the early 1990s’ was the way women were held captive in “rape camps.” Once pregnant, rape victims were released only when the option to terminate the pregnancy, was impossible or too dangerous. In Northern Uganda and other East African countries, the Lord’s Resistance Army (“LRA”) abducted thousands of young girls over the decades-long conflict that spanned from the late 1980s to 2017. To replenish the group’s members, the LRA forced the female abductees to bear children before their reproductive systems matured, resulting in long-term physical and psychological harm. An estimated 8,000 children were born as a result.

Despite the prevailing documentation and awareness in the international community of the widespread use of rape as a weapon of war, the significant and enduring hardships experienced by victims and survivors of conflict-related rape and forced pregnancies persist. Many victims are routinely denied the option of abortion, often while being displaced in neighboring countries.

46. See Gingrich & Leaning, supra note 43, at 7, tbl. 2.
49. Id.
52. See U.N. Report Women & Girls, supra note 35, ¶ 7. There are countless other examples: During the civil war in Sierra Leone, the widespread use of sexual violence against women and girls resulted in an estimated 20,000 children born of rape. Id. During the conflict in Timor-Leste, the perpetration of sexual slavery against women and girls, within or outside military installations, resulted in an untold number of pregnancies and children born of these violations. Id. In the Democratic Republic of the Congo, because of conflict-related sexual violence committed against women and girls by not only local and foreign armed groups, but by State actors, thousands of babies have been born of rape. Id. In South Sudan, women and girls have been subjected to the same. Id.
53. Id. ¶ 9.

Furthermore, while there are significant obstacles for any survivor of conflict-related sexual violence concerning reporting the crime, for those
B. Genocide Unfolding in Ukraine

Almost 6 million Ukrainians have fled since Russia’s invasion began in February 2022.54 Roughly ninety percent of those who fled are women and girls.55 Almost two million of these refugees fled to Poland.56 Recent reports document that Russian forces use sexual violence and rape as a military strategy, and many experts specifically argue that it is part of a broader insidious, political strategy to commit genocide against the Ukrainian people.57

Russian soldiers in Bucha, a small Ukrainian town, repeatedly raped twenty-five women, aged fourteen to twenty-four, nine of which were pregnant at the time of reporting the incident.58 They testified the “Russian soldiers told them they would rape them to the point that they wouldn’t want sexual contact with men to prevent them from having Ukrainian children.”59 Another twenty-five-year-old woman reported to Ukrainian authorities that Russian soldiers raped her sixteen-year-old sister in the street in front of her while shouting, “This will happen to every Nazi prostitute.”60

It is difficult to identify the actual number of victims of sexual violence, rape, and forced pregnancy, according to police, investigators, who become pregnant because of rape, pregnancy may be seen as proof of association with an armed group, “fraternization with the enemy,” or a loss of “honor,” thereby exacerbating stigma and endangering victims and their children.

Id. ¶ 6.


59. *Id.*

60. *Id.*
and counselors. Many factors culminate in under-reporting, be it the death of the victims, stigma, shame, fear, or psychological trauma. By the end of 2023, Russia’s active invasion of Ukraine has been waging for nearly two years. The systematic use of sexual violence and rape, often resulting in pregnancy, has resulted in hundreds of known, documented cases of rape. Still, the number is inevitably much larger, and the trauma is far-reaching.

II. RAPE & FORCED PREGNANCY AS GENOCIDE

To determine if a state is liable or complicit in genocide, we must first look at the underlying crimes. Established in 1951, the leading treaty governing genocide is the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”). Genocide, as defined in the Genocide Convention, has been adopted in several international criminal statutes, including the Rome Statute and the International Criminal Tribunal for Rwanda. While the Genocide Convention does not explicitly include rape and forced pregnancy as part of genocide, they may constitute the “destruction of a group” in theory and practice.

Article I of the Genocide Convention states: “The Contracting Parties confirm that genocide, whether committed in time of peace or
in time of war, is a crime under international law which they undertake to prevent and punish."67 Article II of the Genocide Convention defines “genocide” as an act “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”68 Acts that constitute genocide include:

(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. 69

Rape, in its very nature, can be committed with the intent to destroy a group of people. Though not explicitly listed in the definition of genocide under Article II, rape could fall under each of the enumerated acts, as demonstrated below.70

A. Rape as Genocide

Two ad-hoc tribunals were established to address specific cases of genocide, including rape. The International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) have relied on the ‘rape as an act of genocide’ theory.71 The ICTR, established in the wake of the 1994 Rwandan massacre by the Hutus against the Tutsis, was the first to hold

67. Genocide Convention, supra note 22, art. I.
68. Id. art. II.
69. Id.
70. See id.
71. “Rape may also amount to...an act of genocide, if the requisite elements are met, and may be prosecuted accordingly.” Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 172 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 2998). A landmark precedent was set in 1998 when ICTY’s sister tribunal, the ICTR, rendered a judgment in the Akayesu case in which it was concluded that rape constitutes genocide. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 698-734 (Sept. 2, 1998), https://ucr.irmc.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-04/MSC15217R0000619817.PDF.
that rape constitutes genocide. In connecting rape to genocide, the ICTR found in Prosecutor v. Akayesu that “[t]he rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them.” Moreover, the chamber found “that in most cases, the rapes of Tutsi women in [the location at issue] were accompanied with the intent to kill those women.”

Genocide is distinguished from other international crimes by the intent of the perpetrators in committing the acts to destroy a national, ethnic, racial, or religious group. One of the strongest arguments supporting the theory that rape and forced pregnancy, may on their own, constitute genocide is when rape and sexual violence are used in an intentionally systematic manner to destroy a specific group. In response to the genocide in Bosnia and Herzegovina and the Rwandan genocide in 1994, advocates began arguing that gender-based sexual violence, including rape, should be considered genocide.

Establishing genocide requires showing that “the specific intent of these actions [in question] is the destruction, in whole or in part, of a national, ethnic, racial, or religious group.” One argument against considering rape as genocide is that isolated acts of rape occurring at the same time as, or in the context of war or genocide, does not automatically mean it is a genocidal act. Rather, rape as genocide is

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73. Akayesu, supra note 71, ¶ 732.
74. Id. ¶ 733.
75. See Genocide Convention, supra note 22, art. II.
77. Bosnia-Hercegovina Timeline, BBC News, (Jan. 12, 2012), http://news.bbc.co.uk/2/hi/europe/country_profiles/1066981.stm (Bosnian Serbs took control over half the region and committed ethnic cleansing against Muslims and non-Serbs, in the 1990s.)
79. See Engle, supra note 76 (discussing various viewpoints of the feminist discussion on genocidal rape before the International Criminal Tribunal for the Former Yugoslavia).
80. See Genocide Convention, supra note 22, art. II.
81. See Engle, supra note 76, at 789.
systematic and organized—it is rape “under control.” Acts of rape and other forms of sexual violence can fall into the categories of proscribed acts under the Genocide Convention. Prosecution under the Genocide Convention Article 2 (b) requires a showing that (1) perpetrators committed crimes such as rape, sexual mutilation, and sexual slavery; (2) that caused serious bodily or mental harm; (3) with the intent to destroy, in whole or in part, a group identified by the terms of the convention. Intent must be proven in order to show the systematic, organized nature of rape as genocide. This can be done by referencing all surrounding circumstances, including explicit affirmations or directives or a pattern of actions that clearly indicate the intent to destroy the target group. Under certain circumstances, sexual violence may be prosecuted under Article 2(c)-(d). Rape as genocide has serious effects on groups, which causes the group’s physical destruction and preventing births within the group. For example,

82. Id. at 790; see also Catherine MacKinnon, Rape, Genocide, and Women’s Human Rights, 17 HARV. WOMEN’S L. J. 5, 11-12 (1994) (distinguishing the use of rape to demoralize and demean the “enemy” during war, from genocidal rape committed to maintain or ascertain political control).


84. Genocide Convention, supra note 22, art. II(b); Statute ICTR, supra note 65. The prosecution charged Akayesu with the crime of genocide in Count 1 of the Indictment, punishable under ICTR Article 2(3)(a), which lists genocide as a punishable act. “Count 1 made no specific reference to sexual violence or rape. However, among the definitions of genocide offered by Article 2(2) is ‘[c]ausing serious bodily or mental harm to members of [a] group.” Paul J. Magnarella, Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases, 11 FLA. J. INT’L L. 517, 535 (1997). The Chamber reasoned that “the acts of rape and sexual violence contained in the Indictment constituted genocide in the same way as any other act listed under ‘Genocide’ ICTR Article 2(2), as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, in this case the Tutsi.” Id. at 536.

85. First, the Trial Chamber recognized sexual violence as an integral part of the genocide in Rwanda and found the accused guilty of genocide for crimes that included sexual violence (summarizing the Akayesu Case), Akayesu, supra note 71.

86. In its judgment, the Chamber noted that witnesses testified that “[e]ven pregnant women, including those of Hutu origin, were killed on the grounds that the fetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda, the child belongs to the father’s group of origin.” Magnarella, supra note 84,
women subjected to rape may be left physically unable to reproduce or may be denied this role by their community due to the nature of the attacks they suffered.\footnote{See infra Part II(B).}

Under the Genocide Convention Article II one must consider the intent of the actor to determine whether genocide occurred.\footnote{Genocide Convention, supra note 22, art. II.} The proscribed conduct must be committed with an intent to destroy.\footnote{Id.} This is “an underlying intent,” reaching beyond the immediate intent of the specific action taken.\footnote{See, e.g., Siobhán K. Fisher, Note, Occupation of the Womb: Forced Impregnation as Genocide, 46 DUKE L.J. 91, 125 (1996).} If a fertile woman is raped repeatedly, it is likely she will eventually become pregnant. \textit{Id.} However, “repeated rape alone is still ‘just’ rape, but rape with the intent to impregnate is something more. Furthermore, when there is not only the intent to forcibly impregnate but also the intent to destroy a group of people, it is genocide.” \textit{Id.}

The genocidal intent behind rape and sexual violence in the Rwandan genocide emerged from both the overall pattern of sexual violence and the individual cases of abuse documented in different parts

\begin{footnotesize}
\begin{enumerate}
\item at 531 (quoting Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 121 (Sept. 2, 1998)).
\item See infra Part II(B). \item Genocide Convention, supra note 22, art. II. \item Id. \item See, e.g., Siobhán K. Fisher, Note, Occupation of the Womb: Forced Impregnation as Genocide, 46 DUKE L.J. 91, 125 (1996). If a fertile woman is raped repeatedly, it is likely she will eventually become pregnant. \textit{Id.} However, “repeated rape alone is still ‘just’ rape, but rape with the intent to impregnate is something more. Furthermore, when there is not only the intent to forcibly impregnate but also the intent to destroy a group of people, it is genocide.” \textit{Id.}
\item Id. The fact that specific intent can be so hard to prove has led some scholars to call for a change in the definition of genocide, or a separation of that legal definition from decisions related to humanitarian intervention.
\end{enumerate}
\end{footnotesize}
of the country during different phases of the genocide. The pattern of sexual violence in Rwanda shows that acts of rape and sexual mutilation were neither accessories to the killings, nor, for the most part, opportunistic assaults. As recalled by the survivors, rather, the actions and statements of the perpetrators were carried out with the aim to eradicate the Tutsi.

There are various ways in which rape may cause the physical destruction of a target group. In many instances, a victim of genocide is raped either immediately before or in close succession to being murdered. In some instances, perpetrators inflict fatal injuries on the rape victim, ensuring she will die a slow and painful death. However, as stated above, death post-rape does not alone equate to genocide. When rape is used to commit genocide, there can be intent to cause the maximum suffering and pain, whether or not death follows. The act of rape alone, even if the victim survives, is an act of genocide. Indeed, the physiological and psychological complications of rape, the reality that rape survivors become social outcasts in Rwanda, and the subsequent poverty of those survivors widowed, orphaned, or abandoned, led many Rwandan rape survivors to tell investigators that


95. See Akayesu, supra note 71, ¶ 731.

96. See NOWROJEE, SHATTERED LIVES supra note 94 at 48. Taken all together, the report finds that the evidence indicates that many rapists expected the psychological and physical assault on each Tutsi woman, resulting from their attacks, would further the cause of the destruction of the Tutsi people. Id.

97. For example, accounts of the “Rape of Nanking”—the sexual violence that occurred during the Japanese occupation of China’s capital city during World War II—suggest that it was customary for soldiers to rape a victim and then kill her by forcibly inserting a weapon into her vagina. See Susan Brownmiller, Against Our Will: Men, Women and Rape (Open Road Media 2013) (1974).

98. See Sharlach, supra note 72, at 95 for examples of soldiers using rape as a method of murdering female victims.

99. During the Rwandan genocide, the Hutu army reportedly murdered rape victims or inflicted what they intended to be “mortal wounds” on victims to ensure a slow death. Id. at 99. Reports indicate that many members of the Hutu army also deliberately transmitted human immunodeficiency virus (“HIV”) to their rape victims to inflict pain, suffering, and ultimately death for the Tutsi women and girls. Id.
death would have been a preferable fate. The devastation that inevitably follows rape makes it a particularly effective tool of genocide because it destroys the morale of a woman, her family, and perhaps her entire community. Regardless of how rape is weaponized, the infliction of physical or psychological destruction to the individual victim and the group to which she belongs, coupled with intent, shows that rape can be a tool of genocide.

B. Forced Pregnancy as Genocide

Forced pregnancy is another form of sexual violence. This happens whereby the perpetrator rapes a victim with the intent to impregnate her and then detains the victim beyond the point at which she can terminate the pregnancy. Forced pregnancy came on the international community’s radar in the aftermath of the war in Yugoslavia in the early 1990s. It was widely reported that Bosnian-Serb and Serb soldiers raped victims with the explicit intent to impregnate them, and then they detained women to prevent them from getting abortions.

The Rome Statute defines forced pregnancy as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other

100. See NOWROJEE, SHATTERED LIVES supra note 94, at 54.
101. Id. at 93.
102. Mackinnon considering the Bosnian genocide, describes rape as a method of extermination:
   It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.
Mackinnon, supra note 82, at 11-12.
105. Short, supra note 103, at 512.
grave violations of international law.” In the 2021 International Criminal Court (“ICC”) case against LRA commander Dominic Ongwen, the Court convicted him of forced pregnancy as a war crime and a crime against humanity. This is the first conviction of its kind. Upon appeal, the Court considered the definition of forced pregnancy in the Rome Statute Article 7(2)(f) and found the statute “intends to protect a woman’s reproductive rights, including the right to be pregnant and to autonomously determine the way in which she carries out her pregnancy.” Prior to the Ongwen case, the ICTR addressed the issue of forced pregnancy, particularly in the context of genocide. Though the ICTR did not prosecute acts of forced pregnancy, the court in the landmark Akayesu case recognized acts of gender-based sexual violence, including forced impregnation, may constitute “measures intended to prevent births within the group.” This, in turn, meets one of the ways in which an act may constitute genocide, as defined by the Genocide Convention.

In addition, forced pregnancy may constitute an act of genocide, preventing births, when the infliction of harsh psychological and
physical harm on victims diminishes their desire or physical ability to carry future children, thus preventing future generations. The level of mental and physical damage and trauma caused to victims of violent rape and pregnancy can leave them “unable to have normal sexual or childbearing experiences with their own people.” When used as a weapon of genocide by a perpetrating group, forced pregnancy is likely done with the intent to destroy the target group. Like rape, forced pregnancy fits under the Genocide Convention Article II(d) when viewed as a means of “imposing measures intended to prevent births within the group.” When the perpetrator and victim are members of two distinct groups, forcing a woman or girl to be pregnant with aggressor’s child prevents births of the victim’s own bloodline. It could be said that their wombs are literally “occupied.”

Forced pregnancy could trigger the Genocide Convention Article II(e) by “forcibly transferring children of the group to another group.” In patrilineal societies, a child’s ethnicity stems from the father. The child born through genocidal rape is thus in the bloodline of the perpetrator. Thus, forced pregnancy can be an effective strategy of ethnic cleansing in target groups where there is a deep-rooted community/societal belief in the “genetic myth of race and ethnicity.” Meaning that a child born of rape in this context belongs to the perpetrator’s ethnic group.

112. Short, supra note 103, at 511.
113. Fisher, supra note 90, at 93. For example, girls who are forced to give birth at an early age often are not physically/biologically developed enough to support a healthy pregnancy, or a woman or girl may not be given sufficient medical assistance during childbirth and will suffer resulting physical harm and sometimes death. Id. at 123.
114. Genocide Convention, supra note 22, art. II(d).
115. Short, supra note 103, 510-11 (discussing the lasting effects of forced pregnancy and rape on ethnic groups).
116. Sharlach, supra note 72, at 93.
117. Genocide Convention, supra note 22, art. II(e).
118. Short, supra note 103, at 513.
119. Id.
120. Id.
121. Id. at 512. In Yugoslavia, for example, members of the Serbian army forcibly impregnated Muslim women and girls, intending to “dilute” the Muslim population. Id. The resulting children who were born were then rejected by the mothers’ ethnic group. Id. Societally, these children were considered by both Serbs
Further, the crime of forced pregnancy often includes confinement of the victim to prevent her from terminating the pregnancy.\textsuperscript{122} The "occupation" of women of childbearing age lowers the targeted group’s birthrate and is genocide as an attempt to "prevent births within the group."\textsuperscript{123} Preventing births in this manner is a direct act by the perpetrators, "deliberately inflicting” conditions on the targeted group that will result in the destruction (i.e., weakening by de-population) of the targeted group.\textsuperscript{124} Therefore, this manner of preventing the progression of generations may constitute genocide.

The sexual violence, including rape and forced pregnancy, being committed against Ukrainian women by Russian perpetrators bear all the hallmarks of genocides past and are direct violations of the Genocide Convention and international law.

III. STATE LIABILITY FOR COMPLICITY TO GENOCIDE UNDER INTERNATIONAL LAW

Complicity is often defined as "the state of being involved with others in an illegal activity or wrongdoing; a partnership in an evil action; or a state of being complex or involved," whereas an accomplice is "a person who helps another commit a crime, a partner in wrongdoing."\textsuperscript{125} Black’s Law Dictionary defines complicity as "association or participation in a criminal act as an accomplice."\textsuperscript{126} However, in international law, the definition of complicity is more complex. This Paper focuses on one facet of complicity: a form of State responsibility as viewed under international law. This section lays the foundation for later analysis regarding how state liability and complicity work under international law.

\textsuperscript{122} Engle, \textit{supra} note 76, at 792. \textit{See} Short, \textit{supra} note 103, at 512.

\textsuperscript{123} \textit{See} Short, \textit{supra} note 103, at 512.

\textsuperscript{124} Fisher, \textit{supra} note 90, at 121, 123.

\textsuperscript{125} \textit{Accomplice}, Oxford Dictionary (11th ed. 2020).

A. Differing Standards of Liability

Much of the scholarship on complicity in genocide focuses on individual complicity. There are only a few modes of liability for State complicity in genocide under existing international law. Multiple different standards offer guidance on how to consider a State’s liability for complicity. One standard of liability exists under international criminal law and is governed by the Genocide Convention, as addressed above. States, however, cannot be held criminally liable for crimes under international law, as crimes legally are attached to individual actions. Instead, the standard applied to States falls under civil liability. When a State allegedly violates international law, whether under an international treaty, international humanitarian law, or international human rights law (“IHRL”), that State can be brought before the International Court of Justice (“ICJ”) and held accountable for the violation.

A necessary distinction to understand under civil liability is the difference between “States’ international liability” versus “State responsibility.” The difference between the two stems from civil law vocabularies, which divide the notion of “liability” into the categories of “responsibility” or “civil responsibility.” “State responsibility” therefore regards a State’s obligations under international law generally. On the other hand, “international liability” defines a State’s “civil responsibility,” which is the obligation to make reparations to

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127. A few ad-hoc tribunals have been established, the ICTR and ICTY are examples.
128. See Genocide Convention, supra note 22, art. I.
130. See Sucharitkul, supra note 129, at 822.
131. See id. In comparison, though the ICC has jurisdiction over non-state actors alleged of war crimes, crimes against humanity or genocide, it does not have jurisdiction over governments, corporations, or political parties. How the ICC Works, ABA-ICC PROJECT, https://how-the-icc-works.aba-icc.org/#:~:text=Preliminary%20Examination,-Personal%20Jurisdiction,who%20are%20members%20of%20groups, (last visited Dec. 2, 2023).
132. Id.
non-nationals that suffer injuries outside its national boundaries but resulted from activities within its territory or under its control.\textsuperscript{133}

For the purpose of this Paper, this distinction matters only because it highlights the various challenges in holding a State legally responsible for its actions or omissions that further perpetuate acts of genocide. A State’s international liability is triggered under international law and within the national and municipal legal systems when the circumstances involve transnational relations.\textsuperscript{134} In other words, under international law, a State may be held civilly liable for injurious consequences stemming from misconduct within their jurisdiction or control that affect other States or nationals of other States.

In sum, complicity, under international law, is a form of participation in the wrongful act of another State or international organization. Responsibility for complicity under international law generally can thus be defined as the responsibility of a State for its action or omission, knowingly facilitating the commission of an internationally wrongful act by another actor.\textsuperscript{135}

\textbf{B. State Complicity in Genocide Under Current International Law}

To best understand how a State can be held liable and complicit in genocide, this section will begin by evaluating State liability for complicity as viewed under existing treaties and case law. Though other international treaties speak to member States’ duty to promote or respect international human rights, the Genocide Convention requires member states to “prevent” genocide.\textsuperscript{136} Article I provides that “Contracting Parties . . . undertake to prevent and to punish” genocide “whether committed in time of peace or in time of war.”\textsuperscript{137} In addition, Article III declares that complicity in committing genocide, along with the act of genocide itself, is punishable by the Convention.\textsuperscript{138} The

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} See generally LANAVOY, \textit{supra} note 30.
\item \textsuperscript{136} See Genocide Convention, \textit{supra} note 22.
\item \textsuperscript{137} Id. art. I.
\item \textsuperscript{138} The Genocide Convention Article III explicitly prohibits complicity in genocide. \textit{Id.} art. III(e) (stating that “The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”)
\end{itemize}
\end{footnotesize}
Genocide Convention is one of the few treaties that explicitly prohibits complicity.\textsuperscript{139}

Some notable examples of complicit acts under international law may involve the supply of either monetary or political assistance, which materially facilitate the commission of the crime.\textsuperscript{140} According to one ILC Rapporteur on State Responsibility, complicity may include the “provision of weapons or other supplies to assist another State to commit genocide.”\textsuperscript{141} Complicity to commit genocide may also be found in situations of omission.\textsuperscript{142} Some scholars posit that complicity may be found even if the aid-providing State did not intend to assist in the commission of genocide, but nevertheless had the awareness that such assistance would be used in the commission of the crime.\textsuperscript{143}

Furthermore, a State’s duty under the Genocide Convention to prevent genocide is not limited by territorial considerations. One of the drafts for the Genocide Convention made this pledge clear, requiring parties “to prevent and to repress such [genocidal] acts wherever they may occur.”\textsuperscript{144} When fulfilling this prevention duty, a State places the

\begin{itemize}
\item \textsuperscript{139} Id.
\item \textsuperscript{140} See infra Part III(C). An example of state’s alleging complicity includes Iran’s accusations that the United Kingdom committed a “criminal act” by supplying materials for chemical weapons to Iraq which were then used against Iran. Kate Nahapetian, Confronting State Complicity in International Law, 7 UCLA J. INT’L L. & FOREIGN AFF. 99, 101 n.8 (2002). Other examples included the U.S. accusing the former Soviet Union of being responsible for acts of violence perpetrated by Cuba since it provides material support, and the former Soviet Union claiming that the U.S. was an “accomplice” in Israel’s 1982 invasion of Lebanon. Id. Moreover, in 1982, the U.S. vetoed a Security Council resolution that asked states to stop supplying arms and military aid to Israel after its invasion of Lebanon. John Quigley, State Responsibility for Ethnic Cleansing, 32 U.C. DAVIS L. REV. 341, 374 (1999). Accordingly, the Soviet Union placed responsibility on Israel, but also on the U.S., stating: “Thus, the responsibility of the United States for what has taken place today [casting of veto by U.S.] is clear. For each further step of the Israeli occupiers into Lebanese territory, for each Lebanese and Palestinian child who is killed; for each old person who is killed, for each woman who is killed—I say that the responsibility for all of that will be borne not only by Israel but also by the United States.” Id. at 374 n.187 (quoting Mr. Ovinnikov, U.S.S.R.).
\item \textsuperscript{141} Nahapetian, supra note 140, at 122.
\item \textsuperscript{142} Id. See infra Part III(C)(i).
\item \textsuperscript{143} See Greenfield, supra note 91, at 950. See infra, Part III(C)(i).
\item \textsuperscript{144} This can be seen in the Genocide Convention, but also by considering the broader \textit{jus cogens} nature of genocide. Nahapetian, supra note 140, at 123. There is a finding that the duty to prevent genocide extends beyond states’ borders, therefore,
welfare of the international community above its national interests. For context, if a State sold arms to a country preparing to commit genocide, it would violate the duties set out in Article I.145 The selling State may likely be responsible and complicit in committing genocide under Article III (e).146 Likewise, if a State insisted on fulfilling an earlier contract to sell arms to a government committing genocide, it too, may be held liable for violating the Genocide Convention.

There are very few cases holding perpetrators guilty for genocide individually, even fewer holding States in violation of international law for acts of genocide, and subsequently even fewer holding States complicit in genocide. As mentioned above, the responsibility of a State in preventing and punishing genocide extends beyond its territory. The Genocide Convention imposes a duty on States to prevent and punish genocide “whether committed in time of peace or in time of war . . .”147 This means a State can be liable for its complicity in genocide committed by another State or non-state actors. The ICJ considered State liability in the 2007 Judgement on the Case Concerning the Application of the Convention on

a *jus cogens* violation is a violation against all states and overrides notions of state sovereignty. *Id.* Accordingly, the “*jus cogens* duty to prevent genocide, requires that states protect individual communities and people groups against genocide, regardless of territorial boundaries” and “with regard to the welfare of the international community” and “without self-interest.” *Id.* See James Crawford (Special Rapporteur), *Second Report on State Responsibility*, U.N. Doc. A/CN.4/498/ (Mar. 17, Apr. 1 & 30, July 19, 1999); see also U.N. Econ. & Soc. Council, *Draft Convention on the Crime of Genocide*, U.N. Doc. E/447 (June 26, 1947).

145. Often the actions of an organized armed group “(OAG)” are not directly attributable to a State, but that a State may nonetheless be responsible for aid and assistance to that OAG in the group’s commission of an illegal act. In short, that’s what happened in the ICJ judgment in the *Nicaragua v. United States* case. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27). The Court held that the relationship between the U.S. and the *contra* rebel forces did not meet the effective control test for direct attribution. *Id.* ¶ 115. Nevertheless, the Court found that the U.S. was under “an obligation not to encourage persons or groups . . . to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions . . . ” *Id.* ¶ 220 The Court added, “such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.” *Id.* The Court found that the U.S.’s support to the *contras* breached the State’s obligation under customary international law not to intervene in the affairs of another State, as well as its obligation not to encourage international humanitarian law violations, *Id.* ¶¶ 292(3), 292(9).

146. Genocide Convention, *supra* note 22, art. III(e)

147. *Id.* art. I.
the Prevention and Punishment of the Crime of Genocide which ruled on Bosnia and Herzegovina’s claim against Serbia and Montenegro. \textsuperscript{148} The Court established that a State may be held responsible under the Genocide Convention if it fails to prevent or punish genocide, or if it aids or abets genocide committed by another State or non-state actor.\textsuperscript{149}

The Court addressed the notion of complicity to genocide by a State and the responsibility therein without specific precedent to lean on. Therefore, it had to address State responsibility by looking at available international law, customary international law, and the Draft Articles on Responsibility of States for Internationally Wrongful Acts, to consider what elements would need to be met to hold a State complicit in genocide.\textsuperscript{150} Notably, the Bosnia Court found Serbia liable for failing to prevent genocide committed by Bosnian-Serb forces during the Bosnian war.\textsuperscript{151} In a 1993 Court order after hearing the parties in the

\begin{quote}
\textsuperscript{149} Id.
\textsuperscript{150} See id. ¶¶ 416–450.
\textsuperscript{151} As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them. Such is the case here. In view of the foregoing, the Court concludes that the Respondent [Serbia] violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.
\end{quote}

\textit{Bosn. \& Herz.,} 2007 I.C.J. ¶ 432.
Bosnia case, Judge Lauterpacht of the ICJ found that even unknowingly assisting in the commission of genocide would amount to acting against a *jus cogens* norm.\(^{152}\)

The *Bosnia* case demonstrates that for a State to be in direct violation of Article I, namely the duty to prevent genocide, the threshold for qualifying actions of complicity falls below actions like providing monetary assistance or even selling military arms to the perpetrating country. Judge Lauterpacht found that an arms embargo, even if established for the maintenance of peace, could be enough to violate the Genocide Convention if it inhibited another party’s ability “to prevent genocide or to resist it . . . .”\(^{153}\) Notably, Judge Lauterpacht did not require there to be an intention to assist in the crime itself.\(^{154}\) Instead, he noted that the parties “unknowingly” and “unwillingly” were helping make another party commit genocide.\(^{155}\)

There were other instances of alleged complicity and State liability that never made it to trial at the ICJ but are worth noting, such as Bosnia threatening to invoke Article I of the Genocide Convention against the United Kingdom (“U.K.”).\(^{156}\) On November 15, 1993, Bosnia declared its intention to sue the U.K. for violations of the Genocide Convention Articles I and III(e) for not taking action to prevent genocide in


The duty to prevent genocide rests upon all parties and is a duty owed by each party to every other . . . . First, there is the duty . . . to refrain from conduct that inhibits the ability of the Applicant itself to prevent genocide or to resist it . . . . [T]hen Security Council resolution [imposing an arms embargo on Yugoslavia before its dissolution] can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.

\(^{153}\) See id. ¶¶ 84-97.

\(^{154}\) Id. ¶ 102.

\(^{155}\) Id. Nevertheless, these parties were acting “contrary to a rule of *jus cogens*.” Id.

Bosnia alleged that the U.K.’s opposition to lifting the arms embargo against the former Yugoslavia, which was helping Serbia maintain its military advantage, hindered Bosnia’s ability to prevent genocide. The U.K. quickly moved to settle the case; by December 23, 1993, Bosnia and the U.K. released a joint statement declaring they reached an agreement and the case would not proceed to the ICJ.

Though this Paper’s focus involves State liability, there is value in understanding when, and how, courts or ad-hoc tribunals find State actors complicit in genocide. For example, France was accused of being complicit in the 1994 Rwandan genocide. It was not until 2014, that a French court convicted Pascal Simbikangwa, a former Rwandan intelligence chief, of genocide and crimes against humanity committed during the genocide. In fact, a report by the Research commission on the French Archives Related to Rwanda and the Genocide Against the Tutsi (known as the “Duclert Commission”) and a 2021 report commissioned by the Rwandan government, both found France had not been “blind” to the preparation of the genocide and provided support to the Hutu-led government in Rwanda, which carried out the genocide. The Rwandan commissioned report accused France of enabling the genocide by training and arming the Hutu-led government and militias who carried out the killings.
In a rare case, in 2019, the Dutch Supreme Court upheld a ruling that the State (Netherlands) was partially responsible for 350 deaths in Bosnia’s Srebrenica massacre.164 “The Dutch had been guarding a U.N. safe zone when it was overrun.”165 Three-hundred-fifty men were hiding in the U.N. compound, and the Dutch court ruled that, had the Dutch forces given the men the option to stay, there was a chance they would not have been taken by the Serbs and subsequently killed.166 The Court ruled the Dutch state should be liable for only that proportion of the damages suffered by the bereaved.167

C. State Civil Liability Under International Law

The civil liability that complicit States face under international law can be triggered in two ways. First, a complicit State may be responsible for breaching its obligations under a primary rule of international law (like the Genocide Convention). The second way in which a State may be found liable is when its complicity “incurs [a] derivative responsibility for its assistance to the internationally wrongful act of another State.”168 In short, a State may either violate its international responsibilities or aid in another State’s violation (either directly or indirectly). Derivative, indirect, or ancillary responsibility for complicity is contingent on the wrongful conduct or action of the primary actor.169 In other words, a State can only be complicit in a

165. Id.
166. Id.
167. Id. The Netherlands bore ten percent liability and therefore should owe damages to the families proportionally. Id. It is uncommon for a State to be held liable for their role in failing to prevent genocide, though the court emphasized that the Netherlands bore “very limited liability.” Id.
169. LANAVOY, supra note 30, at 10. (Though there may be nuanced differences between these three adjectives, all of them “base the responsibility for complicity upon the actual commission of the principal wrongful act”).
wrongful act if the underlying act is in violation of international law.\textsuperscript{170} Some scholars argue focusing on the derivative nature of complicity is a weaker approach; that complicity in an internationally wrongful act should be conceived of as a form of shared responsibility involving a factual relationship, of at least two conducts, and three actors.\textsuperscript{171} The argument in this Paper focuses on the conducts of genocidal rape and forced pregnancy and the restriction on abortion access between the three actors: Russia, Ukraine, and Poland.

Framing complicity as a form of shared responsibility helps avoid any diminishing liability attached to complicit conduct as it relates to the principal wrongful act.\textsuperscript{172} Moreover, the theoretical construction of complicity as a form of shared responsibility creates a more balanced approach to allocating the responsibility between the accomplice and the principal.\textsuperscript{173} In other words, it permits treating complicity to the wrongful act of a third party on equal footing as the principal wrongful conduct itself. It also enhances the prospects for the injured State or international organization [sic] to seek reparation from both the principal and the accomplice.\textsuperscript{174}

\textit{i. State Responsibility for Internationally Wrongful Acts}

International laws concerning State responsibility have been a major concern since the League of Nations in the 1930s.\textsuperscript{175} The development of this area of law eventually culminated in 2001, when the International Law Commissions (“ILC”) presented the Draft Articles on States for Internationally Wrongful Acts (“ARSIWA”) providing definitions and rules, as well as commentary to assist with interpretation and application.\textsuperscript{176} Notably, Article 16 of ARSIWA

\begin{itemize}
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} Id. at 11.
  \item \textsuperscript{172} Id.
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} Id.
  \item \textsuperscript{176} Id. See generally ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2 Y.B. Int’l L. Comm’n 2 (2001) [hereinafter ARSIWA]. ARSIWA are drafted by the ILC, the U.N. body of experts tasked with
\end{itemize}
was declared by the ICJ in the *Bosnia* case to reflect customary international law, which is binding.\textsuperscript{177} Article 16 provides:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.\textsuperscript{178}

The Commentary to Article 16 sets out the elements that must be shown to establish State complicity: (1) “one State provides aid or assistance to another” in the commission of “an internationally wrongful act;”\textsuperscript{179} (2) such aid or assistance contributes to the “commission of the wrongful act;”\textsuperscript{180} (3) the assisting State has the intention to facilitate and/or has knowledge of the circumstances of the internationally wrongful act;\textsuperscript{181} and (4) the recipient State’s act would also be wrongful if committed by the assisting State.\textsuperscript{182}

These elements involve complex legal standards and its potentially divergent application. To consider State complicity to genocide, it is worth considering how the elements might be addressed in relation to abortion codifying international law. Therefore, these articles can be considered under Article 38(1)(d) of the ICJ statute as a subsidiary means of determining international law. *Statute of the International Court of Justice*, art. 38(1)(d), ¶ 1.


\textsuperscript{178} ARSIWA, *supra* note 176, art. 16.


\textsuperscript{180} ARSIWA, *supra* note 176, art. 16, cmt. 5; Goodman & Jackson, supra note 179.

\textsuperscript{181} ARSIWA, *supra* note 176, art. 16, cmt. 4; Goodman & Jackson, supra note 179.

\textsuperscript{182} ARSIWA, *supra* note 176, art. 16, cmt. 6; Goodman & Jackson, supra note 179.
access.\textsuperscript{183} Elements one and four have the lowest bar to meet. The first element, concerning aiding and assisting the commission of an internationally wrongful act,\textsuperscript{184} may encompass a variety of methods of support or assistance: supplying weapons, providing technical support, and sharing intelligence.\textsuperscript{185} Similarly, in this way the restriction on abortion access serves a supportive role by preventing the voluntary termination of unwanted, forced pregnancies. Considering the fourth element, the wrongs of recipient States are assumed to be breaches of customary international law;\textsuperscript{186} genocide is clearly prohibited by any State, and therefore, would be wrongful if committed by such assisting State.

The second element, determining how much the State’s “aid or assistance” was given with the view to facilitate the commission of the principal wrong, evokes debate and disagreement amongst scholars.\textsuperscript{187} However, the ILC Commentary states that a significant contribution to the principal wrongful act is “sufficient,” not necessary.\textsuperscript{188} Under ARSIWA Article 16, it could be conceivable that aid or assistance includes every act (or omission) which facilitates the commission of an internationally wrongful act by another State.\textsuperscript{189} However, the threshold for aid and assistance under Article 16 should not extend to include aid or assistance that is only remotely or indirectly related to an internationally wrongful

\begin{quote}
183. See infra Part IV(D) for a more detailed discussion of each element.
184. ARSIWA, supra note 176, art. 16, cmt. 1.
185. Goodman & Jackson, supra note 179.
186. ARSIWA, supra note 176 art. 16, cmt. 6; Goodman & Jackson, supra note 179. Customary international law, as referenced by the ICJ statute 38(1)(b), refers to widespread and consistent State practice which stems from a sense of legal obligation known as \textit{opinio juris}. It can be demonstrated through enacted domestic legislation or judicial decisions. \textit{Opinio juris} requires that a custom be a general practice that is accepted by law. For example, practices that are generally followed by States, but which the State feels free to legally ignore, lacks \textit{opinio juris} and thus could not be considered customary international law. See Customary Law, supra note 177.
188. Id. “There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.” ARSIWA, supra note 176, art. 16, cmt. 5.
189. Omissions can be difficult to address. Considering a case of overflights, it not only possible that a state explicitly grants such rights to another state, but also that it just does not object to use of its airspace. For language on omissions see ARSIWA, supra note 176, art 2.
\end{quote}
Some arguments contend there should, at minimum, be a sufficient nexus to the wrongful act; however, there is a lack of precedent in case law to clearly define what constitutes “sufficient.”

In its ARSIWA Article 16 commentary, the ILC considers instances in which “the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered.” Whether or not these thresholds rise to the level of customary law is fact intensive and up for the interpretation of the Court. Nevertheless, assistance in the form of ultimately preventing abortions for women forced to carry to full term the pregnancy which resulted from genocidal rape could arguably meet a higher threshold (a “significant contribution”).

One of the most disputed areas when considering State responsibility and complicity is how to consider and prove the culpability required of the assisting State in the wrongful act. By providing different language and standards within the text and commentaries, the ILC itself has created some ambiguity when it comes to element two. AWRSIA Article 16’s plain text refers to

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191. Id.
192. ARSIWA, supra note 176, art. 16, cmt. 10; Goodman & Jackson, supra note 179.
194. Goodman & Jackson, supra note 179. See infra Part IV(D). It is worth considering an interpretation informed by the initial thoughts of Roberto Ago on complicity in the ILC. Presenting his Seventh Report on State Responsibility in 1978, Ago described situations falling under complicity in Article 16 as, “cases in which the existence of an internationally wrongful act unquestionably omitted by a state, attributable to it as such and without the slightest doubt involving its international responsibility, is accompanied by the existence of participation by another State. . . .” Roberto Ago, Seventh Report on State Responsibility, 1978 Y.B. INT’L L. COMM’N 31, 52.

On its face, the ILC Commentary’s formulation of “with a view to facilitating” suggests actual intent on the part of the assisting State. However, it remains unclear whether some lower form of mens rea, such as recklessness, would in some circumstances suffice. The ICJ did not reach the issue of the requisite intent in the Genocide case, as the Court held that Bosnia had not established the threshold requirement of knowledge on the part of Serbia.

“knowledge of the circumstances of the internationally wrongful act,” whereas the ILC’s Commentary, paragraph 1, refers to assistance provided “with a view to facilitating . . . an internationally wrongful act . . . .” Providing further ambiguity, paragraph five of the ILC’s Commentary explains that no responsibility is found unless the State “intended . . . to facilitate the occurrence of the wrongful conduct.”

Another element that sparks controversy is how to ascribe and prove fault for responsible States. Article 16 is virtually an inter-State complicity rule, and similar areas of law, like criminal complicity laws, consider the same challenges with the fault issue. However, in contrast to the criminal law in national jurisdictions, the ILC, in the Commentary specified that “the assisting State [will] only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act.” This conduct does not need to be “essential” to the commission of the wrongful act; rather, a State will be held responsible if it “contributed significantly to that act.” Yet, to be culpable, Article 16 requires the assisting State to know “of the circumstances of the internationally wrongful act.”

Over time, States have expressed divergent views as to their preferred standard of intent as interpreted and presented by ARSIWA. Still, many scholars support the standard of knowledge as interpreted by Article 16’s

196. ARSIWA, supra note 176, art. 16; Goodman & Jackson, supra note 179.
197. ARSIWA, supra note 176, art. 16, cmt. 1; Goodman & Jackson, supra note 179.
199. Goodman & Jackson, supra note 179.
200. ARSIWA, supra note 176, art. 16 cmt. 1.
201. Id. art. 16, cmt. 5.
202. Id. art. 16, cmt. 4.
203. Id. art. 16, cmt. 1.
However, this debate continues and the current general rule on State complicity only requires knowledge “of the circumstances of the internationally wrongful act.”

Critically though, the high bar of State knowledge of wrongful intent should not absolve States of their international “responsibility for complicity in situations where wrongful acts are [obviously] being committed.” For example, if State X regularly exports military supplies to State Y (who systematically violates international human rights by repressing its ethnic minorities) and State Y utilizes these supplies to violate those human rights, State X should not be absolved of their responsibility by claiming that it did not intend or desire to support such wrongful acts. The challenge is applying ARSIWA Article 16 in cases where there is no precedent and room for interpretation in the courts.

In cases where intent may not be explicitly found to prove state responsibility, some advocates and scholars hold the view that it may be possible to infer intent where the “assisting State’s knowledge of the circumstances approaching something close to practical certainty that the principal wrong will occur.” Put differently, “as a matter of general legal principle States must be supposed to intend the foreseeable consequences of their acts.” Taken further, this would mean that despite the assisting State’s purpose for providing assistance, the purpose would not obfuscate its potential legal liability if it knows its aid or assistance is significantly helpful to the principal offending state committing a wrongful act, especially when that wrongful act violates jus cogens norms.

205. Finucane, supra note 195, at 416-17.
206. ARSIWA, supra note 176, art. 16.
207. Id.
208. Id.
209. Goodman & Jackson, supra note 179.
211. For example, in El Masri v. Macedonia, Al Nashiri v. Poland, and Husayn v. Poland, the European Court of Human Rights referenced the general rule on State complicity, codified in ARSIWA Article 16, when it found that the respondent States
As discussed above, State complicity in genocide was considered and discussed for the first time by an international court in the *Bosnia* case,\(^{212}\) assessing the responsibility of Serbia and Montenegro for alleged acts of genocide in Bosnia and Herzegovina. The ICJ considered whether the principle underlying ARSIWA Article 16 applied to the Genocide Convention Article III, which establishes an obligation to punish complicity in genocide.\(^{213}\) The Court saw no reason why it could not refer to ARSIWA Article 16 by analogy.\(^{214}\) Thus, ARSIWA Article 16 and the other ILC rules offer strong support reflecting customary international law and context for analyzing harms and violations that lack precedent in case law.\(^{215}\)


\(^{212}\) *Bosn. & Herz.*, 2007 I.C.J., ¶ 182.

\(^{213}\) *Id.* at 219-29. The case did not involve a situation of inter-state complicity but of aid or assistance to the Republika Srpska, a non-state actor. Generally, non-state actors are not governed by the ARSIWA. *Id.* at 217, ¶ 420. So, the court did not directly apply ARSIWA Article 16 in its ruling, rather discussed it for purposes of analyzing liability. *Id.*

\(^{214}\) *Id.*

Before they could consider complicity in genocide, the *Bosnia* Court addressed the special intent requirement identified in the Genocide Convention, namely the *dolus specialis*, which is specific intent to eliminate or destroy a group as defined in Genocide Convention Article II. In considering whether Serbia was complicit in genocide, the Court pointed out that:

> [T]here is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.

In other words, the complicit State’s responsibility arises where there is knowledge of the offending State’s intent. That said, the meaning and application of the knowledge element, as laid out in ARSIWA Article 16, has also perplexed other governments. Thus,

216. Genocide is distinct from other crimes insomuch 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, ethnic, racial or religious group.’ *Akayesu*, supra note 71, ¶ 498, 517-522.


the reasons for having a clear requirement of what qualifies as “aid or assistance”, are the same reasons that favor a narrower or clearer interpretation of the knowledge element of ARSIWA Article 16. It is equally important to define or quantify “wrongful intent.” In the Bosnia case, the ICJ failed to explicitly set out what the fault element is for complicity in genocide—and possibly ARSIWA Article 16 by implication. Thus, it appears the text of ARSIWA Article 16 then serves as a launching point for interpretation.

ii. State Responsibility for a Serious Breach of Obligations

Some internationally wrongful acts have graver implications than others. Certain acts are considered to breach or violate rights that are so fundamental the breach is considered one that violates humanity collectively. These acts are considered grave breaches of peremptory norms under laws of State responsibility. State responsibility for a “serious breach of a peremptory norm” is codified in ARSIWA Article 40.

To invoke responsibility for such a breach, it must be established that (1) the norm is “peremptory” and (2) the breach is “serious.” The ARSIWA commentary depicts an international norm as peremptory by requiring the recognition by “international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.” Within the ARSIWA, specific peremptory norms are identified, along with the provision that “new peremptory norms of general international law may come into existence through . . . acceptance and recognition by the international community of States as a whole . . . .” The prohibition of genocide as defined under the Genocide Convention, including the obligation to prevent and punish governments of Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden, and Denmark), Republic of Korea, and the U.S.).

220. Nahapetian, supra note 140, at 104-06; Quigley, supra note 140, at 358-62.
221. ARSIWA, supra note 176, art. 40.
222. Id.
223. Id.
224. Id. art. 40, cmt. 2.
225. Id. art. 40, cmts. 4-5. These include the right to self-determinism and the prohibitions on apartheid, genocide, and torture. Id.
226. ARSIWA, supra note 176, art. 40, cmt. 6.
genocide, is one such peremptory norm under international law. Therefore, to be complicit and aid or assist in genocide would also breach a peremptory norm.

The breach of a peremptory norm must also be serious. A breach of an obligation is “serious” when it “involves a gross or systematic failure by the responsible State to fulfill the obligation.” The Articles provide that:

> [G]ross refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule . . . Factors which may establish the seriousness of a violation would include the intent to violate the norm; . . . the scope and number of individual violations; and the gravity of their consequences for the victims.

Part I and II outlined the widespread, systematic use of rape and forced pregnancy in armed conflict, historically and globally. Consequently, a State’s denial of access to abortion for women and girls further perpetuates the harm caused to these victims and is a “gross” violation of that State’s obligation to prevent genocide and refrain from aiding and assisting the furtherance of the genocidal act.

Further, an analysis of the ARSIWA articles on serious breaches of obligations under peremptory norms of general international law (Articles 40 and 41) considers the moving away of an intent requirement. Article 41(2) defines a duty of non-assistance or aid to

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227. *Id.* art. 40, cmt. 4.
228. *Id.* art. 40(2).
229. *Id.* art. 40, cmt. 8.
230. *Id.* Ch. III, cmt. 7.

[I]t is necessary for the Articles to reflect that there are certain consequences flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which ICJ has given of obligations towards the international community as a whole, all concern obligations which, it is generally accepted, arise under peremptory norms of general international law.
a State committing genocide.\textsuperscript{231} While intended to be read in connection with ARSIWA Article 16, it does not require the same level of knowledge or intent by the alleged complicit state.\textsuperscript{232} Therefore, considering violations of \textit{jus cogens} (genocide, for example), there is a stricter rule against complicity.\textsuperscript{233} Notably, the ILC lowered the standards of attribution, limited only to the realm of serious or grave breaches of peremptory rules, like genocide.\textsuperscript{234} The lack of a subjective element in Article 41(2) is motivated by the fact that “it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.”\textsuperscript{235} This still leaves some ambiguity about how Article 41(2) can be applied and to what degree the intent and knowledge requirements are measured.

The relationship between the serious breaches’ regime under ARSIWA Articles 40 and 41, Article 16, and the primary rules on complicity under international law can be interpreted to be interconnected as follows: Article 16 provides more of a general rule on complicity, and therefore, can be viewed to have the most restrictive interpretation out of each rule. The serious breaches Articles 40 and 41 not only go further because of the importance that the international community attaches to values sought to protect,\textsuperscript{236} but also because there is a presumption that serious violations of peremptory norms are clearly identifiable.\textsuperscript{237}

Rape and forced pregnancy as genocide has not always been so clearly identifiable in the legal sense. Unfortunately, there is no

\textsuperscript{231} Id. art. 41(2). “In particular, the concept of aid or assistance in article 16 presupposes that the State has ‘knowledge of the circumstances of the internationally wrongful act’. There is no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.” Id. art. 41, cmt. 11.

\textsuperscript{232} Id.

\textsuperscript{233} This still is not clear-cut and is contingent on the interpretation. The scope of application of Article 41(2) is not easy to determine. Generally, it applies “after the fact” while being applicable regardless of whether the internationally wrongful act is continuing or not. See ARSIWA, supra note 176, art. 41, cmt. 11.

\textsuperscript{234} Id.

\textsuperscript{235} Id.


\textsuperscript{237} ARSIWA, supra note 176, art. 41, cmt. 1.
shortage of violent events of alleged genocide to consider how best to allocate State responsibility. The Russian commission of genocide in Ukraine presents an opportunity to consider how relevant and applicable these doctrines are. Particularly so when it comes to ascribing responsibility to States, even if they are not a party to the conflict, but who are obligated to respond under international law.

IV. WHY DENIAL OF ABORTION ACCESS TO UKRAINIAN REFUGEE VICTIMS OF FORCED PREGNANCY MAKES POLAND COMPLICIT TO GENOCIDE

Investigations are underway in Ukraine by international agencies, such as the U.N. Security Council, and by domestic investigations spearheaded by the State prosecutor. They are finding repeated instances of systematic rape perpetrated with the explicit intention to traumatize, shame, and horrifically exterminate a population. Erik Mose, Chair of the Independent International Commission of Inquiry on Ukraine, recently stated that while they found a “wide range of war crimes’ in Ukraine,” investigators have yet to find “conclusive proof” of genocide. However, many other experts believe there is sufficient evidence to name the Russian assault on Ukraine as genocide.


A. Russia’s Genocide in Ukraine

There is no question that the Russian Federation’s second invasion of Ukraine in February 2022 was rooted in imperial, genocidal intent. The evidence is continuing to mount as new cities are being liberated. The liberation of Kherson in early November 2022, for many, renewed hope as Ukrainians celebrated a landmark victory over Russia’s invading army. Within a few short weeks, the mood pivoted to unimaginable grief and rage as the Ukrainian authorities uncovered evidence of war crimes—including sexual violence and rape—committed over the span of eight months of Russian occupation.

This horrific tactic reportedly continues to be repeated in hundreds of liberated villages, towns, and cities throughout northern and eastern Ukraine. In each liberated city, retreating Russian troops left behind mass graves, torture chambers, sexual violence, and deeply traumatized communities. The similarity and patterns revealed by specific reports


244. See Samya Kullab, One Year After Liberation, Ukrainians in Kherson Hold on to Hope Amid Constant Shelling, ASSOCIATED PRESS (Nov. 11, 2023, 1:29 PM), https://apnews.com/article/ukraine-russia-kherson-liberation-counteroffensive-9ce0a29c0f9e513ce99ff56ec22fc3685.

245. Ukraine: Rape and Torture by Russian forces continuing, rights experts report, UN NEWS (Sept. 25, 2023), https://news.un.org/en/story/2023/09/1141417; text=Rape%20allegations%20or%20commission%20or%20other%20violations; Sam Mednick, Torture Allegations Mount in Aftermath of Kherson Occupation, ASSOCIATED PRESS (Nov. 28, 2022, 11:32 PM), https://apnews.com/article/russia-ukraine-europe-f2735ae0c8c436b9198c6458f68f6901. “Ukrainian national police allege that more than 460 war crimes have been committed by Russian soldiers in recently occupied areas of Kherson.” Id. People in the city allege they were tortured, confined, beaten, shocked with electricity, threatened with death and sexual violated. Id. The torture in the city took place in “two police stations, one police-run detention center, a prison and private medical facility.” Id. Inside, Ukrainian Police found rubber batons, baseball bats, and a machine used for administering electric shock. Id.

246. See U.N.S.G. Report on Ukraine, supra note 239; Kostin, supra note 238.

247. Kostin, supra note 238; see Hook supra note 241, 50-52.
of civilian suffering throughout each region highlight that these crimes result from “deliberate Kremlin policy” rather than the rogue actions of individual Russian army units.”

Putin’s genocidal intent is evidenced in other ways throughout Ukraine. In some areas of Ukraine occupied by the Kremlin, symbols of Ukrainian statehood have been removed, leaving behind “a new Russian imperial identity” imposed on the Ukrainian population. Teachers have been brought in from Russia to indoctrinate and “Russify” Ukrainian children. The Ukrainian language is discouraged and suppressed. Access to Ukrainian media has been blocked and prohibited.

248. Peter Dickinson, Vladimir Putin’s Ukrainian Genocide: Nobody Can Claim They Did Not Know, ATL. COUNCIL (Dec. 1, 2022), https://www.atlanticcouncil.org/blogs/ukrainealert/vladimir-putins-ukrainian-genocide-nobody-can-claim-they-did-not-know/ [hereinafter Dickinson, Putin’s Genocide]. At the State Department briefing in November 2022, U.S. Ambassador-at-Large for Global Criminal Justice, Beth Van Schaack, said “evidence of Russian war crimes [in Ukraine,] collected by nongovernmental organizations, the media and dedicated war crimes investigators is extensive.” Rob Garver, US Accuses Russia of ‘Systemic’ War Crimes, VOA NEWS (Nov. 22, 2022, 7:21 PM), https://www.voanews.com/a/us-accuses-russia-of-systemic-war-crimes-/6846332.html. Van Schaack reported that “[t]he aggression against Ukraine is a manifest violation of the U.N. Charter, and we have mounting evidence that this aggression has been accompanied by systemic war crimes committed in every region where Russia’s forces have been deployed . . . This includes deliberate, indiscriminate, and disproportionate attacks against the civilian population and elements of the civilian infrastructure. We’re seeing custodial abuses of civilians and POWs and efforts to cover up these crimes . . . [T]he evidence suggests that ‘these atrocities are not the acts of rogue units or individuals. Rather, they are part of a deeply disturbing pattern of reports of abuse across all areas where we’re seeing Russia’s forces engage.’” Id. Van Schaack pointed specifically to “filtration” camps, where a number of Ukrainian civilians, including children, were processed and deported to Russia. Id. “[T]he scale of the operation suggests the Kremlin’s direct support.” Id. There have also been reports of Russian soldiers stating they are on a “de-Nazification” mission. U.N. S.G. Report on Ukraine, supra note 239, ¶ 24; Peter Dickinson, Goodwill Gestures and De-Nazification: Decoding Putin’s Ukraine War Lexicon, ATL. COUNCIL (June 30, 2022), https://www.atlanticcouncil.org/blogs/ukrainealert/goodwill-gestures-and-de-nazification-decoding-putsins-ukraine-war-lexicon/.


250. Dickinson, Putin’s Genocide, supra note 248; Robyn Dixon, Russia Sending Teachers to Ukraine to Control What Students Learn, WASH. POST (July 18, 2022, 3:00 AM), https://www.washingtonpost.com/world/2022/07/18/russia-teachers-ukraine-rewrite-history/.


252. Dickinson, Putin’s Genocide, supra note 248; Dixon, supra note 240.
These instances are clear violations of the Genocide Convention Article II.\textsuperscript{253} If these circumstances were not enough evidence to show genocidal intent on the part of Russia, there is conclusive evidence that Putin abducted Ukrainian children and placed them in adoptive Russian homes with new Russian passports and a narrative their parents and homeland did not want them.\textsuperscript{254} Long before Russian tanks crossed the border in early 2022, Putin’s intention to extinguish Ukrainian statehood and eradicate Ukrainian nationality was hard to deny.\textsuperscript{255} The

\textsuperscript{253.} Genocide Convention, \textit{supra} note 22, art. II (“In the present Convention, 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: . . . (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; . . . ”).

\textsuperscript{254.} Carlotta Gall et al., \textit{Ukraine’s Stolen Children}, N.Y. TIMES (Dec. 27, 2023), https://www.nytimes.com/interactive/2023/12/26/world/europe/ukraine-war-children-russia.html. Putin, President of the Russian Federation, is “allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). The crimes were allegedly committed in Ukrainian occupied territory at least from [February 24, 2022]. There are reasonable grounds to believe that Mr. Putin bears individual criminal responsibility for the aforementioned crimes, (i) for having committed the acts directly, jointly with others and/or through others (article 25(3)(a) of the Rome Statute), and (ii) for his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility (article 28(b) of the Rome Statute).” Press Release, Int’l Crim. Ct., Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

\textsuperscript{255.} Sen, \textit{supra} note 219. In a speech that took place the day before the invasion in 2022, after previously claiming that “Ukraine is not even a state,” Putin repeatedly referenced Ukraine as artificial, suggesting “he may also be leaving himself the option of declaring all of Ukraine to be a historical invention, serving to justify a wider invasion.” Max Fisher, \textit{Word by Word and Between the Lines: A Close Look at Putin’s Speech}, N.Y. Times (Feb. 23, 2022), https://www.nytimes.com/2022/02/23/world/europe/putin-speech-russia-ukraine.html. \textit{See also}, Michael Schwitz, et al., \textit{Putin Calls Ukrainian Statehood a Fiction. History Suggests Otherwise}, N.Y. TIMES (Feb. 21, 2023), https://www.nytimes.com/2022/02/21/world/europe/putin-ukraine.html (“Putin declared Ukraine an invention of the Bolshevik revolutionary leader, Vladimir Lenin, who he said had mistakenly endowed Ukraine with a sense of statehood by allowing it autonomy within the newly created Soviet state. ‘Modern Ukraine was entirely and fully created by Russia, more specifically the Bolshevik, communist
criminal actions of his army have since matched his menacing statements.\textsuperscript{256} Apologists and sympathizers may have been able to dismiss the Russian dictator’s genocidal rhetoric as mere political hyperbole at an earlier point, but that is no longer possible.\textsuperscript{257}

\textbf{B. Rape and Forced Pregnancy: Weapons of Genocide in Ukraine}

Along with these other horrific acts of genocidal violence, Russians are reportedly using darker and more insidious tactics to eradicate the Ukrainian identity and “assimilate” the Ukrainian people back to their “motherland” roots.\textsuperscript{258} The systematic and seemingly organized use of rape—and subsequent forced pregnancies—appears to be beyond the scope of a mere tactic of traditional war. The use of rape is a Russian genocidal tool.\textsuperscript{259} The pattern of how rape is used in many of the cities, the reported intent as communicated by the actual perpetrators committing the violence, reports of soldiers equipped with Viagra, combined with the seemingly “top-down” mandate and motivation behind these systematic rapes, all point to Russians using rape with the intent and furtherance of genocide in Ukraine.\textsuperscript{260}

Rape is used against Ukrainian women and girls to shame, humiliate, brutalize, torture, and in some cases, as a precursor to death.\textsuperscript{261} The horrific revelation is that many instances of rape are reported with the revelation it is committed with the intent to impregnate in order to “cleanse the bloodline,” “de-nazify” Ukrainians, Russia,” Mr. Putin said. “This process began practically immediately after the 1917 revolution, and moreover Lenin and his associates did it in the sloppiest way in relation to Russia—by dividing, tearing from her pieces of her own historical territory”.

\begin{itemize}
\item \textsuperscript{256} Garver, \textit{supra} note 248.
\item \textsuperscript{257} Kostin, \textit{supra} note 238.
\item \textsuperscript{258} Dixon, \textit{supra} note 240; Dickinson, \textit{Putin’s Genocide, supra} note 248.
\item \textsuperscript{259} Sexual violence and rape of any kind in any situation is egregious and horrific. The Author in no way aims to minimize it here, rather only intends to reveal that Russia’s use of rape and forced pregnancy is committed with a genocidal intent.
\item \textsuperscript{261} See U.N. S.G. Report on Ukraine, \textit{supra} note 239, ¶¶ 88-98; King, \textit{supra} note 57.
\end{itemize}
and return the people to the “motherland.” Simply put, in cases of genocide or ethnic cleansing, rape is not only used to brutalize but to force pregnancies. It seems clear, not just in instances of each individual rape reported and yet to be reported, but when taken in the context of the very motivation of Russia’s violence and offensive against Ukraine. In its totality, the intent to use rape as an act to further genocide is to dilute or cleanse Ukrainian bloodlines and even further the offending “superior” race. This “cleansing” is achieved when pregnancies occur as a result of rape, and there is no option available to terminate these unwanted pregnancies.

Ukrainian women who are raped, forcibly made pregnant, and who then survive the violence, face grave and limited options. There are devastating implications of Russia’s attacks with clear intent to dismantle the very fabric of society in Ukraine, including the destruction and resulting restriction of necessities, including water, electricity, food, and safe shelter. This also includes the resulting restriction on available reproductive healthcare services. Access to doctors, clinics, or safe abortion options is either severely diminished or entirely impracticable for many Ukrainian women who remain in Ukraine. Whether as a downstream consequence of active war or as a lingering consequence of Russian occupation in a region where infrastructures have been bombed and most everyone has fled, the impact on women’s reproductive health is severe.

Fleeing the country is often the safest—and sometimes the only—option for a Ukrainian woman’s survival. Regardless of her reasons for


263. See Gall, Torture in Ukraine supra note 14; Limaye, supra note 17. “Ukraine’s ombudsman for human rights reported that not only did Russian forces hold dozens of Ukrainian girls and women as sexual slaves, but the soldiers also said they hoped that as a result their captives would recoil from sex in the future and thus not bear Ukrainian children. That is genocide wrapped in gender-based sexual violence. The soldiers could have killed the women and girls to prevent reproduction. But they chose to inflict sexual harm as a sign of their power.” Sharon Block, The Rape of Ukraine, THINK (Apr. 25, 2022) https://www.nbcnews.com/think/opinion/ukraine-russia-war-crimes-spotlight-soldier-rape-strategy-rcna25903.


265. Amie Ferris-Rotman, Ukraine’s Women Refugees Face the Harsh Reality of Poland’s Abortion Restrictions, TIME (June 21, 2022, 12:24 PM), https://time.com/6188502/ukraine-women-poland-abortion-ban/ (explaining how the war in Ukraine puts a strain on health care and women’s reproductive services).
leaving her country in response to armed conflict or war, typically, a woman’s options are limited, and she will have to flee to the closest neighboring countries. Ukrainian women and girls who end up in Poland are met with another limitation which perpetuates the gross violations committed against them initially by Russia. Poland has some of the strictest abortion laws in Europe. It is technically legal to receive an abortion up to twelve weeks of pregnancy, but only in cases of rape, incest, or if the pregnant person’s life is in danger. Still, activists and statistics show that, in actuality, no abortions are performed under the rape exemption. In cases where the woman is a victim of genocidal rape and got pregnant as a result, if she is displaced to Poland, she will face the harsh reality of an almost total ban on abortion and thus be denied an abortion if she wants one, even if her forced pregnancy was an act of genocide.

\[\text{266. Here’s what we know about the 1 million women and children who have already fled Ukraine, INTERNATIONAL SECURITY: WORLD ECON. FORUM (Mar.9, 2022), https://www.weforum.org/agenda/2022/03/women-flee-and-show-solidarity-as-a-military-offensive-ravages-ukraine/}.\]

\[\text{267. Ferris-Rotman, supra note 265.} \]


\[\text{269. Adams, supra note 19, (“In practice, activists and providers say, abortions for rape victims are almost never performed. ‘The rape exception is meaningless,’ says Mara Clarke, founder of the London-based Abortion Support Network. ‘You have to prove that you were raped with a certified letter from a public prosecutor. Expecting that anyone, Polish or Ukrainian, will be able to file a criminal complaint and obtain a conviction in time to access an abortion is ludicrous.’”)}\]

\[\text{270. Id.; Robert Biedroń, ‘Not One More’ Woman Can Fall Victim to Poland’s Abortion Laws, POLITICO (Dec. 31, 2022, 4:04 AM), https://www.politico.eu/article/women-victim-poland-abortion-laws/; Gioanna Coi, Abortion Laws in Europe in 4 Charts, POLITICO (May 3, 2022, 6:34 PM), https://www.politico.eu/article/abortion-chart-world-map-europe-law-illegal-roe-v-wade-legislation/ (“In Poland, however, the Constitutional Tribunal rolled back women’s right to terminate pregnancies in 2020, ruling that women can undergo an abortion only in cases of rape, incest, or if their life is in danger.”).}\]

\[\text{271. Adams, supra note 19; Biedroń, supra note 270. Though technically, abortion is legal up to 12 weeks only in cases of rape, the requirements to prove the}\]


C. A Crisis of No Choice: Ukrainian Women Denied Abortions in Poland

There are limited options available to a victim of genocidal rape, especially when she is a refugee seeking an abortion. She can seek out an unsafe abortion; she can carry her unwanted pregnancy full term, which increases her risk of maternal mortality; or, out of desperation, she can commit suicide.\(^{272}\) It is clear that when rape is used as a weapon to commit genocide against a protected group (racial, ethnic, religious, or national group), and then the victims of that rape are denied abortions, the forced pregnancy ensures the woman gives birth to the “child of the enemy,” further perpetuating the genocidal intent of the perpetrators.\(^{273}\)

There is a strong argument that there should be legal implications and liability for States to not only protect victims of genocide, but to help prevent the furtherance of genocide, particularly on their own soil.\(^{274}\) Imagine a woman who is forced to carry a pregnancy resulting from a rape at the hands of a perpetrator who committed these atrocities as part of a campaign to eradicate her Ukrainian identity. In that case, the culmination of the birth of the child is a direct result of the original genocidal act. The denial of abortion access by a State could be viewed as meeting the standards of liability for complicity in that genocidal act—both under the Genocide Convention’s rules of complicity and under ARSIWA Article 16.\(^{275}\) Here, not only is Poland failing to alleviate suffering, but by denying access to abortions, it is ensuring women and girls will experience further trauma by forcing them to carry to term an unwanted pregnancy.

\(^{272}\) See GJC Report, supra note 11, at 1.

\(^{273}\) Id.

\(^{274}\) The Republic of Poland is a member state to the United Nations, and is a party to the Genocide Convention, but also simply being a member of the international community means they have an obligation to prevent genocide, as genocide is an \textit{erga omnes} obligation. Marko Milanović, \textit{State Responsibility for Genocide}, 17 EUR. J. INT’L L. 553, 563-64 (2006).

\(^{275}\) See Genocide Convention, supra note 22, art. III; ARSIWA, supra note 176, art. 16, cmt. 11.
D. Holding Poland Liable for Complicity to Genocide: Building the Case

The potential for bringing a claim against Poland for denying abortions to Ukrainian refugee women, arguing that such denial constitutes complicity to genocide, can be considered in two different ways. The first approach is a claim brought by Ukraine alleging Poland to be complicit in genocide on behalf of its citizens who are denied abortions in Poland. The second approach includes individual claims brought by the victims themselves. By utilizing the theory of State responsibility, along with pertinent international laws, one must analyze the proper jurisdiction, required evidence, legal theories of liability, and challenges associated with bringing a successful claim against Poland for complicity in genocide.

i. Jurisdiction and Possible Plaintiffs

The ICJ, as the principal judicial organ of the U.N., possesses jurisdiction over disputes between States.276 If a State, such as Ukraine, alleges another State’s, such as Poland’s, actions constitute a breach of its obligations under international law, it could bring a claim before the ICJ.277

However, individuals who wish to bring claims either as a victim or on behalf of a victim, may be brought before regional human rights courts, such as the European Court of Human Rights (“ECtHR”). The ECtHR is a regional human rights court that has jurisdiction over


277. Id.
member States of the Council of Europe, including Poland. It considers cases alleging violations of the European Convention on Human Rights ("ECHR"), including violations of the right to life, the right to be free from torture and inhuman or degrading treatment, and the right to private and family life. Claims could be brought against Poland for failing to protect the rights of Ukrainian women under the ECHR provisions. Plaintiffs in this jurisdiction may include affected Ukrainian women, human rights organizations, or the Ukrainian government acting on behalf of the victims.

By the end of 2023, though there is momentum, a special tribunal has yet to be established for investigating and trying war crimes and crimes against humanity related to the Russian invasion and war against Ukraine. Should an ad-hoc tribunal be established, it would likely serve as an alternative court with jurisdiction to try a case brought against Poland.


Regardless of the court of jurisdiction or possible plaintiffs, the defendant in all cases would generally be the state of Poland itself. The claim would be brought against Poland rather than against individual government officials or entities. This is because the actions of denying access to abortions are typically attributed to the State as a collective entity and its policies or laws.\footnote{See, e.g., Case of M.L. v. Poland, App. No. 40119/21 (Dec. 14, 2023), https://hudoc.echr.coe.int/eng?i=001-229424.} In Poland, the government entity responsible for establishing abortion laws is the legislative branch of government.\footnote{For a brief history on abortion laws and Parliamentary legislation in Poland, see Marta Bucholc, Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon, 14 Hague J. Rule L. 73, 80-84 (2022). In 2020 the ruling of the Polish Constitutional Tribunal further reduced the conditions under which an abortion is legal in Poland, “it is not a legal prohibition on abortion, but very nearly so”, see id., at 75. For more on the current implications of Poland’s restrictive abortion laws, see Poland: Abortion Witch Hunt Targets Women and Doctors, HUM. RTS WATCH (Sept. 14, 2023), https://www.hrw.org/news/2023/09/14/poland-abortion-witch-hunt-targets-women-doctors#:~:text=Polish%20law%20permits%20abortion,pregnant%20women%20refused%20terminations%20demonstrate, (Since a near-ban on legal abortion in 2020, Polish officials have increasingly opened investigations on questionable legal grounds against women and girls seeking medical care for miscarriages or after legal medication abortions, as well as against doctors. Polish law does not criminalize having an abortion but does so for anyone who provides or assists someone in having an abortion outside of highly restricted grounds.)} Specifically, the Parliament of Poland, which consists of two chambers, the Sejm (lower house) and the Senate (upper house), has the authority to enact and amend laws—including those related to abortion.\footnote{See Bucholc, supra note 283, 80-84. For information on Poland’s legislative structure, see Inter-Parliamentary Union, Poland, https://data.ipu.org/node/135/law-making-oversight-budget?chamber_id=13495, (last visited May 20, 2023).} The legislative process involves the introduction, the discussion, and the vote on proposed legislation by Members of Parliament.\footnote{Inter-Parliamentary Union, supra note 284.}
on abortion-related legislation. Therefore, bringing a claim against the government of Poland would be the appropriate defendant.

**ii. Theory of State Responsibility & Possible Claims**

Under the theory of State Responsibility outlined in ARSIWA, Poland should be held accountable for complicity to genocide by denying abortions to Ukrainian women. As laid out in Part III, Poland has an obligation to prevent and punish acts of genocide. It may be held complicit to the genocidal acts of forced pregnancy if it fails to take action to *prevent* or punish these acts or if it contributes, by act or omission, to the commission of acts of genocide. Under these obligations, by denying access to abortions, Poland is contributing to the perpetuation of harm against victims of rape, thus failing in its duty to prevent and protect against acts of genocide. Be it State responsibility or breach of a peremptory norm, the underlying claim here is alleging complicity to genocide. By alleging Poland, through its policies or actions, systematically denied access to abortions to refugee women who are victims of genocidal rape, Poland itself bears responsibility for complicity to genocide. To bring a successful claim, there must be the existence of genocide, an act of complicity, knowledge of genocidal acts, control or influence, and a failure to act.

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The Existence of Genocide: The plaintiff must first demonstrate the underlying act of genocide has occurred.\textsuperscript{290} In this case, Russia committed genocide against the people of Ukraine.\textsuperscript{291} Genocide encompasses acts which are committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.\textsuperscript{292} This involves proving the occurrence of specific acts, such as killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures to prevent births, or forcibly transferring children from the targeted group.\textsuperscript{293} There are growing reports of genocidal acts by the hands of Russian soldiers, including rape as a tactic of genocide, leading to forced pregnancy.\textsuperscript{294} That said, the evidence needed to support these claims, by the very nature of the crime, is difficult to gather.\textsuperscript{295} It must be established that the perpetrating party possessed the specific intent to destroy, in whole or in part, the protected group.\textsuperscript{296} This requires proving the perpetrator acted with the knowledge of the genocidal intent or shared the common intent of others engaged in the genocidal acts. In the present case, forced pregnancy should be considered an act of genocide under the Genocide Convention Article II(e).

Forced pregnancies resulting from rape during the war in Ukraine should be viewed as a method employed by the Russian forces to destroy the Ukrainian group.\textsuperscript{297} This strengthens the case for complicity to genocide against Poland, as its denial of abortions furthers the suffering inflicted on Ukrainian women.

\begin{itemize}
\item \textsuperscript{290} Id. ¶ 157.
\item \textsuperscript{291} See supra Part IV(A).
\item \textsuperscript{292} Genocide Convention, supra note 22, art. II. See supra Part II.
\item \textsuperscript{293} Id.
\item \textsuperscript{294} King, supra note 57; U.N. Women, supra note 54; U.N.S.G. Report on Ukraine, supra note 239.
\item \textsuperscript{295} Press Release & Meeting Coverage: Strongly Condemning Rise in Conflict-Related Sexual Violence, Speakers Urge Security Council to Better Prevent, Enforce Accountability for Such Crimes, SC/15357 (July 14, 2023), https://press.un.org/en/2023/sc15357.doc.htm, (“Noting that over 90 per cent of survivors never report the abuse to the police, owing to a lack of faith or trust in the justice system, and that conviction rates of reported cases are “shockingly low”…”). See also Gall, supra note 7; Yaffa, supra note 62.
\item \textsuperscript{296} See supra Part II; Genocide Convention, supra note 22, art. II.
\item \textsuperscript{297} Ukraine: Rape and Torture by Russian, supra note 245; U.N. Women, supra note 54.
\end{itemize}
However, evidentiary proof here will also be challenging. When the perpetrators of rape are soldiers, who are often on the move during active conflict, it may be hard to identify the specific individuals. In some cases, the perpetrating soldiers may not survive the conflict. Some victims and witnesses have come forward with testimony that perpetrators have verbally indicated their genocidal intent in raping and impregnating Ukrainian women in besieged cities.\textsuperscript{298} Even so, finding evidence of the top-down, systematic command to use rape and the resulting pregnancies as an act of genocide, may serve as enough proof to satisfy the “intent to destroy” element. Again, this would require investigative and enforcement bodies to identify and name these acts as genocide. So far, even in light of lessons learned from past genocides, and despite some expert opinions, most governing bodies are unwilling to clearly define Russia’s aggression and violent acts against the Ukrainian people as genocide.\textsuperscript{299}

\textit{Act of Complicity:} Assuming \textit{arguendo} the above element of genocide is met, the claimant must then demonstrate the accused State, Poland, through its actions or omissions, provided substantial assistance or support to the perpetrators of the genocide, Russia.\textsuperscript{300} For Poland, a third-party state, to be held complicit in forced pregnancy, it must first be established that the initial rape was committed with genocidal intent to cause pregnancy.\textsuperscript{301} Established above, there is evidence that the violent attack on Ukraine was perpetrated with the long-seeded intent to commit genocide on the Ukrainian people as defined under the Genocide Convention.\textsuperscript{302}

Under ARSIWA Article 16, a State that aids or assists another in an internationally wrongful act is responsible for that act if the State aids or assists with the knowledge of the wrongful act and that act would

\begin{table}
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298. & Block, \textit{supra} note 263. \\
300. & \textit{See Bosn. & Herz.}, 2007 I.C.J., ¶ 432. \\
301. & \textit{See supra} Part III (B & C). \\
302. & \textit{See supra} Part IV(A); Dickinson, \textit{Putin’s Genocide}, \textit{supra} note 248. Some experts point to Putin’s musing since before and the actual annexation of Crimea, in 2014, as indications of genocidal intent. \textit{See} Kostin, \textit{supra} note 238; Hook, \textit{supra} note 241, at 6-7, 22.
\end{tabular}
\end{table}
be wrongful if the assisting State itself committed it. 303 It would be hard to argue that, by denying abortion access to pregnant, refugee Ukrainian women and girls, Poland was not assisting in the wrongful act of forced pregnancy. The very existence of the unwanted pregnancy, the victim’s account of what happened, and the pursuit of an abortion all would bend towards Poland having knowledge of the circumstances of the wrongful act. Further, Poland would be held to the same international standard as Russia for commissions of rape and forced pregnancy, and as such, the “act would be internationally wrongful if committed” 304 by Poland.

The very act of denying abortions to Ukrainian women and girls who fled to Poland and are victims of rape and impregnated by Russian combatants further perpetuates the genocidal act and the suffering initiated by Russia itself. The birth of a child, in this case, is the culminating event and fulfillment of the intent to eradicate or “cleanse” the “inferior” race or nationality. Because Poland criminalizes abortion and has not created an exemption for refugee women in this case, Poland is, in essence, aiding Russia by way of ensuring that those women have no option to terminate an unwanted pregnancy. Though technically Poland’s abortion laws provide an exception for rape, in practice the exception is rarely, if ever, used or recognized. 305 And particularly Poland’s criminal abortion laws do not allow for exceptions in the case of victims of rape and forced pregnancy during war, which are internationally wrongful acts. Those laws must be amended or revised to meet the requirement to stop the wrongful act.

According to the commentary to the ARSIWA, “[A]ssurances or guarantees of non-repetition may be sought by way of satisfaction (e.g., repealing the legislation which allowed the breach to occur).” 306 In this case, Poland should decriminalize abortion, at the very least, to accommodate victims of rape during armed conflict. 307 The argument

303. ARSIWA, supra note 176, art. 16.
304. Id.
305. Adams, supra note 19.
306. Id. art. 30, ¶ 11.
here is a challenging one as there is no precedent on record indicating that any enforcement bodies who have jurisdiction over claims against a State under international law have ruled another State complicit to genocide by denying abortion access to victims of genocidal rape.

**Knowledge of Genocidal Acts:** A plaintiff must also establish the accused State had knowledge of the genocidal acts or had reason to know about them. This is a difficult element to prove for the principal offense of genocide and equally challenging when alleging the complicity of a third-party state. However, if the court interpreted this element using the plain text reading of ARSIWA Article 16, liability could be applied where there was “knowledge of the circumstances of the internationally wrongful act.” This knowledge could be inferred from circumstances such as public information, reports, or other available evidence. Poland must be shown to have knowledge of the genocidal intent of Russia and knew that withholding or preventing access to abortion would perpetuate and culminate in fulfillment of the intended act of genocide, crime against humanity, or sustained torture. Poland may argue that proving knowledge of Russia’s genocidal intent is too difficult. However, this would not be a strong argument. Poland is not a distant country from the conflict that is cut off from the tangible, everyday encounters with the impacts of the war. Rather, Poland—amassing a Ukrainian population, which, as of the end of 2023 is over two million and counting—feels the impact of the war daily. Poland is providing humanitarian aid, housing, and temporary protected status to millions of Ukrainians, most being women and children. As a member of the U.N., Poland has been privy to U.N.


309. *See ARSIWA, supra note 176, art. 16, cmt. 4; Finucane, supra note 195, at 416-17.*

310. *See supra note Part III(B & C).*


Security Council meetings.\textsuperscript{313} In fact, Poland even went as far as filing a declaration of intervention with thirty-seven other States in the case Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide before the ICJ.\textsuperscript{314} Since early in the conflict, Poland’s Prime Minister Mateusz Morawiecki has been a vocal opponent of Russia’s attack on Ukraine, stating the actions of Russia constitute genocide and called on an international commission to investigate.\textsuperscript{315} Poland, though it may not have been entirely foreseen, knew or should have known that Russia’s attacks, including sexual violence and rape, on Ukrainian women were committed with the requisite intent to commit genocide.

\textit{Control or Influence:} The claimant must demonstrate the accused State exercised some form of control over the perpetrators or had significant influence over their actions.\textsuperscript{316} This can involve showing a direct relationship, command authority, or substantial influence over the genocidal actors.\textsuperscript{317} This element would be difficult to meet given that Poland’s complicity to Russia’s directives and acts of genocide do not come from overt support, control, or influence over Russia’s offenses. Poland would rightly argue it is a third-party state that, in fact, is offering much aid and assistance to those Ukrainian refugees fleeing Russia’s aggression in Ukraine. However, like the Bosnia case, the ICJ found Serbia violated its obligations under the Genocide Convention by failing to prevent the genocide that occurred in Srebrenica.\textsuperscript{318} However,
the Court did not make a specific finding of control or influence over the perpetrators of genocide. The Court’s decision instead focused on Serbia’s failure to prevent genocide, including its failure to take necessary and reasonable measures to prevent the genocide, punish the perpetrators, or provide assistance and support to Bosnia and Herzegovina during the genocide.320

Failure to Act/Omission: In some cases, complicity to genocide can arise from a State’s failure to take necessary and reasonable measures to prevent or suppress genocidal acts. This failure can be attributed to the accused State if it knowingly allowed the commission of genocide to occur. This is evidenced in the Bosnia case.323 Under international law, Poland has an obligation to prevent and punish acts of genocide. It may be held complicit to the genocidal acts of forced pregnancy if it fails to take action to prevent or punish these acts or if it contributes, by act or omission, to the commission of acts of genocide.325

iii. Legal Challenges

Based on these elements under international law, there is a case to be made for holding Poland complicit to genocide for denying victims of genocidal rape access to abortion. However, satisfying each element faces substantial challenges. The predominant challenge is the legal complexity of building a case of this nature. Proving Poland’s complicity to genocide requires establishing a link between Poland’s denial of abortions and the acts of genocide committed by Russian forces. Collecting evidence, such as testimonies, medical records, and expert opinions, to establish causation and intent may pose challenges. Secondly, there is the issue of sovereign immunity. Poland may invoke the defense of sovereign immunity, asserting that it is immune from the jurisdiction of foreign courts. However, exceptions to sovereign immunity exist, such as when a state engages in grave human rights violations.

319. Id.
320. Id. ¶ 425-38.
321. Id. ¶ 145; A Foreseeable Genocide, supra note 160.
323. See supra Part III(C)(i).
324. Genocide Convention, supra note 22; supra Part III.
325. Bosn. & Herz., 2007 I.C.J. ¶ 432
violations or acts contrary to international law. Genocide is a grave violation of human rights in the purest form, so meeting this threshold would not be difficult, pending clear consensus that Russia, in fact, is committing genocide and using rape and forced pregnancy as methods to do so.

Finally, there is lack of consensus and precedent for bringing a claim against a State for complicity in genocide for denying abortion access to refugee victims of genocidal rape. Though there seems to be more willingness from the international community to accept forced pregnancy as an act of genocide, there is only one case where an international court enforced a judgment on an individual holding forced pregnancy a war crime and crime against humanity. Convincing the Courts of the legal recognition of forced pregnancy as a genocidal act and the subsequent complicity to this act against a third party may prove challenging, but as evidenced in the aforementioned analysis, not impossible.

326. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). (This landmark case before the United States Court of Appeals recognized an exception to sovereign immunity for claims of torture. The court held that individuals who commit acts of torture can be held accountable, even if they are acting in an official capacity for a foreign state.); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992). (The Inter-American Court of Human Rights ruled that sovereign immunity does not shield states from their responsibility to provide reparations for human rights violations. In this case, Argentina was held accountable for its failure to investigate and provide remedies for the enforced disappearance of a woman’s daughter during the military dictatorship.); Jones v. the United Kingdom - 34356/06 & 40528/06 (2006) (The European Court of Human Rights held that sovereign immunity does not bar claims against a state for acts of torture committed by its agents. In this case, the court found the United Kingdom in violation of the European Convention on Human Rights for its complicity in the torture of detainees in Saudi Arabia.); In the case of Al-Adsani v. United Kingdom [GC], no. 37112/97, ECHR 2000-XI) (2001.) (The House of Lords in the United Kingdom recognized an exception to sovereign immunity for claims arising from torture, despite the fact that the alleged acts were committed by a foreign state’s agents outside the jurisdiction of the United Kingdom.) Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999.) (In this case, the U.S. District Court held that sovereign immunity does not protect a foreign state from claims of genocide, crimes against humanity, or war crimes. The court ruled that individuals can bring claims against foreign states under the Alien Tort Claims Act for such egregious violations of international law).

327. See Ongwen, supra note 107.
There are other legal theories of liability under international human rights law not explored in this paper that could potentially provide a way forward in compelling reform to Poland’s restrictive abortion laws, which would help Ukrainian refugees. The denial of access to safe and legal abortions infringes upon the right to health, as recognized in various international human rights instruments. Poland’s complicity should be viewed as contributing to the deterioration of the physical and mental health of Ukrainian women, thereby violating their fundamental rights. There may also be an argument that denying abortions to rape victims perpetuates gender-based violence and discrimination. This violates obligations under international human rights law, which prohibits discrimination based on sex and affirms the right to be free from cruel, inhuman, or degrading treatment.

International law in its current form is ill-equipped to provide a clear, unobstructed pathway to justice for victims of genocidal rape and forced pregnancy who are then denied access to abortion if wanted. However, there are some steps Poland should take to avoid violating the human rights of refugee women under their care. Where a state like Poland commits a serious breach of a peremptory norm, the obligations incurred include the duty to “cease the act, if it is continuing” and “to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.” The consequences for a State in this instance are close to the same as the consequences incurred for the commission of an internationally wrongful act.

328. GJC Report, supra note 11, at 22-5.
329. Q&A: Access to Abortion is a Human Right, HUM. RTS. WATCH (June 24, 2022, 5:00 PM), https://www.hrw.org/news/2022/06/24/qa-access-abortion-human-right.
331. GJC Report, supra note 11; Poland: Regression on Abortion Access Harms Women, supra note 330.
332. Id.
333. ARSIWA, supra note 176, art. 30.
334. Id. art. 30, ¶ 6.
VI. Conclusion

What is unfolding in Ukraine at the hands of Russia’s authoritarian leader and repressive government, though unprecedented in some ways, sadly reveals genocide occurring in historically documented ways. Using rape and forced pregnancy as intentional acts of genocide are egregious and horrifying. Ukrainian victims should not be forced to endure further suffering and trauma by carrying to term the unwanted pregnancies resulting from rape because no option for termination is available. Denying abortion access to refugee women who are victims of genocidal rape has profound and severe consequences for victims, particularly when they are displaced. Poland’s restrictive abortion laws serve only to further perpetuate and provide the conditions by which Russia’s genocidal intent culminated in the birth of a child. This is not only morally wrong, but also a violation of international law.

Poland’s archaic, restrictive abortion laws need to change for all women. At minimum, there must be abortion laws with explicit language that, in times of war or armed conflict, local abortion laws do not preclude the provision of access to abortion services to victims of rape and forced pregnancies. By enabling, at the very least, refugee women who are victims of rape, safe access to abortions, Poland could fulfill their obligations under peremptory norms and avoid liability by literally preventing the birth of the child, created with genocidal intent.335

Holding Poland complicit to genocide may be relevant in such circumstances where Poland fails to take action to prevent or punish acts of genocide or actively contributes to the commission of acts of genocide. These provisions not only apply to Poland, but for all countries who are complicit in rape and forced pregnancy as genocide. Bringing a successful claim against Poland for complicity to genocide for rape and forced pregnancy under current international laws would likely face significant legal challenges. However, the possibility of such a claim may motivate legislative reform and conviction for States to ensure access to reproductive health services, including safe abortion, to refugee women who are victims of genocidal rape, to prevent the commission of acts of genocide, and to fulfill their obligations under international law.

335. There have also been calls upon the European Union (E.U.), by women’s rights advocates and international human rights advocates, underway since the 2020 near total ban on abortion was handed down from Poland’s Constitutional Tribunal, to establish structures and laws that provide an option for Polish women, as well as Ukrainian refugee women, options for abortions despite the Polish domestic laws. See Poland: Regression on Abortion Access Harms Women, supra note 330.