The Missing Gender Frame: The Unspoken Tension Around Sexual Violence Crimes in The International Criminal Justice System

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Introduction: Facing My – And Our Collective – Unfamiliarity

The first time I was exposed to the reality of gendered violence, violence that targets certain individuals because of their gender, during conflict was the second semester of my junior year. I was in my fifth class that covered WWII in detail. This class in particular outlined war tactics and movements of the Allied and Axis powers, providing context for our current global political environment. About halfway through the semester, the professor was lecturing on German military activity in France, illustrating the movements for the class on the white board. As he concluded his representation and shifted back to the PowerPoint, he added, "Over this particular movement, it is suspected that somewhere between 50,000 and 100,000 women were raped by traveling soldiers." Then he moved on. I was shocked. I raised my hand and asked if he could go into more detail. He summarized that it was estimated that over the course of the military movement he was outlining, between 50,000 and 100,000 women had been raped between both the Allied and Axis regimes. I could not believe it.

I was not only shocked by the number of attacks but also by the fact that this was the first time I was learning about any such violence. I was in my fifth class covering WWII history at the collegiate level, and this was the first time I had even heard of gendered and targeted violence. After class I did some more digging on sexual violence during WWII and found that the numbers my professor referenced were actually minimal compared to the projected total number of female rape victims in WWII. It is estimated that 2 million German women were raped by the Soviet Red Army soldiers during the war.[1] I could not get over the exclusion of such widespread sexual

[1] Walter S. Zapotoczny, "The Russian Army in Germany: 1945," in *Beyond Duty: The Reasons Some Soldiers Commit Atrocities* (Fonthill Media, 2017).

violence from my education, and I was determined to learn more about sexual violence during conflict. That exploration led me to this project.

In the subsequent pages, I will explore the phenomenon of sexual and gendered violence during war. When I began this venture, I set out to answer the question, "What is it about sexual violence crimes that makes them different from other crimes against humanity such that we do not talk about them?" In pursuit of an answer, I will provide a summary of some of the leading scholars' work on gender imbalance, as well as the writings of practitioners in the field. Then, I will outline the history of prosecuting sexual violence and gendered crimes in the international criminal justice system (ICJS). I will explore case studies from the ICJS and track the development of precedent that has led to the current international justice approach in use today. I will utilize interviews I conducted with leading practitioners in the field to explore the ICJS from the view of those working inside it. I will explain my method for the questions I asked – ranging from their view of their role to the justice priorities of those working in international criminal courts – and the answers I received. Finally, I will close this project by concluding that we have a gender framing problem that spans from domestic policy to that at the highest level of international criminal justice. I will argue that our inability to verbalize the gender imbalance in our society inhibits our legal system from achieving justice for female victims of sexual violence.

I will argue that in order to truly achieve justice for sexual violence crimes, we have to be able to address that on top of rape being an atrocious crime – as the ICJS has established through convictions over the past three decades – it is also a gendered crime. I will maintain that because of the gendered nature of sexual violence, rape is distinctive from other crimes against humanity as it targets victims based on gender. I will argue that only through addressing sexual violence

crimes committed against women as gendered crimes can we achieve justice for women as women.

Throughout this analysis, I maintain that the ICJS employs criminal law to promote social good. In my estimation, the ICJS is promoting a broader socioeconomic and spiritual understanding of sexual violence for a particularly heinous form of crime. I make the distinction that no legal institution fights against the rule of law, rather, that changes are slow moving because progress has to be purposeful. I also maintain that the ICJS has made positive steps toward adjudicating sexual violence, even though there is a missing gender frame. I argue that we can continue to make our system better by acknowledging the gendered nature of sexual violence crimes. I will suggest that the effort to address the legacy of sexual violence should begin with education, as we can only tackle the problem if the public knows it exists.

Chapter 1: Literature Review

Rape as a war crime is not a new idea. Rather, it has been a tool of domination for actors in conflict for centuries.[2] The first recorded tribunal for war crimes – held in 1474 for German military leader Peter von Hagenbach – featured rape as a prominent portion of the conviction. But, in the centuries that followed, sexual violence was sparsely mentioned in military convictions or trials. By the time the Nuremberg Trials were conducted following WWII, rape was all but excluded from the court proceedings and entirely absent from the convictions. However, that is not to say that no progress has been made. In the past century, the international criminal justice system (ICJS) has been completely transformed. Formal tribunals were established and have convicted and sentenced those guilty of mass atrocity crimes. The International Criminal Court (ICC), the newest organism of the ICJS, is a staple of international justice and sets precedents for the adjudication of war crimes with its convictions.

Over the past three decades there has been increased scholarship in the field of rape as a war crime, prompted both by the civil society interest in the issue and the increasing international attention paid to women's rights and sexual violence. This work spans countries and ideologies. Scholars and field actors alike contribute to the body of work, studying the use of rape in conflict and the evolution in the legal treatment thereof. It is my view, for the reasons outlined throughout this project, that the developments in the treatment of rape in the ICJS have been path dependent. Each conviction delivered in the system is informed by the work of the preceding trials. It is also my view that expansion in approach and conception of gendered violence in the

[2] Linda Grant, "Exhibit Highlights the First International War Crimes Tribunal," in *Harvard Law Today* (15 Apr. 2020), today.law.harvard.edu/exhibit-highlights-the-first-international-war-crimes-tribunal/. The first known war crime was that of Peter von Hagenbach, who, in 1474, was tried and convicted by the first international criminal tribunal. His crimes included that of "violation of 'the laws of God and man,' specifically murder, rape and perjury."

ICJS can come from the public. Civil society actors have been behind many of the developments that have expanded the equality and treatment of women in the ICJS, as examined in Chapter 2. In a similar vein, with the rise in feminist scholarship like that evaluated in this chapter, we have also seen an elevation in the treatment of sexual violence in the ICJS.

To understand where the recent shifts towards addressing rape and gendered crimes arise from, it is crucial to contextualize and explain existing scholarship. Evaluating the scholarship provides an analytical framework for existing precedents as well as demonstrates the societal underpinnings of the system's development. It is also important to understand the scholarship in relation to justice achieved for the individual. Precedents are born not just out of crimes committed, but from our conception of those crimes. The work of scholars in the gender justice field helps inform our societal gender framework that shapes the conceptions available to practitioners working in the ICJS itself. Where theory ends and practice begins are keys to understanding how we arrived at the current understanding of sexual violence and gendered crimes. To evaluate the state of gender framing in our ICJS, I will examine the recent work of scholars in relation to the ICJS. I will then connect the theorists summarized below to the practitioners interviewed in Chapter 3 and draw conclusions about gender framing from the overlapping observations.

The Reality of Rape Prosecutions

Considering scholarship from before the modern international criminal justice system (ICJS) establishments that now define the field – the International Criminal Tribunal of Rwanda, International Criminal Tribunal for the former Yugoslavia, Rome Statute – is helpful for understanding where our approach to the international treatment of sexual violence stems from.

Susan Estrich offers that context in her article "Rape," published in 1986.[3] Her argument is rooted in a call for systematic change in how rape is handled broadly, and examines precedent in domestic American criminal law to identify the prevailing societal attitude towards women.[4] The article opens with a chilling account of Estrich's own experience being raped. She outlines the systematic inefficacies and biases she had to face when reporting her attack. Her personal summary of her experiences shines a light on the treatment of rape victims: dismissive, unreliable, and unsupportive, according to her accounts. Estrich uses her experience as a starting point from which to analyze and classify the history of rape jurisprudence as racist and sexist. Her argument is rooted in the understanding that rape itself is sexist and racist based on the victims of sexual violence. Her article focuses primarily on the sexism within the crime and its treatment.[5]

Estrich calls for a three-pronged approach to assessing and improving rape law. She outlines this approach in her article, which establishes "first and foremost, a study of rape law as an illustration of sexism in the criminal law."[6] Estrich claims that the definition of and legal approach to rape in criminal law is a representation of the misogyny baked into the system. This claim is also present in the second arm of her approach, which aims "to examine the connections between the law as written by legislators, as understood by courts, as acted upon by victims, and as enforced by prosecutors."[7] Estrich argues that sexist precedents dictate the future of treatment, and thus continue the sexist thread within the criminal justice system. Estrich's argument also holds that because the law itself is designed to impose a male-dominated order, enforcing the law

[3] Susan Estrich, "Rape," in *The Yale Law Journal*, (vol. 95, no. 6, 1986, p. 1087.).
[4] Estrich, Page 1090.
[5] Estrich, Page 1089.
[6] Estrich, Page 1090.
[7] Estrich, Page 1090.

further perpetuates gender imbalance. She argues that the original gendered and racial bias from which our current laws stem from is perpetuated by the nature of legal precedent; the poisoned fruit continues to rot the system. Finally, Estrich argues "for an expanded understanding of rape in the law."[8] Estrich concludes her analysis by calling for a broader, more equitable and applicable legal understanding of rape law. She holds that the current scope of rape law prohibits expansion in its application and limits our legal ability to achieve justice for the victims of rape.

Estrich's analysis and call for change in domestic jurisprudence has implications for international law. Throughout her article, Estrich identifies double standards that exist in the prosecution of rape, which are mirrored in the international spectrum: ambiguity in the term consent, inherent bias towards attackers because of gender, racially rooted implications of guilt, implied permission by female victims, and gendered roles of those involved in the rape. These are all problems in her eyes that are not addressed fully in the criminal justice system.

In Estrich's review of the legal precedents surrounding sexual violence, she makes the point that women are treated inequitably under criminal law when it comes to rape. Her initial example of this double standard is the legal difference between a "real rape" and a non-real rape. In a real rape, in the American legal conception, violence and force are used, the victim doesn't know her attacker, and the attack happens out of the context of daily life.[9] These are the characteristics that make a rape legitimate enough to prosecute under the domestic legal conception, according to Estrich. These qualifications, Estrich points out, are also the criminal classifications of non-gendered crimes. Thus, only in cases where rape mirrors other assault crimes does the law fully qualify and punish rape as a crime. Otherwise rape is brushed off as a

[8] Estrich, "Rape," Page 1090.
[9] Estrich, Page 1088.

lesser crime, according to Estrich, belittled because of sexism or presumed guilt on behalf of the female victim.[10]

Estrich acknowledges recent shifts in the conception of gendered crimes. She explains that this women-as-the-guilty-party "vision, while under attack in recent years, continues to be a dominant force in [American] society and in the law of rape."[11] Estrich continues that one of the core problems in adjudicating rape is our inability to consider it outside of a patriarchal lens. She maintains that our framework for evaluating rape charges is skewed by gender bias and limits our ability to truly achieve justice for the crimes. Estrich's analysis can be widely applied and is useful in understanding the international approach to rape. However, it is limited in its scope.[12] Estrich directly speaks only to American criminal law and, as she admits, doesn't delve deep enough into the racial components of rape law to fully critique the gender and racial biases we have grown to tolerate. While accepting that there has been positive change in the previous decade, Estrich does not realize the power in her method. Her work speaks beyond the range she applies it to. Moreover, she does not acknowledge the movement of women that share her views. Estrich also does not account for the civil society component and powerhouse.

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[10] Estrich, "Rape," Page 1092. "A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. In that case, the law-judges, statutes, prosecutors and all-generally acknowledge that a serious crime has been committed. But most cases deviate in one or many respects from this clear picture, making interpretation far more complex. Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight, the understanding is different. In such cases, the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman."

[11] Estrich, Page 1092.

[12] Estrich, Page 1157. On the focus of the law, Estrich says, "The decision whether to focus on the actor or the victim may or may not have an impact on quantifiable events such as the reporting of rapes and conviction rates, but it almost certainly will have an impact on the experience of an individual victim as she proceeds through the system."

Estrich's is the most succinct notion of consent in terms of conception in rape law.[13] Over time and as evident throughout existing scholarship, definitions of rape become more complicated as they include war and conflict. Estrich's analysis is not limited to rape in times of peace or in times of war but can be considered in both realms. Her work provides a base from which to explore the overarching complications of rape law. Notable in this foundation is the implication that rape still cannot be tried as a crime because of the gendered asymmetry persisting in precedent. In other words, Estrich suggests that the facts of rape cases are less determinative for convictions than the longstanding approach to the crime. Such a prejudice, as Estrich argues, is problematic and perpetuates inequity in sexual violence crimes. If the system is stuck trying to define what rape is under the umbrella of previous circumstance and conception, then it will never get to the reason behind why rape happens and why we cannot fully adjudicate it. This is what Estrich identified in her work, an issue that persists today.

The Role of Feminist Theory in Rape Convictions

Our legal systems and societal conceptions of rape limit our ability to lawfully address problems and violence. The gendered nature of rape changes the process of adjudicating it, even though that truth goes unspoken. Command of the theoretical component of this legacy comes from the feminist philosophy of Catharine MacKinnon, a key foundational figure for sexual violence and gender theory. MacKinnon, an American legal and feminist scholar, writes in her book, *Are Women Human?* about the philosophical assumptions associated with the use of mass

[13] Estrich, "Rape," Page 1093. "The law should be understood to prohibit claims and threats to secure sex that would be prohibited by extortion law and fraud or false pretenses law as a means to secure money. The law should evaluate the conduct of 'reasonable' men, not according to a Play- boy-macho philosophy that says, 'no means yes,' but by according respect to a woman's words. If in 1986 silence does not negate consent, at least crying and saying 'no' should."

rape of women as a tactic during conflict. MacKinnon's work has created a framework from which scholars and practitioners can consider the history of sexual violence. In my own exploration of this field, I rely on MacKinnon's definition of violence against women, which she identifies as "aggression against and exploitation of women because we are women, systemically and systematically."[14] MacKinnon maintains that the way in which women are subject to sexual violence during war shows an understanding of women as less than human in the eyes of men and society.[15] To apply a gender hierarchy is to apply a human hierarchy; to treat women as less than men is to treat them as less than human, according to her view. MacKinnon's argument relies on her foundational assertion that group identifications are a key part of humanity, thus making group-targeted injuries a true violation of human rights.[16] In this sense, being a woman is a part of an individual's identification as a person, and being discriminated against or violated because of this characteristic is to be refused humanity. MacKinnon's book outlines the ways in which women have been objectified throughout history and throughout conflicts – in Japan, the former Yugoslavia, and Bosnia Herzegovina.

Throughout her work, MacKinnon connects the reaction to sexual violence with the international legal and justice systems currently in use. MacKinnon maintains that human rights law and activism can be classified as a response to atrocity.[17] But, as MacKinnon explains, the notion and definition of "atrocity" become problematic in crimes such as rape because of the normalization of violence, particularly against women. MacKinnon extends this assertion, saying, "Before atrocities are recognized as such, they are authoritatively regarded as either too

[14] Catharine A. MacKinnon*, Are Women Human?: and Other International Dialogues* (The Belknap Press of Harvard University Press, 2007). Page 29.
[15] MacKinnon, Passim.
[16] MacKinnon, Page 2.
[17] MacKinnon, Page 3.

extraordinary to be believable or too ordinary to be atrocities."[18] Using this framework, the persistent inability in the criminal justice system to achieve justice for sexual violence can be explained. Such an approach leads to a system of laws that only punish the most extreme abuses, normalizing other offenses which are still violations of humanity committed on the basis of gender. MacKinnon continues, explaining that this has been the status quo for decades of domestic and international criminal justice, perpetuating women's dehumanization and victimization via the law.[19]

MacKinnon points to specific cases of atrocity to illustrate how deeply engrained the issue of gender inequality is. In her chapter "Torture," MacKinnon recounts domestic stories of women who were brutally beaten by men.[20] These stories detail the experiences of women who were in reality tortured, but were treated by the legal system as if they were equally as responsible as their attackers for the sexual violence they endured.[21] Such a duality in the legal understanding of torture puts the treatment of sexual violence at odds with our moral understanding of cruelty and crimes against humanity, according to MacKinnon. MacKinnon addressed this disparity, claiming, "When the abuse is sexual or intimate, especially when it is sexual and inflicted by an intimate, it is gendered, hence not considered a human rights violation."[22] MacKinnon argues that we view domestic sexual crimes as different than sexual violence as a crime against humanity. Similarly, MacKinnon argues that when sexual or gendered violence is committed in the context of international and political conflict, the rules of

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[18] MacKinnon, *Are Women Human*?, Page 3. "If the events are socially considered unusual, the fact that they happened is denied in specific instances; if they are regarded as usual, the fact that they are violating is denied: it is happening, it's not so bad, and if it's really bad, it isn't happening."
[19] MacKinnon, Page 3. "Legally, one is less than human when one's violations do not violate the human rights that are recognized."
[20] MacKinnon, Pages 18-20.
[21] Like victims of rape are. In both instances, because the victim were women, they had less accountability and clout in the courts where they brought their cases.
[22] MacKinnon, Page 21.

justice change. According to MacKinnon, "Torture is regarded as politically motivated; states are generally required to be involved in it."[23] The same does not hold true for sexual violence, even though the only legal difference between the definition and act of torture and sexual violence is the gendered nature of the crime.

When women are victims of torture outside of conflict zones, societal and broader considerations of their rights are different. States and governments hold the power to shift the context of crimes depending on when and where they are committed, according to MacKinnon. However, they fail to recognize the brutality of rape in the face of mass atrocity. Rape during conflict is thus written off as a spoil of war or collateral damage, a necessary evil to achieve victory. But, MacKinnon contends, why should human rights be contingent on the state's classification of their violation? The state is only one actor in this system, yet it holds this immense power in the discretionary prosecution of sexual violence committed against women. It was on this premise that the call for an International Criminal Court was made, the need for an international body with concrete guidelines, definitions, and rules needed to formalize and equalize violations of human rights.[24] However, MacKinnon argues that such a system does not yet get to the core of the issue: that the state and its precipitating legal precedents are founded upon giving men private access to women's bodies.[25]

Important to note when considering MacKinnon's scholarship is that it began at a time when the fight for women's rights needed innovation. Her book, *Toward a Feminist Theory of the State,* offered the first compiled and broadly applicable theory of the functioning gender

[23] MacKinnon, *Are Women Human*?, Page 21.
[24] MacKinnon, Page 27. "If, when women are tortured because we are women, the law recognized that a human being had her human rights violated, the term 'rights' would begin to have something of the content to which we might aspire, and the term 'woman' would, in Richard Rorty's phrase, become 'a name for a way of being human.'"
[25] MacKinnon, Page 90.

hierarchy.[26] She characterized male power as the leading force in society, painting broad strokes about the innerworkings and factors contributing to the imbalance between men and women in society. Her expansive approach was criticized for being too indiscriminate.[27] MacKinnon's work revolved around the argument that any steps towards achieving equality for women have to take into account the construction of femininity through the gender hierarchy that constantly favors men over women.[28] She was unyielding in her claim that society and states were created by men, for men, and thus always existed at the cost of women. Her inability to see or address exceptions to this trend limits the applicability of her theory.

I do not take this portion of MacKinnon's scholarship as faultless. However, her point that the state and our legal system are products of a society and government dominated and created by men offers an interesting point of reflection. How deeply entrenched is our gender framework? If we truly do live in a domestic and international system that is rooted in a context forged by men, should we not pay closer attention to the gender relations at play? MacKinnon argues that progress can be made through sweeping changes to human rights laws and global recognition of female equality.[29] In her view, official force is not enough to change the narrative and reality. Rather, she reasons, "Beyond incarceration, punishment, and other retribution; beyond damages and other reparations; beyond truth and reconciliation and symbolism; beyond restitution for the irreparable loss of family members; beyond the return of farms, homes, jobs, and legal systems, human rights can give back the humanity the rapist takes away."[30]

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[26] Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard Univ. Press, 1991).
[27] Cornell, "Sexual Difference, the Feminine, and Equivalency," Page 2264. "MacKinnon fails to understand the critical lesson of deconstruction. The lesson is that no reality can perfectly totalize itself because reality, including the reality of male domination, is constituted in and through language in which institutionalized meaning can never be fully protected from slippage and reinterpretation."
[28] Cornell, Passim.
[29] MacKinnon, Page 111.
[30] MacKinnon, Page 14.

MacKinnon contends that a reconceptualization of the law is necessary for an egalitarian legal system. She holds that the state is responsible for creating a system that implicitly grants men's access to women's bodies and that we cannot achieve gender justice until we address that fact.[31]

Important to note about MacKinnon's work is its relation to Marxist theory. In her article, "Feminism, Marxism, the Message and the State,"[32] she claims that the gendered components of our legal system can be deduced from the Marxist ideal that male dominance is institutionalized into modern society, imposing itself in all realms. Such an over simplification is unsatisfying to the detailed evaluation of gendered violence and precedents. That said, the article and theory is laudable in its own right. MacKinnon's work on this subject clarifies the persistent dynamics between the state, women, ownership, and violence in a way that was unmatched in its thoroughness. Because of this, her work maintains value today. Critiques of MacKinnon's work argue that she fails to see the intersectionality of gender dynamics, particularly with regard to race.[33] I agree with this critique, as race has to be a part of the consideration of gendered violence and justice. There is a difference in treatment between white women and non-white women in situations of sexual violence within society. Women are connected in that they are all objectified by their sex, as MacKinnon points out. However, throughout periods of conflict across the world and throughout history, the wholesale raping of women takes a different form. The trials of such violence have to deal with the discrimination of women because of their ethnicity as well as their

[31] Under this logic, the reason international or wartime access to women is so problematic is that an actor outside of her respective state ownership is taking control of her. Unresolved from MacKinnon's work is the question, does this woman get justice for what was done for her? Or do her people get justice for what was done to her?
[32] Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," in *Signs* (vol. 8, no. 4, 1983, pp. 635–658. *JSTOR)*, www.jstor.org/stable/3173687.
[33] Drucilla Cornell, "Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State," in *100 Yale Law Journal* (1991). https://digitalcommons.law.yale.edu/ylj/vol100/iss7/12.

gender. This double objectification is a facet of the issue that MacKinnon's work does not account for or address.

While many of MacKinnon's writings and models are useful to this day, they must be understood and utilized in context. States are not exclusively or universally male actors,[34] as MacKinnon's earlier work reasons. Rather, the state is a complex and integrated system, full of competing power dynamics. Certainly, the state can be a means of perpetuating gender inequality through inherited and deeply engrained male bias, but that is not why it exists. As one critique of MacKinnon, Drucilla Cornell, explained, "We do not have what MacKinnon calls a 'negative' state, but rather a social reality which guarantees the positive "freedom" of women precisely through the limit on state intervention."[35] No longer is fighting for equality between men and women or justice for victims of rape seen as a fruitless or fringe effort, as it was during MacKinnon's early work. The fight for women in the international and domestic arenas has been largely popularized. The new civil attention span for gender equality – movements like #MeToo and The Year of the Woman – has shifted the reality which MacKinnon writes about. Although we live in a world founded by men, that does not mean that there is no room for women.

MacKinnon's work, though fairly criticized for over-universality, gives us a framework to ask: why are crimes committed against women not addressed as such? Mackinnon attempts to argue that a reconceptualization of the state is necessary for gendered violence to be fully addressed, but we might note that she does not recognize the room for improvement in the existing system and the capacity for change from reform. In other words, MacKinnon does not address a path of systematic alteration. Instead of reasoning that there is something particular

[34] MacKinnon, *Toward a Feminist Theory of the State*, Page 161. "The state is male in the feminist sense: the law sees and treats women the way men see and treat women."
[35] Cornell, "Sexual Difference, the Feminine, and Equivalency," Page 2257.

about rape that doesn't allow it to be fully resolved because of the gender framework, MacKinnon holds that the state is responsible and must be unraveled.[36] Such an argument doesn't allow for nuance or explicit application. Instead, this claim offers an important counterpoint that crimes against women are a violation and afront to humanity in a different way than crimes that are not gendered. This holds true even if they are not enacted explicitly by a male state designed to objectify women for male pleasure. The resulting tension from this claim is that sexism and ownership in sexual violence are rooted in the crimes themselves as well as the structures that adjudicate them. To MacKinnon's credit, this still has not been resolved.

The Role of Race in Gendered Crimes

Where MacKinnon and Estrich do not venture is where modern scholarship grows, as current scholars analyze the juncture between gendered violence and race. In their article, "The Intersection of Race Viewed through the Prism of a Modern-Day Emmett Till," Chelsea Hale and Meghan Matt explore the historical exploitation of African American women based on their gender and because of their race.[37] Their findings were incongruous to Estrich's approach, which should always be complicated by the fact that when ethnic difference is added to the mix, non-white women are more endangered because their compounding characteristics.[38] Hale and Matt's analysis begins with a summary of the death of Emmett Till, a 14-year-old who was lynched for the alleged rape of two white girls in 1955. Hal and Matt examine the context in which the

[36] Under this logic, the reason international or wartime access to women is so problematic is that an actor outside of her respective state ownership is taking control of her. Unresolved from MacKinnon's work is the question, does this woman get justice for what was done for her either on the basis of sex or race? I maintain that she does not receive justice unless her attacker is prosecuted for the targeted attack one the bases of both gender and race.
[37] Chelsea Hale and Meghan Matt, "The Intersection of Race and Rape Viewed through the Prism of a Modern-Day Emmett Till," in *American Bar Association* (16 July 2019), www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-intersection-of-race-and-rape/.
[38] Hale and Matt, "The Intersection of Race and Rape."

African American boy was killed and remind their reader that white raped black women all the time with little to no acknowledgement of the crime. Through this lens they explore the historical context of the increased legal and societal dangers faced by African American women in the United States.

Throughout their piece, the authors elaborate the point that women are particularly targeted because of both their skin color and their gender.[39] The two maintain that non-white women face discrimination because of asymmetry in our conception of racial and gender equality. Hal and Matt summarize their analysis, saying it represents "the unchanged and recurring reinforcement of power and ownership when it comes to the bodies of African American women."[40] Leaning on the Emmet Till example to illustrate the problem over time, the authors maintain that our gender and racial framework is unbalanced and limits justice available for minority groups. They state that we have a societal and systematic prejudice that permits discrimination of non-white women.

The implications of the racial and gendered phenomenon as explained by Hal and Matt are not fully elucidated in the scope of the ICJS. However, it is crucial when evaluating the issue of sexual violence against women that any analysis has to be done with respect to the complications of ethnicity and race. Racial hierarchies, prejudices, and biases are motivating factors in the case studies outlined in Chapter 2 and persist as outstanding issues in our society. Previous feminist scholars do not make this distinction, which limits the application of their respective work. This project, because of its limited scope and duration, only touches lightly on the issue of race in the context of gendered violence but I want to emphasize its influence. A deeper exploration into the subject of race and gender is necessary to be able to fully address

[39] Hale and Matt, "The Intersection of Race and Rape."
[40] Hale and Matt.

justice for sexual violence victims with the proper framework and context. Such an exploration would further the findings of this project and add to our understanding of the existing legal systems.

The Role of Practitioners

How gender and race manifest in the modern international legal field is informed by those practicing therein. The current state of international legal discourse can be understood from those who live and work in the ICJS every day, as I delve into in Chapter 3. However, informed commentary on the ICJS is not limited to ambassadors. In her article, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation," international criminal attorney Patricia Sellers argues that the targeted rape of women during conflict speaks to the larger issue of discrimination against and a lapse of human rights for women.[41] Continuing that thread, Sellers explains the contexts in which gender-based violence usually occurs, as well as the negative effects such acts have on the rights and social standing of women. Sellers stresses that, "War related gender-based violence usually encompasses individual criminal responsibility and can exacerbate the denial of women's human rights."[42] Although this is a persistent problem, Sellers maintains that there is a way in which women seeking justice can do so with equality, even in a system that has historically excluded them.

Sellers argues that developments within the ICJS and international humanitarian law (IHL), specifically the prosecution of rape, can serve "as a measurement of the protection from gender-based violence and of the right to equal access to judicial forum that is afforded women

[41] Patricia Viseur Sellers, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation," in *OHCHR* (2009), https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf.
[42] Sellers, Page 3.

and girls."[43] Sellers supports this point by looking at the history of rape during conflict and tracking how it has advanced. She makes the claim that that, as far back as warrior codes, rape was prohibited during war to protect the innocent from being brought into conflict unnecessarily.[44] The exception to this rule, Sellers continues, was labeled *jus in bello*, a key concept which "sanctioned murders, pillaging, looting, the infliction of rapes, etc., upon enemy soldiers and the presumed innocent inhabitants of the enclave under siege."[45] However distasteful it started as, Sellers explained, this lawless conduct became commonplace as conquerors' claimed such dominating attacks were their right after victory.[46] The purest form of ownership and supremacy over a people, Sellers described, is rape and sexual violence committed against women, and the normalization of gendered attacks in conflict made gender asymmetry even more extreme in society.

Throughout her analysis, Sellers maintains that progress in prosecuting rape has been significant since the 14th century, a point I will outline in my case studies in Chapter 2. Sellers uses this history as a means of presenting her conclusion, saying, "Adjudication of rape is a bell weather that can measure women's access to justice."[47] Sellers argues that in looking to the future of international treatment of rape and women during conflict, IHL must pull from human rights law and vice versa. Neither exists in a vacuum, she maintains, and in evaluating the two in tandem, more equality can be achieved. To that end, women's rights must be considered human rights and women must be afforded the same equality as men for their rights to be considered human.

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[43] Sellers, "The Prosecution of Sexual Violence in Conflict," Page 3.
[44] Sellers, Page 6.
[45] Sellers, Page 6.
[46] Sellers, Page 6.
[47] Sellers, Page 18.

Such reclaiming and redefining of the international approach to rape and sexual violence against women opens up new doors and potential for framing gender inequality. As Sellers summarizes, "Women and girls are securing the right to equal access to the judicial process as a means to redress discrimination, including gender-based violence."[48] However, the extent to which this process is backward-looking is largely left out of Sellers' analysis. Her approach focuses on case history, which of course plays a role in creating change. However, she does not cover civil society actors' role in this development. Sellers also does not account for the fact that while sexual violence crimes are being adjudicated in the ICJS, convictions and discourse exists outside of the context of a gender framework. Sellers does not make the distinction between the presence of sexual violence in the courts and explicit justice for sexual violence crimes. Thus, while Sellers' work deserves a place in the leading literature surrounding sexual violence law, it cannot be taken to be indicative of the future or to prescribe any steps forward outside of what history has already demonstrated.

The Role of Civil Society

As I have stated throughout this analysis, civil society actors play a large role in the justice system. Judge Peggy Kuo reaches beyond Seller's claims and application of experience in this sense, arguing that progress made in the international criminal justice system (ICJS) should be credited to civic involvement and public reaction to violence.[49] Kuo has written and lectured on prosecuting sexual violence perpetrators in an international setting, reflecting largely on her experience as a prosecutor in the International Criminal Tribunal for the former Yugoslavia. One

[48] Sellers, "The Prosecution of Sexual Violence in Conflict," Page 39.
[49] Peggy Kuo, "Prosecuting Crimes of Sexual Violence in an International Tribunal," in *Case Western Reserve Journal of International Law* (vol. 34, no. 3, 2002). https://scholarlycommons.law.case.edu/jil/vol34/iss3/8. Page 305.

of the largest cases in her analysis and one of the most noteworthy in modern sexual violence precedent is the Foca rape case, tried in the International Criminal Tribunal for the former Yugoslavia (ICTY). In contrast to other experts and thinkers writing in this field, Kuo questions the progress truly made by the ICTY and outlines what is left to be done with regard to the Foca rape case.[50] Kuo's argument builds on the history of sexual violence during conflict. She establishes the phenomenon of rape's place in history, stating that "rape during wartime is as old as war itself, and so is sexual enslavement, in which women were treated as the booty of war."[51] While Kuo credits the steps that have been made in addressing and trying sexual violence through legal means, she does not indemnify the prevailing international criminal process. Rather, she maintains that that civil society actors played a dominant role in the successes of the system:

> Certainly, the attention paid to what happened to women in the Balkans was a direct consequence of the outrage by the international community, non-governmental organizations, women's groups, the media, and individual journalists who had the courage to go into the war zones, talk to women, record their testimony, and bring the information to the world. Also, there was a great change because women were more willing, having been given this voice, to speak out and let the world know that this was happening. This kind of change in the entire legal community and society at large made the kind of prosecution that occurred in the Foca case possible.[52]

The rise in knowledge of women's struggles, Kuo argues, gave rise to women themselves. Not only as victims or activists, but as judges, lawyers, prosecutors and the like. As I will conclude later in this paper and as Kuo signals to here, it is only through continuing to educate the public about the discrimination and targeting of women that can we hope to truly achieve legal justice for sexual violence and gendered crimes.

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[50] Largely represented on the international stage through Kunarac, Kovač & Vuković. Later explained in the evaluation on the ICTY proceedings.
[51] Kuo, *"Prosecuting Crimes of Sexual Violence in an International Tribunal,"* Page 305.
[52] Kuo, Page 308.

A direct indication of this freedom, Kuo writes about her experience in the ICTY and her work in establishing the definition of slavery and paving the way forward on sexual violence and gendered issues. Kuo writes candidly about her experience in the ICJS and what she was able to take away from it personally. She also comments on the observations she made professionally during her tenure. One of her key reflections is that the relationship between legal actors and citizens is strained. Kuo explains that the witnesses and victims she interacted with were reluctant to testify, as many of them felt shamed by what had happened to them.[53] This impacted the way the witnesses and victims acted and reacted in the courtroom during questioning, she continued. Kuo maintains that the women who had been victims of sexual and gendered violence were robbed of their safety, their identity, and were subject to discrimination in their communities. This was complicated further, Kuo continues, because of the difficulties inherently associated with facilitating testimony from victims of objectification and torture against their attacker.[54]

In her analysis, Kuo highlights the limitations of international criminal law with respect to mass atrocities. These limitations were twofold, she explains, "You can only handle a few [trials] at a time and the cases are only as good as the witnesses' ability to remember, describe, and testify honestly."[55] Kuo's reflection speaks to the larger struggle for prosecutors when working with victims of rape: how to treat them.[56] From Kuo's analysis of her work and the field in which she operates, she found that while victim testimony will always be inherently limited – because of trauma, poor memory, and emotional impact – the way and manner in which

[53] Kuo, *"Prosecuting Crimes of Sexual Violence in an International Tribunal,"* Page 316.
[54] Kuo, Page 316.
[55] Kuo, Page 317.
[56] I will explain how civil society responded to this issue in the next chapter, and how it continues to be an issue for practitioners today in Chapter 3.

testimony is collected can be hugely impactful on their conduct, comfort, and willingness to participate as a witness.[57] Working with victims of gendered crimes further complicates achieving gendered justice in the ICJS, Kuo expounded.

Kuo had first-hand experience working with victims of intense violence as well as familiarity with the practical implications of the ICTY's categorization as rape as an instrument of terror.[58] The way in which she recounts her experience and explains the history and accomplishments of the ICTY offers a window into the reality of an international criminal trial. Even with the advancements in the prosecutorial options for sexual violence and gendered crimes, there are still shortcomings in the treatment of victims and the process of trying sexual violence cases, according to Kuo. She writes about the frustration she and her colleagues felt with transient tribunals that were created to be short-terms checks of long-term crimes.[59] While this was ameliorated slightly for her with the advent of the International Criminal Court (ICC) in 2002, her complaint about the lack of funding and resources needed to prioritize and make further strides in gendered justice remains relevant and unanswered.

Despite Kuo's frustration and the limitations of the ICJS and the ICC, the importance of the institution and its work cannot be overstated. The legal means of the ICJS are unmatched in scope and international impact, not just because of the system's delivery of justice but because of its bearing on future cases and the development of precedent used around the world.[60] Kuo's work examines this truth, and is useful in understanding how practitioners view themselves and gender justice through the lens of the ICJS.

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[57] Kuo, *"Prosecuting Crimes of Sexual Violence in an International Tribunal,"* Page 319.
[58] Kuo, Page 318.
[59] Kuo, Page 309.
[60] Kuo, Page 321. "I hope that what we are doing in places far away from here, in The Hague, in Arusha, in places where many of you perhaps will never go, will have some effect on places that are close to home, so that we learn to value women in their role in society, not just as victims, but as a fundamental part of society and a fundamental part of who we are."

Order Building and Feminist Theory

Order building is a key component of the justice that the ICJS achieved. The ambassadors I interviewed in Chapter 3 emphasize order building as a key goal of their efforts. However, the motivation and merit behind order building in the ICJS should be analyzed and evaluated. Of course, the justice system cares about women. But, justice for women is considered in the context of getting society's order back together after a conflict. This order building is oriented at restoring a patriarchal system that allowed for the targeting of women in the first place, as explained by MacKinnon and Sellers. Thus, in order to restore society's male-dominated order, those working in the ICJS have to overlook the gender frame during convictions, because otherwise the process of order building would require an upheaval of normative gender hierarchies. To evaluate this process, we have to ask: Is transitional justice really justice if women are just put back into a patriarchal order where they are not valued? If you "got" the bad guy but reinstate the institution that created the environment where women were victimized and raped, have you really achieved justice? I maintain that the reordered society that comes from order building convictions in the ICJS continues to be a violation against women, even after the conflict and the rape has passed. If we cannot see this double-layered patriarchy – where women are used by other ethnic groups and then again by men in their own societies outside of periods of conflict – then where does justice for women come from?[61]

Taking the role of feminist actors into greater account and applying them more broadly onto the field of sexual violence justice, Rosalind Dixon in her piece, "Rape as a Crime in

[61] This project does not fully address or delve into the reality or brutality of sexual violence targeted against males. While this is a crucial component of adjudicating sexual violence crimes, the targeting of men by men exists largely outside of the scope of this paper. However, many of the foundational principles for gendered violence hold true when applied for both male and female victims. That is true for the justification arguments of Rosalind Dixon.

International Humanitarian Law: Where to from Here?" examines developments in the treatment of sexual violence crimes through the lens of the Kunarac case in the ICTY.[62] Dixon focuses her research on the role of feminists in the development of rape's treatment in the international criminal context. She maintains that criminal charges serve as a tool for framing crimes and a way to protect and build on the patriarchal order as means of protecting the status quo. Dixon asserts that "the priority of an 'order-building' project is to obtain convictions (for breaches of abstract legal norms), rather than convictions for the crime of what the accused actually did to the victim."[63] Dixon puts to words what so often goes unsaid: crimes against humanity committed during conflicts are different from other crimes against humanity because of who they target. The focus of international institutions and legal actors, Dixon suggests, are informed by the status-quo, implicitly discouraging norm-breaking behavior.

One point of interest that Dixon makes is, "In a misogynist world order, invoking harm to a particular community will also increase the chance that crimes of sexual violence will be charged and successfully prosecuted."[64] Sexual violence on its own is typically not enough to justify legal action or investigation. This goes back to MacKinnon's point that sexual violence either is not believed because it is too atrocious to be real or ignored because it is too common. Dixon argues that women do not have authority or importance in their own right in the criminal justice system. Dixon takes this notion one step further and makes that claim that it is only when external and non-gendered harm is enacted that legal functions will kick in and justice will be

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[62] "Kunarac Et Al. (IT-96-23 & 23/1)," in *International Criminal Tribunal for the Former Yugoslavia* (8 Nov. 1999), www.icty.org/en/case/kunarac. "Leader of a reconnaissance unit of the Bosnian Serb Army (VRS) which formed part of the local Foča Tactical Group," tried under the International Criminal Tribunal of the former Yugoslavia. His case was crucial in the establishment and extension of victims of sexual abuse in the international criminal justice system.

[63] Rosalind Dixon, "Rape as a Crime in International Humanitarian Law: Where to from Here?," in *European Journal of International Law* (vol. 13, no. 3, 2002, pp. 697–719), Page 698.

[64] Dixon, Page 703.

pursued. But this justice is not for the female victim's sake, according to Dixon. Rather, it is limited and achieved to maintain societal integrity and thus to reconstitute the patriarchal society. In the context of the ICJS, the pursuit of order building ignores the gendered nature of sexual violence crimes at the root of why women suffer. "Justice" is achieved in conception, but not in reality for the female victims who are then forced back into the male-dominated systems which bred their attacks. As Dixon explains, the perpetrators may be convicted, but the root of the issue goes unnamed: the crimes were only considered vile and worth prosecuting in the international context when committed amongst other atrocity crimes. But the women are returned to a society where they are made to be victims again. Female justice is lost in the name of an entity that prioritizes non-gendered justice and preserving the norm.

Dixon further explains the disparity between the impact of violence on men and women, saying that it does not end with legal implications but extends into cultural ones. Dixon argues that rape, in a male-dominated society, can effectively demean female victims to becoming untouchable. She continues, explaining that female victims of rape are robbed not only of their dignity and autonomy, but also of their virginity and marriage prospects.[65] Such an utter loss of self and worth, Dixon explains, is irrelevant in the larger scope of order-building. This is because, according to Dixon, "In the criminal process, women are treated as 'witnesses' rather than complainants in the prosecution of crimes of sexual violence against them and have no 'ownership' of the process."[66] The feminist reaction to this standard serves as Dixon's main argument, and is centered around the feminist re-ordering project and inclusion of women's

[65] This is particularly true in non-western cultures and is demonstrated in the cases tried by the ICTY and the ICTR.
[66] Dixon, "Rape as a Crime in International Humanitarian Law," Page 705.

experiences in the law. Dixon defines this re-ordering effort as a means to "deter and punish crimes of sexual violence against women."[67]

In summation, Dixon claims that in order to make serious improvements in the treatment of women during conflict, there has to be a change in the narrative around such crimes as well as a change in the punishment of perpetrators of sexual violence.[68] This could be accomplished, under Dixon's recommendations, through an increase in the severity of punishments for sexual violence in international tribunals. She also argues that positive change could come via a shift towards harsh censures in the law, a goal of the feminist re-order project.[69] Such changes would respond "to feminist calls to name sexual enslavement as a crime of violence and exploitation against women, rather than simply defining the role of women as family and community property in a patriarchal order in which to be raped or sexually enslaved is shameful and dishonorable, and virginity or chastity are preconditions of the treatment of rape and sexual enslavement as a crime."[70] Dixon maintains that from the feminist perspective, there is a clear advantage for prosecuting sexual crimes – rape, forced pregnancy – as acts of genocide because genocide is the most serious crime in international humanitarian law and thus mandates the most severe punishments.[71]

Rape in itself is a problem for such a conception of jurisprudence; the wars, conflicts and prevailing international dialogue only complicate it, Dixon explains. The intricacies of war and the ICJS make justice difficult to achieve. Justice for perpetrators and justice for women are conflated to be the same thing but, as Dixon examines, the ICJS fails to treat gendered crimes

[67] Dixon, "Rape as a Crime in International Humanitarian Law," Page 699.
[68] Dixon, Passim.
[69] Dixon, Page 702.
[70] Dixon, Page 702.
[71] Dixon, Page 703.

with the same level of gravity as non-gendered crimes. Dixon does not recognize fully the complexities of sexual violence during conflict outside of punishment structures. Her work, while explicative of the primary influences and necessary considerations of precipitating effects, neglects the many compounding factors and actors involved in the system that create the reality of witness experiences and gender justice.

Dixon argues that, in order for improvements to be made in the international criminal justice system with regard to rape and gendered violence, the trials and the laws must acknowledge the harms imposed on female victims and understand their trauma as more than just witnesses.[72] We must accept and acknowledge that sexual violence is targeted, it is deliberate, and it is by definition sexist. It is a crime committed largely against women by men and attacks the core of what it means to be human. Only through acceptance of this bias, Dixon holds, will the value of the female experience and life be appropriately considered in IHL and the ICJS.

Humanitarian Organizations and Criticisms in Treatment

Scholars, philosophers, and activists are not the only ones who have weighed in on and added to this issue. Humanitarian organizations have also played a role in the extension and continuation of improving resources for victims of sexual violence in the international sphere. In their editorial in the *International Review of the Red Cross* in 2014, Vincent Bernard, Editor-in-Chief, and Helen Durham, Director of International Law and Policy, for the International Committee of the Red Cross wrote about the increased dialogue and the systematic changes being implemented by their organization. They credit the increased public awareness about the pain and suffering brought on from sexual violence to improvements on multiple fronts.

[72] Dixon, "Rape as a Crime in International Humanitarian Law," Page 718.

Specifically, they claim that "a growing understanding of the consequences of sexual violence has led to multiple initiatives from various humanitarian organizations, United Nations (UN) agencies, civil society actors, governments, militaries and academics."[73] Such humanitarian involvement demonstrates growth in not only awareness, but resource allocation and public distaste for sexual violence.[74]

While Bernard and Durham applaud the improvement in treatment and recognition of sexual violence on the international stage, they maintain that the international criminal justice system (ICJS) is in no way a perfect model in addressing such horrors. Rather, they hold that even though "we know more about the causes of conflict-related sexual violence, its magnitude and human cost, this knowledge has yet to be translated into effective prevention and response activities."[75] The two argue that while we understand the use and history of sexual violence in conflict, we have not yet addressed it appropriately to stop it from happening again. Similar to the claims of Dixon, Bernard and Durham hold that we do not yet understand or vocalize the true nature of sexual violence crimes as they relate to targeting women as women. While we have an understanding of the issues, Bernard and Durham explain, there are no structures in place to combat the prevailing inadequacies or prevent future atrocities.

Importantly, Bernard and Durham add to MacKinnon's definition of sexual violence to include its use in conflict. Sexual violence is used, they state, for "strategic purposes, opportunistically, or because it is tacitly tolerated."[76] This addition to the conception is important in establishing a working definition for further exploration and analysis of the field, but also for

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[73] Vincent Bernard and Helen Durham, "Sexual Violence In Armed Conflict: From Breaking The Silence To Breaking The Cycle," in *International Review of the Red Cross* (vol. 96, no. 894, 2014, pp. 427–434), Page 427.
[74] Civil society involvement is important in any political progress, as such engagement signals the will of the people and the support of the public towards a cause.
[75] Bernard and Durham, Page 428.
[76] Bernard and Durham, Page 428.

comparing and tracking the development between MacKinnon's work and that of Bernard and Durham. Though they are civil society actors rather than theorists or practitioners, their analysis plays a role in the scholarly discourse surrounding the ICJS with respect to sexual violence. Bernard and Durham use their experience and awareness of sexual violence to contribute to the modern understanding of rape in conflict and their experience as civil society actors to advocate for change. However, the change they call for is not that which they can institute themselves or through their means. Instead, they argue it must come from those working within the ICJS. This claim is flawed, as we know from the work of Dixon and critiques of MacKinnon, as civil society can and does play a major role in creating change in the ICJS.

Bernard and Durham consider the consequences of sexual violence in their analysis of its legal treatment. Convictions classifying sexual violence as a crime against humanity have had a major role in the extension and attention paid to the treatment of rape in the international criminal justice system, they maintain. However, the two identify that more could be done on many fronts. Bernard and Durham consider the work of humanitarian organizations like the Red Cross as insufficient. They maintain that this deficiency came from those on the ground and in two-parts. As humanitarian responders, they had previously thought they could not help due to "their lack of expertise or their limited capacities when also faced with people's immediate 'visible' needs for food, water and/or shelter."[77] While at the same time, reluctance to help stemmed from the "highly sensitive nature and the risk of being perceived as interfering with local customs or religious beliefs."[78] Bernard and Durham argue that these were not and are not reasons for humanitarian organizations to remove themselves from the issue of sexual and

[77] Bernard and Durham, "Sexual Violence In Armed Conflict," Page 429.
[78] Bernard and Durham, Page 429.

gendered violence. Instead, they contend that non-governmental actors should seek a more active role in the ICJS to ensure proper treatment and resources for sexual violence victims.

A major aspect of Bernard and Durham's evaluation is the need for increased resources and a greater importance placed on assistance for victims. The trauma that victims of sexual violence have been through is too extensive for humanitarian organizations to not have a protocol for handling.[79] Unique to the Red Cross and lacking from the International Criminal Court (ICC) is the proactive approach to reporting sexual violence. Rather than waiting for the victims to report their assault during times of conflict, Bernard and Durham explain, the Red Cross in its trauma and victim-focused work assumes that sexual violence was committed.[80] More than just removing the barrier of reporting for victims, this assumption "allows the [Red Cross] to be prepared to take remedial actions and to work preventively wherever potential risks are identified and with all armed actors likely to be involved in violence."[81] This is a step which the adopted international protocol – outlined in the next chapter – does not take, but that, given the proper and sufficient resources, could improve the reaction time and quality of treatment for victims of sexual assault.

Bernard and Durham also touch on the deterrent effect of new approaches to jurisprudence in sexual violence law. They establish this argument, saying, "Even if only a few perpetrators have been brought to justice, one must not forget the role justice plays in the symbolic statement of what is right and wrong, in gaining recognition for victims and in demonstrating that there are grave consequences for grave offences."[82] Bernard and Durham

[79] As I will explain in the next chapter, such a protocol has been created and adopted. It was pushed forward by actors outside of the ICJS.
[80] Bernard and Durham, "Sexual Violence In Armed Conflict," Page 430.
[81] Bernard and Durham, Page 430.
[82] Bernard and Durham, Page 432.

argue that there is power in using the ICJS to explain what is right and what is wrong. Such an attitude has been instrumental in the development and attention paid to the international treatment of sexual violence and has been used as justification and stimulation for activism.

While deterrence is positive, it is not enough. Bernard and Durham argue that regardless of the civil society attention paid to sexual violence crimes, an overvaluation of timeliness in sentencing is not the best approach for delivering justice.[83] In other words, we cannot prioritize a hasty trial above thorough justice even if the will is there to do so. International criminal tribunals and court trials can last upwards of 10 years. The victims, humanitarian and advocacy groups, and courts sustain incredible costs over this time, emotionally and financially. Bernard and Durham allude in their piece to pushes from interest groups to hasten this process, deliver justice quicker, and to maintain the attention of the public. However, they reason that expediency cannot come before diligence. Expanding on this point, the authors claim, "The increased attention of the media and public opinion on sexual violence cases should not jeopardize fair trial guarantees by putting pressure on the justice system to secure quick convictions."[84] However tempting a quick trial may be, Bernard and Durham caution that it is counter to the goals of the justice system and the integrity of the process.

While useful in explaining the civil society role and approach to the ICJS, the analysis of Bernard and Durham is limited. They call for a reflection of process without consideration for the compounding factors and the purpose of the trial. Bernard and Durham do not seem to understand their power as civil society actors and the extent to which they inform the ICJS. Still, their work delivers a strong message on the importance of action in the realm of sexual violence. The two conclude their piece, saying, "It is no longer tenable to claim that sexual violence is

[83] Bernard and Durham, "Sexual Violence In Armed Conflict," Page 432.
[84] Bernard and Durham, Page 432.

simply an ugly facet of our worst human inclinations and an unfortunate companion of war; today it is widely acknowledged that sexual violence is not an inevitable consequence of armed conflict."[85]

Where We Are Now

Little by little scholarship and professional review has been unfolding in the realm of sexual violence. It is important to understand the scholarship on this issue to appreciate the impact of justice for the individual. Existing literature is helpful in understanding the system in which sexual violence is evaluated, the implications of the international criminal justice structure, the initial formation of our justice system, and the history of sexual violence committed against women in times of conflict. However, what the literature does not do is map this history with respect to its development. What has yet to be sufficiently examined is the gender asymmetry which sexual violence attacks stem from. We recognize sexual violence crimes as inhumane and an atrocity, but we for some reason fail to get at the root of why gendered violence is so cruel. In hopes to answer the question of why rape and sexual violence persists in conflict, I will trace the history of its adjudication in the ICJS.

This paper seeks to take the next steps in the field, and to answer the question: how have we gotten to our current understanding of sexual and gendered violence? In the next chapter, I will discuss further the specific relationship between authors, practitioners, and gender, how we have gotten to our modern international criminal justice system, the factors that led us to the modern conception, and the problems within the system.

[85] Bernard and Durham, "Sexual Violence In Armed Conflict," Page 434.

Chapter Two: Outlining Our History Prosecuting Sexual Violence

When we hear and think about the international criminal justice system (ICJS), it is often subject to lofty rhetoric and idealism. Its mission to better the world, right international wrongs, and deliver the human ideal of justice lends it a deep level of respect. However, it also veils the process of adjudication and the systems of conviction in a fog of confusion. Further complicating the public understanding of the ICJS is the organizational structure, the court processes, and the international and collaborative nature of the body. The average citizen with a limited attention span for foreign affairs is highly unlikely to fully understand or engage with tribunals, cases, and convictions. This is a problem for a system rooted in human values, morality, and ideals. Moreover, it creates a vocabulary of exclusion, resulting in trends and phenomena going unnoticed and unaddressed. Perhaps if there were more scholarship, more education, and more understanding of the ICJS there would be broader understanding of its history. A deeper understanding of the past would allow for more analysis of the system and its precedents, like that of sexual violence.

This chapter aims to establish a basic history of the ICJS with relation to sexual violence. My goal is not to detail the intricacy of every trial or every court that has been established over the past four decades. Rather, I seek to explain the big ideas and the key occurrences and progressions of the system. My goal is to outline, in broad strokes, the history of sexual violence justice to be able to track the development and understand the context of our current system.

As I have covered in the previous chapter and will explore through personal interviews in Chapter 3, there is something about sexual and gendered violence that stops us from being able to fully address it. I approach this chapter with the understanding that there is something missing

from our conception of sexual violence crimes, and I am seeking to identify the root of this problem through the context of sexual violence cases.

Of course, the ICJS and the cases, courts, and tribunals therein are incredibly complicated. Tribunals are known for lasting upwards of a decade, conducted in multiple languages for multiple crimes. This summary is by no means exhaustive. Rather, this is meant to paint the picture of the largely foreign, to the general American public, ICJS and the decisions thereof over the past few decades. This history is a slight oversimplification of the evolution. It is not complete. However, the purpose of this exploration and of this project is not a comprehensive history – that can be read online or in a textbook.[86] The purpose is to convey where we started and what we started with, and how each case and each court has progressed us to where we are today. I aim to explain the outstanding issues and the unsolved or unaddressed limitations of the system.

The case studies explored below will be evaluated in chronological order to best track the development between each case and the establishment of precedent. Over time, we will see that discussing sexual violence and adjudicating it is becoming more acceptable. Small steps have been taken to further punish those who target and abuse women. However, what we are still missing are steps that are explicitly rooted in gender, and not previous case findings.[87] This thesis is an investigation of this path-dependent problem made evident through cases within the system. I have used a qualitative analysis approach for the history of the ICJS and supplemented with personal interviews with international practitioners in recent courts and tribunals, that will be explored in the next chapter.

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[86] Cenap Çakmak, *A Brief History of International Criminal Law and International Criminal Court* (Palgrave Macmillan, 2017). One example of a textbook outlining the history of the ICJS.
[87] "The Influence of Precedent in International Law," *Brandeis Institute for International Judges* (2007). https://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/Precedent_BIIJ2007.pdf.

The issue of legal development is not one I plan to solve in this project. Precedent has an important role in the legal system. It keeps laws balanced and stops swings based on public opinion. Rather, my approach is to identify the thread of legal rigidity that may have allowed for gendered crimes to persist unaddressed for so long. Gender framing is a continual theme throughout the development of the ICJS. The ICJS was created by the cross-continental intermixing of laws that have developed to become our international law. I pull this lens from Alison Cole, the author of "Rethinking Rape Law." In her article, Cole summarizes the creation of international criminal justice law, saying:

> International law is distinct from national laws in that there are various sources of law, a range of courts applying only limited jurisdiction, and no overarching global executive charged with ensuring enforcement. This unique character of international law is a result of its origins as a means to regulate relations between nations. Under this approach, questions relating to the treatment of individuals remained within the purview of the nation state, on the basis of a general principle that no country should interfere within the treatment of another country's citizens. This has had a predictably negative impact in terms of advancing and protecting the rights of women. Certain aspects of national law, which were established without reference to women's concerns, have been transferred into the foundations of international law. As an example, the divide between the 'public' and 'private' spheres, which historically left family relations and abuse in the home outside the protection of national law, is also present in the foundations of international law where the treatment of citizens is a private matter for each state. Indeed, it has been argued that international law is inherently gendered because its rules have developed as a response to the experience of the male elite.[88]

International law endures to regulate behavior that exists outside of the scope of one nation. The ICJS was established for this purpose from the existing laws of participating countries, and thus carries with it the standing biases that existed in the foundational countries. Thus, it is possible that the inability of the ICJS to address gender violence as a gendered problem may stem from domestic systems being unable to fully adjudicate such crimes. Rape law could be seen as an example of this.

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[88] Alison Cole, "Rethinking Rape Law," ed. McGlynn, C. and Munro, V., (London: Routledge-Cavendish, 2010).

Rape is a crime of aggression. It can erase the humanity of women across cultures.[89] Women, especially during wartime rape, are not targeted as ends in themselves. Rather, as I will track in the preceding case studies, they are raped and murdered as a means of attacking men, as supposed by MacKinnon and Williamson in Chapter 3. It's a targeted attack on property, devaluing the women's autonomy and humanity. Women are the collateral damage in the broader context of male-dominated crime.

I maintain that we have an unequal system that is rooted in inequity stemming from societal biases. That being said, sexual violence has not gone unnoticed. After decades of neglect and dismissal, there has been a movement to convict individuals guilty of gendered violence. As I map out in the international case development, we have seen progress since the inception of international law. We have seen demonstrated efforts to create change. However, there is this unspoken competition between wanting to progress to a more equal system and being constrained by the lack of a neutral, gender-equal, starting ground. A lack of a balanced base makes progressing towards a fully egalitarian system difficult and outside the scope of our criminal justice vocabulary. This is the conflict persisting in law all around the world.

The first step towards addressing gender asymmetry in criminal law is identifying it. Far be it from me, an undergraduate, to propose an absolute upheaval of the international system or claim to have resolved the global issue of gender disparity. However, I will address it head on. The first step in evaluating gendered and sexual violence law and development is tracking it. Context of the previous cases of sexual violence in the ICJS is crucial, as is tracking the progress between courts and situations.

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[89] Margo Kaplan, "Rape Beyond Crime," in *Duke Law Journal*, (U.S. National Library of Medicine, Feb. 2017), www.ncbi.nlm.nih.gov/pubmed/28234443.

Codifying the Rules: The Geneva and Hague Conventions

It is crucial to have a working understanding of the outstanding war crimes documents to analyze where the legal focus of trials is oriented. Prior to these conventions, war crimes standards were defined by religious documents and beliefs, and thus varied from region to region and religion to religion. Obviously having multiple and inconsistent measures of warfare limitations was not sustainable for a functional and effective international criminal justice body. Because they were the first documents to codify human morality and legal values, the Geneva and Hague Conventions are the backbone from which our modern ICJS was born.

The first Geneva Convention of 1864 was convened at the urging of a group of Swiss citizens who had witnessed the on-the-ground terrors of warfare protocol, underwriting the importance and impact of civil society actors on the formation of international law.[90] Also involved in the establishment efforts was the International Committee of the Red Cross, which played a leading role in the adoption of the Geneva Conventions.[91] The Geneva Conventions and their protocols are a web and compilation of rules oriented toward limiting the atrocity of war. There have been multiple iterations and additions to the Geneva Conventions, starting with the 1864 conference, subsequent additions have been adopted incrementally and notably in 1906, 1929, 1949, 1977, and 2005.[92] The core of the Geneva Conventions has remained throughout their development, always stemming back to minimizing the human cost of war and lessening the aggressions taken out on civilians and other non-combatants.

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[90] "The Role and Importance of the Hague Conferences: A Historical Perspective," in *UNIDIR* (2017), www.unidir.org/files/publications/pdfs/the-role-and-importance-of-the-hague-conferences-a-historical-perspective-en-672.pdf. Page 12.
[91] "The Role and Importance of the Hague Conferences," Page 12.
[92] "The Geneva Conventions of 1949 and Their Additional Protocols," in *International Committee of the Red Cross* (16 Dec. 2019), www.icrc.org/en/document/geneva-conventions-1949-additional-protocols.

The Geneva Conventions have a strong reputation in international humanitarian law (IHL), largely because they exist as one of the international treaties that has been universally ratified, indicating their alignment with universal ethical values.[93] The four conventions, as they stand at the time of this paper, are:

1. The First Geneva Convention: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
2. The Second Geneva Convention: The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
3. The Third Geneva Convention: The Geneva Convention Relative to the Treatment of Prisoners of War
4. The Fourth Geneva Convention: The Geneva Convention Relative to the Protection of Civilian Persons in Time of War[94]

The practical uses of the Geneva Conventions are vast and far reaching. For one, they are the basis of our current international humanitarian law, including that of the Hague Conventions, outlined below. When referring to the Geneva Convention, singular, most often this is concerning the 1949 convention, which came about after WWII.[95]

There were two Hague Conventions, one in 1899 and a second one in 1907. The first convention was convened as an attempt to bring the world to conciliation and establish basic norms for peaceful conflict resolution. The original Hague Convention was largely pushed

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[93] "Changing World, Unchanged Protection? Seventy Years of the Geneva Conventions: Speech given by ICRC President Peter Maurer to the Graduate Institute, Geneva, 13 March 2019," in *International Review of the Red Cross* (vol. 100, no. 907-909, 2018, pp. 395–401), Page 396.

[94] "Summary of the Geneva Conventions of 1949 and Their Additional Protocols," in *American Red Cross*, (Apr. 2011). https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf. Pages 2-4. "All four Geneva Conventions contain an identical Article 3, extending general coverage to 'conflicts not of an international character.'" This common article summarizes the codification that conflicts not between two state actors still have norms and moral rules to follow and be held to.

[95] "Changing World, Unchanged Protection?," *International Review of the Red Cross.* "Together the world agreed that even during armed conflict there remain limits as to what we – as nations, communities, brothers and sisters – can do to each other. This was a powerful concept brought into conventional law." Post-WWII marks the first time after decades of global conflict that nations were willing and able to sit down to evaluate and prioritize the human cost of war.

forward by Russian Tsar Nicholas II, who had a grand vision for limiting military brutality and widespread disarmament.[96] While the conventions were less than what Nicholas II wanted to achieve – in part because of the steamrolling of the United States delegation[97] – they succeeded in establishing a set of standards, outlined in Appendix 1.

The initial Hague Convention created the groundwork for future international warfare standards, establishing the process by which international agreements can be made. The second Hague Convention came at a time when the world was beginning to see the seedlings of war and were an even larger international affair than the initial convention. Called for by U.S. President Theodore Roosevelt, the 1907 conference met with the goal to improve the existing conventions and add in new laws and customs for maritime warfare.[98] The participants succeeded in adopting fourteen additions, as listed in Appendix 2.

Important to note is that "both the 1899 and 1907 conferences adopted without much controversy conventions expanding the principles of the 1864 Geneva Convention and its 1906 update, respectively, to naval warfare."[99] The ideological shift between the 1864 Geneva Convention and the Hague Conventions was the minimization of "unnecessary evils of war." This effort to minimize extreme brutality was ultimately terminated by nations protecting their own military interests at the expense of the meaningful adoption of international standards.[100] Such purposeful exclusion is indicative of the formation of the ICJS: the nations in power at the time put considerations for their own interests above the success or exhaustiveness of international peace. The impact of this valuation has stuck with the ICJS to this day. National

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[96] "The Role and Importance of the Hague Conferences," Pages 1-2.
[97] The country was coming off a victory in the Spanish-American war, and was a rising power with a vested interest in the continuation of the military development.
[98] "The Role and Importance of the Hague Conferences," Page 3.
[99] "The Role and Importance of the Hague Conferences," Page 8.
[100] Chris Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," in *The Development and Principles of International Humanitarian Law* (2017, pp. 49–95).

interest is of course something nations must prioritize, but there was a systematic unwillingness to consider the long-term benefits of a thorough international peace agreement from the leading countries during the formation of the Geneva and Hague Conventions. Leading powers in the early 20th century failed to prioritize the collective good over their singular goals, thus leading us into a legal system designed with loop holes and the implicit expectation of new military clashes.

The First Trial: Leipzig War Crimes Trial

The history of international law is complicated. There are many "firsts" throughout the establishment of the system we have in place today. One of the earliest attempts to prosecute war crimes was conducted after World War I. Following the defeat of Germany and the Treaty of Versailles, the Allied victors wanted to bring justice to the agitators and send a deeper message of guilt to the German war machine.[101] A such, the Leipzig War Crimes Trials were created in concert with Turkish trials in Istanbul.[102] The trials were designed to convict enemy leaders who were charged with criminal violations of international law during the war. The Allied governments explored this goal via the mechanisms of the Paris Peace Conference and the Treaty of Versailles, establishing the Commission of Responsibilities to handle the logistics of creating a war crimes tribunal.[103]

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[101] Alan Kramer, "The First Wave of International War Crimes Trials: Istanbul and Leipzig," in *European Review* (14, no. 4, 2006: 441–55).

[102] Kramer, Page 441. The Turkish case was even more of a failure than that of the Leipzig Trial as it was never a formalized court structure. Important to note is that the Istanbul case served as further proof of the insufficiency of international law. "Just as great power involvement played a role in the development of the Ottoman policy of genocide, bungled great power intervention ensured that the judicial process against the perpetrators was aborted after a promising start."

[103] "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," in *The American Journal of International Law* (14, no. 1/2 (1920): 95-154), Page 95.

The Allied governments were eager to seek justice for the crimes perpetrated against their citizens, naming 1,590 German suspects accused of committing war crimes.[104] Upon request of extradition, public opinion and logistical limitations forced the Allied powers to cut the list down to 862 suspects.[105] The German government refused to extradite those accused, and requested the individuals be tried in the German court, the *Reichsgericht*. Realizing the challenge in finding, transporting, and trying over 800 individuals, the Allied powers agreed to shift the trials over to the German court system. Of the 862 alleged war criminals submitted to Germany by the Allies, only 45 were chosen to be tried at Leipzig, serving as an initial test of good will.[106] However, in the aftermath of the war it was nearly impossible to track people down, and only 17 people eventually stood trial. Of those 17, only ten were convicted. The unsatisfactory results were in part thanks to the trial's adherence to German law, which at the time "followed the principle that German military law took precedence over international law, even when, as with the Hague Convention, the German government had signed an agreement to incorporate it into domestic military law."[107]

The Leipzig War Crimes Trials have largely been written off as a failure on the part of international criminal justice. However, it was the first attempt at creating a modern international

[104] Kramer, "The First Wave of International War Crimes Trials: Istanbul and Leipzig, Page 446. "The First Wave of International War Crimes Trials: Istanbul and Leipzig."
[105] Kramer, Page 447. "The individuals sought for extradition were charged with various types of crimes. The greatest number, 18%, related to the killing of civilians in the invasion of Belgium and France, and in total 37% of the charges related to crimes committed during the invasion in 1914. Other major categories included crimes against prisoners of war (14%), and deportations of civilians. On allied definitions these were 'atrocities' and 'war crimes' by contemporary understanding (the term 'war crime' having been introduced in 1906 by the German-British international lawyer Lassa Oppenheim)."
[106] Kramer, Page 448.
[107] Kramer, Page 449.

justice structure, and in many ways the global frustration with the results of the post-WWI trials set up the establishment of the current system and informed post-WWII efforts.[108]

A Missed Opportunity: The Nuremburg Trials

After the completion of World War II, the international community needed some way of bringing Nazi war criminals to justice and to send a message that mass atrocities were not going to be tolerated in the new world order. This led to the Nuremburg Trials, established by the London Agreement of 1945,[109] running from 1945 through 1949. The Trials were the first opportunity for violence against women to be addressed in an international legal setting, although the treatment left much to be desired. The Nuremberg Trials also served as the formal legal codification that humanity would be held to a shared standard of international justice, from heads of states to soldiers in conflict. This set of rules became known as international humanitarian law. Despite the opportunity to address the issue that was so prevalent during the conflict of WWII, sexual violence was excluded from all convictions and prosecutions, and was not mentioned during trial for the entire duration of the Nuremberg Trials.

Over the decades of development, international legal commentators have argued that the rules of war have become humanized, a reality that is demonstrated via the rise of so-termed "human rights law" after the Second World War.[110] Gradually since the 1960s, the international rules that were previously known as the "laws of war" have become a body of rules named "international humanitarian law."[111] This humanist transition developed alongside the

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[108] Kramer, "The First Wave of International War Crimes Trials: Istanbul and Leipzig," Pages 450-451. "In a broader sense, the attempt to prosecute those guilty… implanted in the international public sphere a new consciousness and a will, however imperfectly realized, to intervene."
[109] "Nuremberg Trial Proceedings Vol. 1 London Agreement of August 8th, 1945," *Avalon Project*, avalon.law.yale.edu/imt/imtchart.asp.
[110] "The Role and Importance of the Hague Conferences," Page 14.
[111] "The Role and Importance of the Hague Conferences," Page 14.

Nuremberg and Tokyo trials, as the trials established a framework from which to try individuals for war crimes and offered an avenue for addressing military actions based on their impact on individuals, societies, and countries.[112]

Prominent in the Nuremberg Trials were the concepts of the laws of war, as defined by customs and by the Hague and Geneva Conventions. The International Military Tribunal defined within its jurisdiction three types of crimes, outlined in Article 6 of the charter, which would be used to convict the accused: crimes against peace, crimes against war, and crimes against humanity.[113] The closest mention to gendered crimes or sexual violence came under the humanity designation in section c, "other inhumane acts committed against any civilian population."[114] While the Nuremberg Trials cemented for the international community a standard from which to build from, the absence of gendered crimes in the foundational document set a precedent of ignorance and implied unimportance of, and for, gendered crimes.

Evaluating individual case results or trials is less useful for the Nuremberg Trials in connection to sexual violence or convictions of gendered crimes. Of the 42 volumes of court proceedings, "rape" is mentioned once in Volume VIII and Volume XX in a laundry list of other crimes, and "sexual violence" is never mentioned,[115] despite the fact that both were widespread

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[112] Igor I Lukashuk, "The Nuremberg and Tokyo Trials: 50 Years Later," in *Review of Central and East European Law* (vol. 20, no. 2, 1994, pp. 207–216). "The major significance of the charters of the tribunals lies in that they introduced an element into the mechanism of safeguarding peace that was new in principle and absolutely indispensable, namely, the individual criminal responsibility of heads of states under international law for acts of aggression." This reality and innovation were massively important in the creation of our modern international justice system, and marked the transition towards human rights, even in times of conflict. Thus, opening the door for human rights to gain value elsewhere in society, and for this paper to have the substance it does.

[113] "International Conference on Military Trials: London, 1945."

[114] "International Conference on Military Trials: London, 1945."

[115] "Trial of the Major War Criminals before the International Military Tribunal," in *Trial of the Major War Criminals before the International Military Tribunal (*The Library of Congress, 4 May 2016), www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html. "Rape" is utilized to refer to the rape of nations throughout the proceedings, but not in connection to targeting or attacks on individuals or in connection to sexual violence. It also appears in Volumes 5 and 7 quoting German produced anti-Jewish propaganda. There is some mention in Volume 20, 24, and 30 of restrictions on sexual intercourse, some of which resulted in hanging or death for Jews or Poles, but none of which made it into a conviction.

and perpetrated by both German and Allied military personnel.[116] Volume II of the Tribunal proceedings recalled torture tactics in which captives were "chilled to 27 to 29 degrees" and then "rewarmed" with animal heat, which consisted of surrounding the hypothermic male "with bodies of living women until he revived and responded to his environment by having sexual intercourse."[117] The cruelty perpetrated by the Nazi machine was inhumane, and utilized women as objects of torture. Still, in the court proceedings, the presence of women or use thereof is not mentioned in the convictions. It has been argued that this is solely because the vocabulary did not exist in the Nuremberg Charter to convict for rape or sexual violence, and in part that is true. But, that language stems from a lack of willingness to convict individuals for gendered crimes. It wasn't explicitly written in the charter because the international leaders were not prepared to address the sexual violence crimes committed by the troops. This unwillingness includes the Allied military personnel, which were also known to have committed mass rapes. If they had convicted Nazi military for raping women, they could have risked subjected themselves to a similar kind of scrutiny.

Addressing the absence of sexual violence crimes and convictions in the Nuremburg Trials is crucial to establishing an understanding of the current ICJS and case precedents, especially with regards to gendered violence. Given their timing, their visibility, and their global participation, the Nuremburg Trials serve as the backbone to all modern international courts and exist as the foundation for steps forward. This was the footing that the rest of our ICJS was built, and it excluded the vocabulary and the willingness to address gendered crimes. We have made

[116] Ruth Seifert, "War and Rape: A Preliminary Analysis," in *The Criminology of War* (2017, pp. 307–325). It has been estimated that upwards of 100,000 German women were raped by the Soviet Army alone. Other estimates put the total number of women raped during WWII at 1,000,000.
[117] "Trial of the Major War Criminals before the International Military Tribunal," in *Trial of the Major War Criminals before the International Military Tribunal* (The Library of Congress, v. 2), Pages 129-130.

great strides since the Nuremberg Trials – not the least of which being the designation of rape and sexual violence as a crime against humanity – but we still have incredible hurdles of inequality to surmount before the ICJS demonstrates equality between gendered and non-gendered crimes.

Underplaying Even the Most Brutal Rapes: Tokyo Trials

The violence that the Japanese military committed during WWII hurdled past that which the Nuremberg Trials covered. The racial attacks and brutality committed by the Japanese military were purposeful, targeted, and inhumane. Overlapping for the majority of their duration, the International Military Tribunal for the Far East (IMTFE) was similar to the Nuremburg Trials, but created for the Asia-based leader of the Axis powers. Known by many names – the International Military Tribunal for the Far East, IMTFE, the Tokyo Trial or the Tokyo War Crimes Tribunal – the trial was established to try the military leaders of Japan for their involvement in waging World War II and any war crimes committed during the conflict. Operational from 1946 through 1948, the IMTFE convicted guilty military leaders of everything from conventional war crimes to crimes against humanity.[118] While the IMTFE occurred at nearly the same time as the Nuremburg Trials, there was one key difference between the two: the presence of rape in the trial proceedings.

July of 1945, the U.S., U.K., and China joined together to sign the Potsdam Declaration, a post-war document which ordered the "unconditional surrender" of Japan and stated that "stern

[118] Lukashuk, "The Nuremberg and Tokyo Trials: 50 Years Later," Page 210. "The Second World War demonstrated with particular force the connection between human rights and peace and the security of states and peoples." The Tokyo Trials were the codification of this connection, and one of the first steps toward universal adoption of that truth with the inclusion of gendered crimes in the mix.

justice shall be meted out to all war criminals."[119] Important to note is that this declaration came before Japan surrendered and before the U.S. dropped the second bomb. Under the direction of Supreme Commander of the Allied Powers, General MacArthur established the International Military Tribunal for the Far East. The IMTFE has many of the same parameters as the Nuremberg Trials, including the jurisdiction to try individuals for crimes against peace, war crimes, and crimes against humanity, using virtually the same definitions as the Nuremberg Charter.[120] The trials spanned between April of 1946 and November of 1948, ultimately indicting 28 Japanese officials.

It would be impossible to talk about the International Military Tribunal of the Far East without discussing the Rape of Nanking. Nanking was then the capital of China and thus a target for Japanese troops during WWII. "Rape" in the name refers to both the brutality of the attack as well as the pervasive and vicious sexual violence. There were heinous acts of violence committed against the people of Nanking, including brutal sexual violence and the mass rape of women. Of the litany of brutal and gendered attacks was the systematic raping of more than 20,000 women, [121] from young girls to old women.[122] The attacks were treated like games for the Japanese soldiers. Some of the most brutal forms of Japanese entertainment torture came from gendered violence: impalement of vaginas, gang rape, forced incestual rape, dismemberment of sexualized body parts, and sodomization.[123] This is by no means a full picture of the horrors committed in Nanking in the late 1930s, but rather just a sliver of the inhumanity and of the mass rape and mass murder committed during the massacre.

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[119] "The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)," *U.S. Department of State*, history.state.gov/milestones/1945-1952/nuremberg.
[120] Ibid.
[121] "The Tokyo War Crimes Trials," in *My China News Digest*, cnd.org/mirror/nanjing/NMTT.html.
[122] Iris Chang, *The Rape of Nanking: the Forgotten Holocaust of World War II*, (Ishi Press International, 2012), Pages 61-80.
[123] Ibid.

Similar to the Nuremberg Trials, individual case studies are not as explicative of the overall trends of the trial as collective analysis. As outlined above, "rape" and "sexual violence" were all but absent from the entirety of the Nuremberg proceedings even though they were prevalent throughout German military movement during WWII. The sexual violence committed by the Japanese military was even more violent and directed. In a shift from the Nuremberg Trials, sexual violence was mentioned during the IMTFE trials. The knowledge and duration of the Rape of Nanking alone was a major issue in the trial and made its way into many of the convictions.[124] However, because the IMTFE took much of its foundational language from the Nuremberg Charter, the court still did not have the vocabulary or the authority to find individuals guilty specifically for mass rape, sexual violence, and other gendered crimes. This was true even though there was overwhelming evidence to prove that such crimes were systematically committed, and that the Japanese military used sexual violence as a tactic during the war. But, because of the confines of the foundational charter, the court was limited in its reach and scope to the language of crimes against humanity, which did not include sexual violence.[125]

Scholars in the international legal field are not blind to the shortcomings of the IMTFE. The failures of the IMTFE are particularly important because of the continued inability to address sexual violence crimes that existed at the beginning of our ICJS. The IMTFE was the first iteration of prosecuting widely known sexual and gendered violence. However, the scholarly

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[124] "The Tokyo War Crimes Trials."

[125] "International Military Tribunal For The Far East: Special Proclamation by the Supreme Commander For the Allied Powers at Tokyo January 19, 1946," in *United Nations*, www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf. "Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any or' the foregoing crimes are responsible for all 'acts performed by any person in execution of such plan."

criticisms of the IMTFE largely pertain to the makeup of trial leadership, the lack of representation from affected countries, and the overt politicization of the process. There is a pronounced absence of scholarship and critique about the absence of gendered and sexual violence from the convictions and the court proceedings.[126] Of course, these critiques are also valid and incredibly important in auditing our ICJS. However, we cannot leave the plight and suffering of women out of the picture. Addressing the fact that justice for women has been missing from our ICJS in some form since its inception is crucial in being able to address systematic biases and elucidate how we move forward, past societal gender inequality. The Rape of Nanking was one of the largest scale affronts to human dignity in human history and specifically targeted women, yet, it has gone understudied. But, if we are going to move forward in our ICJS, we need to study the IMTFE and acknowledge the absence of gendered and sexual violence in the proceedings.

Trying to Universalize the Rights of Women: CEDAW

Case precedents are not the only influence on our international legal approach to sexual violence. International documents, treaties, and agreements also contribute to our ICJS. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was adopted in 1979 by the UN General Assembly.[127] This treaty offered an international bill of rights for women and was instituted in 1981. CEDAW codified the transnational value placed on

[126] Lukashuk, "The Nuremberg and Tokyo Trials," Page 212. “Underscoring the importance of the Nuremberg and Tokyo trials, we are by no means inclined to idealize them. They were not free from defects and could not but reflect the realities of their time. The trials were to a substantial degree politicized. The judges and prosecutors were appointed by the victorious powers. Among the 11 judges on the Tokyo tribunal, only three represented Asian countries.”

[127] Simone Cusack and Lisa Pusey, “CEDAW And the Rights to Non-Discrimination And Equality,” in *Melbourne Journal of International Law* (vol. 14, 2013), law.unimelb.edu.au/__data/assets/pdf_file/0003/1687440/03Cusack1.pdf.

the safety and treatment of women, a designation that is important to explore with regards to the expectations placed on equality in the ICTY and ICTR. While CEDAW has largely been applied in the ICJS to case trials and in domestic trials of abuses committed against women, its very existence marked a shift in the international dialogue. Coming off the first two international tribunals which neglected to adjudicate gendered crimes, CEDAW demonstrates the public desire to establish gender equality.

The CEDAW treaty was important because it came from civil society calls for more attention to be paid to women's protection and set the tone for precipitating conflicts in terms of international treatment and expectations. In this paper, I deal only briefly with CEDAW because it is directed toward forcing national governments to "eliminate discrimination against women by granting them legal rights as well as equal opportunities."[128] International legal practices are not so directly influenced by the passage of the treaty as to mention it in court proceedings, or in the establishment of tribunals or courts. However, the impact of CEDAW is significant when considered in the context of bolstering women's rights around the world. Since the treaty's adoption, the call for women's rights has increased across the globe and its presence in the ICJS has become a key aspect of the justice delivered for sexual violence crimes. Directly mapping the impact of CEDAW has yet to be accomplished, but there is a strong correlation between its adoption, civil society engagement and an increase in feminist activism in the ICJS.

The First Tribunal in The New System: ICTY

Key to understanding our current approach to sexual violence is mapping it alongside the development of the ICJS. Thanks to the Nuremberg and Tokyo trials, the world had been

[128] Cusack and Pusey, "CEDAW And the Rights to Non-Discrimination And Equality," Page 12.

exposed to international law, but not to a trial of a smaller-scale regional clash. Modern conflicts were not formally dealt with in the international criminal justice realm until the UN established trials for the Yugoslav Wars. These trials, formally designated The International Criminal Tribunal for the former Yugoslavia (ICTY), were established to prosecute the serious crimes committed in the Balkans in the 1990s. The Tribunal was established in 1993 and was not completed until 2017, running a duration of 24 years. The ICTY is a crucial component in the evaluation of international sexual violence precedent as it marked the first modern court proceeding that dealt with gendered crimes as well as the first time that sexual violence was used as a main component in convictions.

The major achievements of the ICTY were the complete overhaul of the existing international humanitarian law landscape, the voice provided to victims, and the ability to send a global message about intolerance for violence. The very existence of the ICTY, let alone the convictions it handed out, marked a shift in the international position on sexual violence. The ICTY proudly claims on the tribunal's website the role of the court in the advancement of sexual violence justice, saying:

> More than a third of those convicted by the ICTY have been found guilty of crimes involving sexual violence. Such convictions are one of the Tribunal's pioneering achievements. They have ensured that treaties and conventions which have existed on paper throughout the 20th century have finally been put in practice, and violations punished.[129]

The specific manifestation of these success came in the form of 32 sexual violence specific convictions.[130] One of the most notable of the ICTY convictions in relation to sexual violence was that of Duško Tadić, who was found guilty of the beating and other attacks

[129] "Crimes of Sexual Violence," *International Criminal Tribunal for the Former Yugoslavia*, www.icty.org/en/features/crimes-sexual-violence.
[130] "In Numbers," *International Criminal Tribunal for the Former Yugoslavia*, www.icty.org/en/features/crimes-sexual-violence/in-numbers.

committed against Fikret Harambašić, a young man.[131] Tadić was the first individual tried by the ICTY and the first person to appear before an international war crimes tribunal since Nuremberg.[132] His case was noteworthy, and marked large steps made since the Nuremberg Trials, like the ability to discuss and investigate accusations of rape in an international court. However, the Tadić case was not without flaw; rape was presented as mere background color for other crimes, and the court dropped gendered rape charges after witness complications. The Tadić case, according to author and scholar Alison Cole, specifically "showed that formal provisions to support the prosecution of rape are insufficient: strategies for investigating gender crimes need to be implemented from the outset and maintained through to trial, in particular, to provide adequate protection and security to witnesses."[133] Harambašić, the male victim, suffered horribly at the hands of Tadić, facing sexual mutualization and humiliation the last time he was seen alive.[134] The court found Tadić guilty of cruel treatment (Count 10) and inhumane acts (Count 11), which included sexual violence, beatings, and gendered crimes.

> The Trial Chamber found beyond reasonable doubt that Duško Tadić was present on the hangar floor at the time of the assault upon and sexual mutilation of Fikret Harambašić, and that, through his presence, Duško Tadić aided and encouraged the group of men actively taking part in the assault. Of particular concern here is the cruelty and humiliation inflicted on the victim and the other detainees involved.[135]

The changes that occurred between the Nuremberg and Tokyo trials and the ICTY and ICTR, which are often referred to as sister tribunals, are important to understanding the development of sexual violence precedent in the ICJS. In addition to the introduction of

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[131] As stated above, the ICTY marked a major shift in the institutional approach to sexual violence crimes, a reputation that was made possible by many trials that I cannot fully examine in this paper. If you are interested in reading more about the ICTY and the precedent the tribunal set, visit the ICTY website, ICTY.org.
[132] "Tadić, Duško," in *The Hague Justice Portal*, www.haguejusticeportal.net/index.php?id=6077.
[133] Cole, "Rethinking Rape Law," Page 51
[134] "Tadić (IT-94-1)," in *International Criminal Tribunal for the Former Yugoslavia* (14 Dec. 1995), www.icty.org/en/case/tadic#tjug, Page 14.
[135] Ibid.

witnesses into the sexual violence proceedings, the ICTY was able to establish that sexual violence crimes can be classified as torture, enslavement, or persecution; convictions for rape could be classified as a crime against humanity; and that gendered crimes could be the tied into other, broader convictions.[136] The ICTY's judgement against Radovan Karadžić was the first instance where a definition of rape was created and utilized.

> Rape involves sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim. This was the definition that was adopted in the trial of Kunarac, Kovač and Vukovič, the ICTY's leading case on rape. [137]

Although it was far too narrow, the ICTY was the first example of our ability to define and prosecute instances of sexual violence during conflict.

Civil society actors, in conjunction with the ICTY, began the call for gender equality and justice for sexual violence in the international sphere. However, the fair or equal treatment of female victims, stand-alone convictions for sexual violence, and the vocabulary to address the outstanding gender bias in the ICJS was not achieved in the ICTY. All of that was yet to come, but the ICTY was a huge step toward such accomplishments and itself represents the forward motion of the ICJS approach to sexual violence justice.

Pushing the Definition and Convictions Further: ICTR

The ICTY created important precedents and extended the international tolerance for sexual violence convictions, but still failed to address culpability for sexual violence rings and structures. Established by the UN one year after the ICTY, the International Criminal Tribunal

[136] Cole, "Rethinking Rape Law," Page 51.
[137] Janine Natalya Clark, "The First Rape Conviction at the ICC," in *Journal of International Criminal Justice* (vol. 14, no. 3, 2016, pp. 667–687), Page 664.

for Rwanda (ICTR) was the international court endowed to put those responsible for the Rwandan genocide and other severe crimes in Rwanda in 1994 on trial. The Tribunal was tasked with handing out convictions for genocide, crimes against humanity, and violations of the Geneva Conventions in terms of war crimes. Important to note about the ICTR is that it dealt with crimes that were almost exclusively rooted in ethnic targeting and marked the first time that rape was designated as a war crime. This is a key fact in tracing the influence of the ICTR in future cases, and as we know from Chapter 1, race is an inextricable part of gendered crimes.

The development of convicting rape as a war crime – crime against humanity – was lauded as the most significant development up to this point in terms of the international treatment of sexual violence. This designation was a strong message to other international bad actors that the world was not going to tolerate sexual violence. The major themes in this case study are the classification of rape as an act of genocide, the legacy of the ICTR in terms of sexual violence precedent, and the major jump in treatment from the ICTY.

The ICTR was notable in the context international justice for many reasons, but most important for the purposes of this paper were the designation that genocide can be committed in the form of rape and the explicit use of rape in a conviction.[138] The defining case that brought sexual violence into the conviction during the ICTR was that of Akayesu. Broadly speaking, the Akayesu case is about abuse of power. The accused, a Hutu, was appointed bourgmestre and put in charge of a commune in Rwanda during the civil war.[139] In his commune, Taba, and over the

[138] "International and Regional Perspectives," Page 54. "The first case of the ICTR, Akayesu, made the groundbreaking finding that genocide can be committed by acts of rape and sexual violence, since these crimes constitute the 'serious bodily or mental harm' referred to under the Genocide Convention, if coupled with specific intent to destroy the targeted group."

[139] "Prosecutor v. Akayesu, Case No. ICTR-96-4, Indictment (1998)," *University of Minnesota Human Rights Library* (ICTR-96-4-I), hrlibrary.umn.edu/instree/ICTR/AKAYESU_ICTR-96-4/Indictment_ICTR-96-4-I.html. "In Rwanda, the bourgmestre is the most powerful figure in the commune. His de facto authority in the area is significantly greater than that which is conferred upon him de jure."

course of his leadership, at least 2,000 Tutsis were killed. In the initial judgement of the Akayesu case,[140] rape is mentioned 17 times. Of his charges, in section 12B, it is accused:

> Jean Paul Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul Akayesu encouraged these activities.[141]

The court established its own definition of rape for the purposes of the trial. The definition was unique as it revolved around the coercive nature of the act.[142] This was arguably the largest jump in understanding of rape as a purposeful attack and is a key success of the ICTR. Akayesu was found responsible of 15 counts of criminal violations. The 15th count was the ground breaking charge, stating:

> COUNT 15: Violations of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol 2, as incorporated by Article 4(e) (outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault) of the Statute of the Tribunal.[143]

This groundbreaking conviction was almost left out of the verdict due to the institutional biases of the prosecution. Their initial charges did not include rape. Rather, the rape charges were added after multiple witnesses testified to seeing rapes during their statements. After hearing the horrors and realities of the wartime rapes from multiple witnesses – even after the prosecutor argued that it was impossible to document rape because the female victims would not talk about it – Judge Pillay, the only woman judge out of the nine at the ICTR at the time, adjourned the meetings to allow the prosecution to include rape in their charges.[144] If it had not

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[140] The case was appealed, and another judgement delivered in 2001 that did not change the precedent in terms of sexual violence or rape being named in the conviction.
[141] "The Prosecutor Versus Jean-Paul Akayesu," *International Criminal Tribunal for Rwanda*, (Case No. ICTR-96-4-T. 2 Sept. 1998), www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf. Page 11.
[142] Clark, "The First Rape Conviction at the ICC," Page 677.
[143] "The Prosecutor Versus Jean-Paul Akayesu," Page 16.
[144] Cole, "Rethinking Rape Law," Page 54.

been for the active involvement of Judge Pillay, the development of a sexual violence precedent and expansion of justice in the convictions of gendered violence may have been setback indefinitely. It is this type of activism and active understanding of criminal violations that current actors in the system must achieve if improvement is to continue to be made.

Important to note is the overlap in timeline between the two tribunals – the ICTY and ICTR – and the stark difference in approach taken. The Jean-Paul Akayesu case led to the classification of rape as a violation of the Geneva Conventions, and thus a war crime, and pushed the ICJS toward acknowledgement and addressment of mass sexual violence committed against women. This is potentially the largest jump in terms of legal treatment of rape and sexual violence in the history of the ICJS, the legacy of which will be tracked through the rest of the cases. It is hard to overestimate the role this classification played in the context of other international developments, especially considering the elevation in utilizing existing international doctrines and rules.[145]

Changing the Structure, Consolidating the Process: International Criminal Court

Prior to the 2000s, the international criminal court system was operating off loose rules and largely developing from unconsolidated standards for rape, as seen in the ICTY and ICTR. The international community recognized this disparity and created the Rome Statute of the International Criminal Court – also known as the Rome Statute or the International Criminal Court Statute. The treaty sought to codify the future global response to war crimes and conflicts.

[145] If this were a purely chronological outline of the development of sexual violence precedent, next would come the Special Court for Sierra Leone. However, seeing as the goal of this chapter is to paint broad strokes on the development of our international approach to gendered crimes, the SLSC has been omitted. While the court was a momentous development in the ICJS, it does not directly contribute to the undertaking of this paper. The court continued the patterns already tracked above into that of sexual slavery and extended the processes of the below developments.

Aiding in the shift toward process, the treaty establishes the International Criminal Court (ICC), outlines its' functions, as well as jurisdiction and structure. Important to note about the statute and the ICC is that the court system can only try cases that states are either unwilling or unable to try themselves.

The Rome Statute defines four core international crimes to be dealt with by the ICC: genocide, crimes against humanity, war crimes, and crimes of aggression.[146] Rape falls into Article 7, that of crimes against humanity section g:

> Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[147]

Other forms of forced sexual violence are classified in Article 8, war crimes, in section (xxii):

> Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.[148]

Additional precautions and steps were put in place to provide for gendered crimes. This included Article 42, which outlined in section 9:

> "The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children."[149]

The Rome Statute also created Victims and Witnesses United, designed to provide counseling and other necessary measures for victims and witnesses of trauma, specifically targeting those who have experienced sexual violence.[150]

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[146] "Rome Statute of the International Criminal Court," *International Criminal Court* (2011), www.icc-cpi.int/resource-library/documents/rs-eng.pdf.
[147] "Rome Statute of the International Criminal Court," Page 3.
[148] "Rome Statute of the International Criminal Court," Page 6.
[149] "Rome Statute of the International Criminal Court," Page 21.
[150] "Rome Statute of the International Criminal Court," Page 21. "The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence."

One of the most progressive steps taken by the Rome Statute with regard to violence against women were the protections mandated for victims in the language of the document. This included special mandates for prosecutors to "respect the interests and personal circumstances of victims."[151] The ICC was a long time coming – in consideration since 1951 – and put into practice the lessons learned from the previous international attempts at achieving wartime justice.[152] Some of the foundations of our modern ICJS were made concrete via the Rome Statute, including the classification of prostitution and female trafficking as a form of sexual slavery, formal protection for victims, and the extension of persecution to include gender targeting.[153] The Rome Statute also laid the groundwork for the ICC to adopt the precedents set by the ICTR and ICTY, including the classification of rape as a war crime, and sexual violence as both a form of torture and genocide.[154]

The product of the Rome Statute, the ICC situations are the new system in action. The ICC was created to enact the practices solidified by the Rome Statute and to organize criminal courts. There have been multiple ICC situations since the establishment of the system in 2002.

The New System and Restorative Justice: ICC Situations

The ICC was created to better handle international conflicts. The system was designed specifically to address that which domestic governments could not. Through selected case

[151] "Rome Statute of the International Criminal Court," Page 24. Article 54, section 1b): "Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children." These mandates were repeated in Article 68, sections 1 and 2.
[152] Cole, "Rethinking Rape Law," Page 58. "The Rome Statute crystallized the advancements in prosecuting sexual and gender-based violence which had arisen out of the ICTY, ICTR and SLSC."
[153] Cole, Page 58.
[154] Cole, Page 58.

studies, I will conduct a qualitative examination of convictions to determine the precedent and treatment implications that the Rome Statute brought. I will utilize the first ICC reparations case, that of Thomas Lubanga Dyilo which failed to include any sexual violence convictions even though they were present in the conflict, and the first ICC conviction of rape, that of Jean-Pierre Bemba Gombo, to explain the way in which gendered crimes are handled in the ICC writ large and to track the precedents set and their impact on the broader international approach to sexual violence. Looking at two case studies in different moments of the ICC but in the same situation will provide a timeline of implementation and a means of tracking the impact of previous tribunals in the newly constructed system.

These two cases were selected because of their timeliness, and because of the content of the trials. An additional benefit of using the ICC situations is the ability to examine the new structures through the same lens as the initial ICTY, ICTR, and the existing precedents. Important to note about the ICC and the analysis thereof is the use and definition of sexual violence during conflict. Because of the nature of the cases that the ICC is able to take on – those that domestic judicial systems cannot or will not handle themselves – the crimes are brutal in nature and the convictions are complex. Race, ethnicity, and religion play into the violence and the crimes are committed against a targeted demographic, a reality that was somewhat accepted after the ICTR. As such, the means and way by which the ICC handles sensitive, gendered, and sexualized cases becomes increasingly important to the development of sexual violence law.

When the ICC first started, it lacked the institutional will to fully embrace the reality and horror of sexual violence in context. This can be seen and tracked through the first ICC reparations case, that of Thomas Lubanga Dyilo who was convicted for his crimes during the Situation in the Democratic Republic of the Congo. Lubanga was the President of the Union des

Patriotes Congolias/Forced Patriotiques pour la Libération du Congo (UPC/FPLC).[155] He was found guilty in March of 2012 of war crimes consisting of conscripting children under the age of 15 and using them as child soldiers. Crucially missing from this conviction was the mention of sexual or gendered violence, which was brought up in the court proceedings.[156] Specifically, evidence came out during the trial about violence committed against female soldiers.[157] One witness testified that:

> The children were trained to kill and to rape. All the girls recruited as soldiers would be raped and abused because they are girls.[158]

Despite this claim of gendered violence, the prosecution did not attempt to get sexual violence as a stand-alone conviction. Rather, they used it as supporting evidence for proving forced conscription of child soldiers during the majority of the trial.[159] Because the prosecution failed to include allegations of sexual violence in the initial charges and to investigate them sufficiently throughout the trial, the judges were unable to find Lubanga guilty of such crimes.[160] The prosecution tried to get sexual violence included in the reparations phase of the trial, however,

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[155] "Lubanga Case," www.icc-cpi.int/drc/lubanga.

[156] "Prosecutor V. Thomas Lubanga Dyilo," *International Criminal Court* (10 July 2012), www.icc-cpi.int/CourtRecords/CR2012_07409.PDF, Page 45. To give an idea or the universality of rape and gender-based violence during the conflict, below is a summary of one witness testimony.
"Whilst considering the gravity of the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities, it is essential to keep in mind the differential gender effects and damages that these crimes have upon their victims, depending on whether they are boys or girls. Along these lines, Ms Schauer stated that sexual violence, including torture, rape, mass rape, sexual slavery, enforced prostitution, forced sterilization, forced termination of pregnancies, giving birth without assistance and being mutilated are some of the key gender-based experiences of both women and girls during armed conflicts."

[157] Louise Chappell, "A Chance for the International Criminal Court to Fix Sex Crimes Injustice," in *The Conversation* (Australian Human Rights Institute, 21 Oct. 2019), theconversation.com/a-chance-for-the-international-criminal-court-to-fix-sex-crimes-injustice-88966.

[158] "Prosecutor V. Thomas Lubanga Dyilo," Page 24.

[159] "Prosecutor V. Thomas Lubanga Dyilo," Page 25. "On this basis, the prosecution submits that the sexual violence and rape to which some girl soldiers were subjected demonstrates that the crimes of conscription, enlistment and use of children were committed with marked cruelty, and they were directed at victims who were particularly defenseless, within the meaning of Rule 145(2)(b)(iii) of the Rules."

[160] Chappell, "A Chance for the International Criminal Court to Fix Sex Crimes Injustice."

the defense won on the argument that since Lubanga was not found guilty of sexual violence crimes formally, he could not be held accountable to pay reparations for those victims.

The Lubanga case was the first conviction handed down by the ICC Trial Chamber. It was ground breaking in terms of mandating reparations for war criminals to compensate victims. However, the case failed to reach the full potential of justice, specifically justice for females and victims of sexual violence. While future cases were able to achieve justice specifically for gendered crimes, the Lubanga case was not quick enough to act on the facts. Victims who testified to being rape or witnessing horrible gendered violence were left to the same mechanisms of justice as those who were child soldiers. This falls into the logic of 'getting them on whatever sticks,' which I will explore in Chapter 3, that ultimately undermined justice for sexual violence victims.

Convictions that are likely to garner guilty verdicts are no longer limited to that of non-gendered violence or personal abuse, as proven by the next case study. The Jean-Pierre Bemba Gombo case came out of the Democratic Republic of Congo (DRC), Trial Chamber III of the ICC.[161] The conviction was delivered in March of 2016 for crimes committed in 2002 and 2003. The Bemba case was one of power and command responsibility. While the Bemba case adds distinctive policies to the ICJS, precedent making convictions do not come quickly. Still, the court stated that, even though the crimes Bemba was convicted of were not all perpetrated by him, he nonetheless had criminal responsibility because he was the military commander and wholly neglected to address the crimes.[162] This was significant, given that sexual violence had not yet been concretely established in chain-of-command guilt, and the demonstrated best way to

[161] Clark, "The First Rape Conviction at the ICC," Page 667.
[162] Clark, Pages 670-672.

discourage a military policy of sexual violence is to prosecute those at the top.[163] Further, the Bemba case utilized the definition of rape found in the Rome Statute's associated Elements of Crimes document,[164] a definition that importantly does not focus on consent.[165] This is a crucial development, because consent in rape is implicitly absent. Acknowledging that rape is an act perpetrated against an individual without any question of their inviting it, the Bemba case was a major step toward gendered violence justice.

The Bemba case also included the impact of the rape on the victims, a precedent that started with the ICTY and the ICTR. Victims of sexual violence in the Congo were socially ostracized, robbed of their identities, and harmed mentally and physically. This was a massive step in protecting the humanity of victims and witnesses and prioritizing their health above simple facts of the trial.[166] Such prioritization is the first step towards improving our approach to sexual violence. The Bemba case was not perfect; it neglected the reality that the victims who came forward faced further discrimination from their communities after coming out.[167] Bemba was also acquitted on appeal on the basis of lack of command responsibility.[168] However, this is a problem that we can continue to build on, and to combat as we work through and deliver justice on international conflicts.

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[163] Clark, "The First Rape Conviction at the ICC," Pages 672-673. "The Trial Chamber's affirmation in this context that command responsibility under the Rome Statute is a mode of liability and not a separate offence of omission, underlines that sexual violence is not just a frolic of unruly soldiers but a core international crime which demands positive actions by superiors."

[164] Clark, Page 676.

[165] Iba, "Case of The Prosecutor v. Jean-Pierre Bemba Gombo." *IBA*, www.ibanet.org/ICC_ICL_Programme/ICC_CAR_Bemba.aspx.

[166] Clark, Page 683. "In the Bemba trial, victim-witnesses men and women ç were given the opportunity to tell the court how the MLC's crimes had affected them and their daily lives. Not only does this individualize victims, but it also creates the space for greater acknowledgement and understanding of their needs ç and particularly their long-term needs. What makes this especially important in the Bemba case is that unlike the ICTY and ICTR, the ICC has a capacity ç through, for example, its power to award reparations and its Trust Fund ç to respond in a concrete way to some of the multiple needs of victims in post-conflict societies."

[167] Clark, Page 684.

[168] Because the crimes were committed remotely, the Appeals Chamber of the ICC found that there was inadequate proof of Bemba's responsibility for the rapes.

The ICC was created with the hope of achieving justice for victims who previously were not accounted for in the ICJS. It has slowly worked its way up to this goal, improving on early cases and using errors to inform more recent trials. Still, there is plenty of room for improvement. Victims need to be prioritized more in the court process, as is outlined in the foundational Rome Statute. The ICC is still working towards these goals, but some civil society actors have taken action into their own hands to ensure the necessary steps are taken.

Progress for the Treatment of Victims and Witnesses

In the past decade, there has been an increased global prioritization of the rights of victims and their treatment. Such advocacy for protecting individuals has made its way into the ICJS and created practical adjustments for actors within the system. These changes, specifically concerned with victims of international conflict, were brought in by civil society actors concerned with the inconsiderate and inconsistent treatment of female victims of sexual violence during conflict. The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict was developed by the government of the United Kingdom in tandem with civil society actors and seeks to establish a set of standard practices when working with sexual violence cases. The motivation behind this protocol and the creation thereof are crucial aspects to our contemporary approach to sexual violence justice and the role of civil society on the ICJS.

Much like the legal precedents in the court room, treatment of victims was largely developed from previous atrocities and failed to account for the individuality of each location, region, and people it applied to. As such, a protocol of how to work with victims, document their lives and experiences, and get them to testify in court became necessary. However, the ICC and its affiliated institutions were incapable of creating one, either because there was a lack of

capacity, vocabulary, or will. The International Protocol was created to fill this voice and to establish best practices for the documentation of sexual violence as a crime or violation of international law.[169] More than just the treatment of victims, the International Protocol was created as a way to educate international actors on how to preserve and collect evidence to ensure justice could be served in the court system.

The Protocol details multiple facets of the international criminal justice process, including the definition of sexual violence, the difference between individual and state responsibility, reparations, the process of collecting evidence, how to interact with witnesses without causing harm, and best practices for interviews of trauma victims. There were two versions of the Protocols, which the creators envisioned to be a living document. It is targeted towards sexual violence practitioners, or those working in the realm of achieving justice for victims of atrocity-related crimes.[170] Think of the Protocols as a road map for those working in the system; they form a collection of best practices based on experience and testimonies of actors in the field. The Protocols are founded on the belief that:

> Practitioners must do their utmost to ensure their activities contribute to, and do not undermine, existing official efforts to bring justice to victims.[171]

The International Protocol is the first of its kind and, significantly, was developed outside of the scope of the ICC and its actors. There are eight parts of the protocol, each outlining different aspects of victim treatment or case approaches, as available in Appendix 3.

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[169] Sara Ferro Ribeiro and Danaé Van der Straten Ponthoz, "International Protocol on the Documentation and Investigation of Sexual Violence in Conflict," *UK Foreign & Commonwealth Office* (2nd Edition, Mar. 2017), assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf.
[170] Ribeiro and Van der Straten Ponthoz, Page 12.
[171] Ribeiro and Van der Straten Ponthoz,Page 14.

The International Protocol represents the next wave of activism for sexual violence crimes. The agency demonstrated by the UK government actors displays the efforts and progress that we can make as a global society. This does come with a caveat; an entirely Western understanding of sexual violence and gender crimes will not be sufficient in handling these crimes in the international sphere. The diversity in culture and context is a key factor in the ICJS and has to be made a priority of understanding for these areas of law. This has been somewhat understood; however, steps need to be taken in the ICJS to ensure teams and practitioners represent and grasp the necessary context and diversity to handle sexual violence crimes from areas around the world in a central way. That is where the role of state appointed actors comes in.

Chapter 3: Practitioners Within the System

In order to better understand the work and scope of practitioners in the ICJS, I interviewed five different individuals who have experience with international criminal trials. The overall takeaway from these discussions was that there are unspoken limitations within the system that prolong the status quo. Patriarchal society, male-dominated arenas of war, and a lacking vocabulary for gender inequality all contribute to the perpetual lack of gender justice, in my estimation. As we heard from Dixon and as we are going to see in the interviews below, the international courts tend to focus on order building and broad strokes justice. Such an approach comes at the cost of justice for individuals, and for women. The ICJS has taken steps to address sexual and gendered violence, but these steps ignore the root of the problem: in order to address sexual violence, you have to acknowledge that it is a gendered crime. Women are targeted because they are women, and our laws and society are contracted in such a way that perpetuates the problem of gender inequality. What's more, those working within the system lack the vocabulary and gender framework to fully address the gender dynamics that have allowed sexual violence to go under punished, under noticed, and unadjudicated for so long.

The practitioners I interviewed are experts and leading advocates in the ICJS. Yet, as a collective they demonstrated a persistent absence of a gender framework with which to talk about sexual violence crimes. As Dixon observed and outlined, the end goal of justice often eclipses individual justice, and underlying inequities perpetuate gender inequality. Each decision, each case, and each conviction carry the weight of hundreds of actors working within the courts. But how much say do those people have? To answer this question and explore the reality of the modern criminal justice apparatus, I interviewed three of the previous U.S. Ambassadors-at-

Large for War Crimes Issues. These three men, each serving less than seven-year terms, were the leaders of U.S. policy on war crimes and made monumental decisions about the role of the United States in these international situations. How each of them conceived of their role and of the problems they faced dictated how they behaved and the choices they made.

The United States Ambassador-at-Large for War Crimes Issues is the U.S. lead of war crimes in the international sphere. This position holds the responsibility of heading the Department of State Office of Global Criminal Justice and works in tandem with the U.S. Secretary of State to formulate the U.S. response to atrocities and war crimes across the globe.[172] The mission of the Office and the ambassador, as stated on the State Department website is:

> The Office of Global Criminal Justice advises the Secretary of State and the Under Secretary of State for Civilian Security, Democracy, and Human Rights on issues related to war crimes, crimes against humanity, and genocide. In particular, the Office helps formulate U.S. policy on the prevention of, responses to, and accountability for mass atrocities.[173]

The position began under President Bill Clinton, and the first person to hold the office was David Scheffer from 1997 to 2001. Scheffer was succeeded in 2001 by Pierre-Richard Prosper, who served until 2005 and was replaced by John Clint Williamson in 2006. Williamson held the ambassadorship until 2009. Fourth in the role was Stephen Rapp, who was appointed by President Barack Obama and served from 2009 until 2015. There was a vacancy in the position from 2015 to 2019 amid controversy over the existence of the Office of Global Criminal Justice, during which Todd Buchwald served as the lead of the office. The position was technically unfilled for more than four years until the appointment of the sixth and current ambassador Professor Morse Tan, who was Senate confirmed in 2019. I interviewed Scheffer, Williamson,

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[172] "About Us," *U.S. Department of State* (Office of Global Criminal Justice), www.state.gov/about-us-office-of-global-criminal-justice/.
[173] "Office of Global Criminal Justice," *U.S. Department of State*, www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/office-of-global-criminal-justice/.

and Rapp for this project, allowing me to analyze the developments and changes in the office over time. I also interviewed two practitioners within the system who had experience working with victims and on cases of sexual violence who were not ambassadors.

I conducted all of my interviews during the summer of 2019; three were in person and two were over the phone. What struck me as I listened back to these interviews was the fact that I was using a different vocabulary than the ambassadors. My questions revolved around gender and its role in the ICJS, but the answers I received seemed to be addressing questions not concerned with gender at all. That is not to say the practitioners were ignoring my questions or dismissing my method, because they were not. Rather, they were approaching their role and the ICJS from a completely different playing field than I was. In the moment, I considered this a part of my introduction to the system. I was trying to understand the world they operate in and that I exist wholly outside of.

Throughout these interviews, I was trying to learn more about how the ambassadors saw gender discrimination in their work, if they thought that women were treated differently than men in the ICJS, and if they thought the role of gender in the ICJS was a problem. There were key patterns that became clear in all of the interviews, with each ambassador indicating that the attorneys responsible for compiling evidence, evaluating the crimes, and building the case play a major role in the justice process. Throughout this process, it became clear that if they decide to pursue one accusation over another, that means something. If they choose to put all their energy to get one specific person on one specific crime, that also means something.

The ICJS, as explored in the previous chapter, is unique in the context of legal criminal bodies. Traditionally, criminal law is conservative. The ICJS is distinct in its willingness to use criminal justice and criminal convictions as part of a movement, in this case towards sexual

violence justice. This is another point I approached with a different vocabulary than the ambassadors. In my initial questions, I assumed in my word choice that the ICJS was working to improve the treatment of gendered violence and crimes because it had struggled to in its early cases. This was not the same way that the ambassadors looked at the issue. Instead, they described the progress as ongoing, and the issue of sexual violence was one that had been largely addressed by the court. My questions assumed that because gendered violence had been excluded from criminal law for so long that the court acknowledged a disparity in justice for the victims thereof. In other words, I asked about sexual violence as a crime that implicitly targets women and that itself represents a societal gender prejudice. However, the notion of rape as a different category of crime because it is targeted against women was not reflected in the answers given. Upon review of each of the interviews, this discordance occurred with every ambassador to some extent.

Speaking with the previous ambassadors about their work, their tenure, their struggles, and their proposals for progress illuminated the difference between an academic and international view of the system. It is incredibly different to be writing about the past decisions of actors and courts than it is to be making those decisions. The overall takeaway from these discussions was that there are unspoken limitations within the system that prolong the status quo.

David Scheffer: Former U.S. Ambassador-at-Large for War Crimes Issues (1997-2001)

I spoke with Ambassador Scheffer on the phone during the Summer of 2019. I began the interview asking the former ambassador about his work in the ICJS. Starting with his work since he left the position, Scheffer explained that he had spent time writing on his experience prosecuting the gruesome reality of war crimes. His book, *All the Missing Souls: A Personal*

History of the War Crimes Tribunals, he summarized, outlines his personal work in the ICJS, as well as the struggles and challenges he faced in his role.

Next, Scheffer explained his experience in the position. Specifically, Scheffer spoke to his team's work to combat and achieve convictions for those guilty of committing atrocity crimes. This was one of the first times I had been introduced to the phrase "atrocity crimes." Looking deeper into the official designation of such crimes, I came to understand that the incidents which Scheffer was referring to are "considered to be the most serious crimes against humankind. Their status as international crimes are based on the belief that the acts associated with them affect the core dignity of human beings."[174] I asked Scheffer about his experience being the first U.S. Ambassador-at-Large for War Crimes Issues, and about the establishment of the position. Scheffer alluded to some political tensions that slowed the adoption of the position, the details of which he explained were fully outlined in his book. He continued, saying that as the nation's first ambassador tasked with combatting and handling war crimes issues, he and his team worked toward atrocity prevention, that goal being the primary focus between 1999 and 2000. Scheffer outlined that he and his team hit the ground running, quickly immersing themselves in the world of international criminal justice in the new international institutions created by the Rome Statute.

Scheffer explained that he and his team were able to contribute to major developments in the treatment of sexual violence in the ICJS. When I asked him to outline his biggest accomplishments, Scheffer spoke about the Akayesu Case (ICTR-96-4), which marked the evolution of the legal categorization of rape as an act of genocide, including rape in the charge

[174] "Framework of Analysis for Atrocity Crimes," United Nations Office on Genocide Prevention and the Responsibility to Protect (2014), www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf. Page VI.

sheet. Scheffer pointed to this case as one of the many strides taken in his tenure. Interested in the origins of the ambassadorship, I asked about the motivation for creating the position. Scheffer, the inaugural position holder, explained that he had a lot to do with the establishment of the office and the work thereof. He explained that the details of the position's establishment were outlined in his book and directed me there as he said it was written better than he could explain over the phone.

Shifting back to his work in the position, I asked Scheffer about his work specifically with the issue of rape and sexual violence. Scheffer explained that over his time at the Hague, he was able to create and implement change in the treatment of sexual violence and atrocity crimes. He expounded, saying, "The tribunals represent more than [a conviction], they represent history being put on trial." Trying to understand the developments of the ICJS, I asked about any limitations Scheffer felt or witnessed. Scheffer explained that while prosecuting cases of extreme violence is incredibly challenging, the tribunals are not mere judgements on the case at hand. Rather, he continued, the decisions of the courts serve as a new analysis of our human values. Each decision brings to light a new conception of human priorities, he clarified.

Clint Williamson: Former U.S. Ambassador-at-Large for War Crimes Issues (2006-2009)

Of the former ambassadors in the position, each took a different approach with their teams. Ambassador Williamson took a geographic focus and a hands-on approach, he explained to me at the beginning of our in-person interview. Interested by what this meant, I asked the former ambassador to outline for me the logistics of how his team operated in the ICJS. Williamson summarized that he directed his team in the actual investigations and then worked in the court through the indictment. Feeling inspired by the way he talked about his experience, I

asked Williamson what he saw his role as in the ICJS in adjudicating sexual violence. He explained that he took his work earnestly and saw it as a call to action. “Until this modern era of international justice, rape was seen as a bi-product of international justice – undeserving of any special attention.” Williamson continued, saying his role was one where he could help change that understanding.

I asked the former ambassador about his experience working through cases involving sexual violence and gendered crimes. Williamson recounted to me the extent to which he saw rape used in conflict and his experience trying to achieve justice for the victims thereof. Williamson said that in his experience, rape during conflict was multidimensional, and often inextricably linked to race. “Rape is used to sow fear and assist in the goals of ethnic cleansing,” Williamson explained. During the conflicts, the former ambassador went one, victims often saw no justice and perpetrators saw no punishment. It wasn’t really until the post conflict period that suspects who couldn’t be prosecuted were dealt with, Williamson said. And at that point his team and the ICJS could get involved.

Ambassador Williamson identified this issue early on and spent his tenure trying to raise the profile of sexual violence, especially that targeting women. In the past few decades, Williamson noted that “there has certainly been an evolution in thinking. Tribunals are oriented towards dealing with [sexual violence] crimes.” Williamson stressed that while addressing these crimes as crimes against humanity is key, simply admitting they exist is not enough. Williamson continued this claim, saying there must be some conception of progress in our way of thinking and in identifying causes instead of consequences. If the men are targeting women to get at the men in the culture, how can we establish that as unacceptable?

The other issue that Williamson spoke to in detail was the parity in the horror of rape during conflict. He said that in his experience working with victims and witnesses, the women living in the conflict zone often felt that rape was over-emphasized in the trials. These women had been raped, yes, but their families had been murdered. There children had been taken. The women, especially those in Bosnia, voiced concern over and over again to Williamson's tribunal team that they had been raped, but that it wasn't even the start of the suffering.

Williamson also spoke about the importance of culture when considering cases when I asked him about the societal treatment of victims. From the Bosnian case, Williamson explained, we can learn about the role of victims in their own trials as well as that of culture in the trials. Background is a prolonging part of the longstanding practice of women being considered as less than men, Williamson summarized. So how can we change that? We can use international justice to identify what is good and what is wrong. He described criminal convictions for perpetrators of sexual violence not as a deterrent, but as a playbook. Through this, Williamson concluded, we can re-orient our human goals and directly shift them away from bias and discrimination and toward a more equitable reality.

Stephen Rapp: Former U.S. Ambassador-at-Large for War Crimes Issues (2009-2015)

My conversation with Ambassador Rapp began with me asking him about the broad role of sexual violence crimes in the ICJS. Rapp answered this question with a deep dive into case studies from the past three decades. The first was that of Pauline Nyiramasuhuko, who was convicted by the ICTR. Nyiramasuhuko served as the Rwandan Minister for Family Welfare and the Advancement of Women.[175] She was the first woman convicted of sexual violence crimes in the ICJS. This example surprised me, considering the centuries of the ICJS not fully embracing

[175] "Pauline Nyiramasuhuko," in *Trial International*, trialinternational.org/latest-post/pauline-nyiramasuhuko/.

the extent of the rape during conflict. It seemed odd to me that after so many years of neglecting the issue, the ICJS was charging a woman for her involvement. Rapp answered many of my questions in his explanation, painting a clear picture of the case. During the trial, one of the women who had been brutally raped, kidnapped, and held captive on a train under the supervision of Nyiramasuhuko was publicly humiliated. The defense's lawyer belittled the victim, questioning, "Why would any man have sex with you, you smell like feces." The judge laughed in the court, revealing the unprofessionalism and disregard for humanity that existed in the system. This was the same system in which the ambassadors and other actors were operating within; one where sexual violence crimes were not placed at the same level as other atrocities. The trial ended up continuing, Rapp explained, as witnesses could not be brought back to testify again. Ultimately, Nyiramasuhuko was charged with genocide, war crimes, crimes against humanity, deprivation of life, infringement of physical integrity, and other persecutions and apartheid.[176]

Rapp, in talking about the priorities in prosecuting crimes noted, "It was a strange inequality between crimes; easier to prove murder than rape." It was not the norm of the tribunal to assume rape, or to even prove there was organizational motivation to rape, said Rapp. Instead, rape existed as a separate investigation, and often, he explained, was harder to prove than other crimes. The chain of command was difficult enough to follow but pinning down official orders to rape during attacks was close to impossible, Rapp reflected. "The idea that that [the people on trial] wanted to rape people wasn't something the judges were willing to go to." Rapp continued explaining how arduous proving rape to the point of conviction can be in the ICJS. Even if it could be proven that the mass rapes occurred, there was often no way, in Rapp's experience and

[176] "Pauline Nyiramasuhuko," in *Trial International.*

expertise, of succinctly proving it was a part of a formal plan. “Inferring an interest in raping people is difficult,” Rapp pointed out. He explained that there came a point when if you could get the horrible people in prison for life for their other crimes, it was better than letting them walk free pigeon-holing yourself on a rape charge.

Like Williamson and the others interviewed, Rapp made it clear that it is a difficult job to convict people of the worst crimes humanity can commit. And, he explained, at the end of the day, not every charge can be seen all the way through. Rapp’s priority when he was ambassador was to get every guilty man or women convicted, even if it was not on the full list of complaints against them. “You would still have your conviction, but you wouldn’t get them all,” he clarified. I followed up on this point, interested in the actually process and timeline of trying convictions that were not guaranteed to stick. I asked if Rapp had witnessed anyone giving up more quickly with charges of sexual violence, or when women were the targeted victims. He contested the very root of my question, “You’re never going to pull any punches in this job.” The prosecutors are there to delivery justice to the best of their abilities, he made clear. Rapp went on to explain the daily challenges of being a war crime prosecutor, explaining that “you are sifting through a sea of evidence, testimony, and hundreds of cases to work through.” Rapp continued, there is no winning in these situations, but you get them on what you can and work to get the next one. “Better to get him than not to. But it’s the nature of bargaining.”

It became clear to me throughout my conversations with the ambassadors that prosecuting the darkest and most hateful crimes is not an easy task. Even if you have the best and most dedicated team, which all three were proud to say they had, if there isn’t evidence to support a charge, often times it doesn’t have the support to make it to a conviction. Rapp explained this balance in the context of limited time, resources, and witness testimony; sometimes there was

simply not enough to move forward with a complaint. Even given this restriction, Rapp was adamant that a dropped rape charge is not an utter defeat in the ICJS. He continued that getting the criminal is the goal of the prosecutorial team, by whatever means necessary. The whole orientation of his team was toward the bigger picture, said Rapp. "You can't evaluate a case based on what charges are dropped."[177] This approach reminded me of what Dixon examined and what I had seen throughout the case studies: the bigger picture goal has a double layer of patriarchy, that of the attack and that of society. It made me wonder, are women safer in the preserved bigger picture and society if they will continue to be victimized because they are women?

Intrigued by the multifaceted process of collecting testimony and the steps taken to protect witnesses, I asked Rapp what the relationship was like between prosecutors and witnesses. Rapp explained that when gendered crimes are prosecuted in the ICJS, the representation provided to victims is dependent on the court system where the situation is being tried. In the ICC statute, Rapp continued, and therefore in ICC situations, victims are represented by judge appointed prosecutors. This is where his team came in. Rapp noted about this configuration, which is not universally adopted, "If you are a believer in victim representation, you believe that the prosecutor may do things to make it worse for the victim." Rapp explained that in theory, there is the chance that the act of witnesses testifying could endanger them. However, he continued, saying, "The idea of the victim being represented is to get us something more." Rapp clarified that every action of the prosecution is directed towards justice and getting a conviction, including their interactions with victims.

[177] Beyond discussing the process of prosecution, Rapp commented on the contributing factors for genocidal rape in the international context. He asserted that rape is more likely to happen when you send in foreign troops. He argued that it is human nature to be more comfortable to otherize a stranger than your people or your neighbor.

Stephanie Barbour: Lawyer and Investigator for the ICC

There are more than just state appointed actors and judges working in our ICJS. Also within the system are lawyers, prosecutors, investigators, civil society actors, and researchers who help bring those responsible for mass atrocities to justice. Stephanie Barbour is one of those people. Connected via my job at the Commission on Security and Cooperation in Europe, I interviewed her over the phone as she was overseas. Barbour made clear that she spoke in her own capacity, and that the views she shared were her own and not representative of any of her affiliated institutions. Barbour works in the ICJS conducting research, collecting testimonies, and case building for trials that are up and coming or heavily anticipated, she explained. Barbour outlined that a large part of her work revolves around considering previous cases and preparing evidence for future ones to help the ICJS achieve higher levels of justice.

Interested in her on-the-ground experience, I asked Barbour about her work within the system. She answered by explaining her research. Barbour touched on her experience in the ICTR, dealing largely with the Rwandan genocide. She spoke about how, because of the enormous caseload of sexual violence charges of the tribunal, “fewer victims were called to testify in cases, and there became an imbalance” in the system. Barbour explained that the sheer mass of victims and witnesses complicated the tribunal’s ability to hear individual testimony. She also spoke about the inaccessibility of proceedings to the people being a problem for transparency. Because of the volume of cases coupled with the desire to protect witnesses, some of the actual proceedings were mandated to be closed in part or in full. Barbour clarified that often an important component of protecting witnesses and ensuring safe testimony was limiting court access. Barbour explained that the process used in the ICTR by which witnesses were

brought in and interviewed was far from perfect. She reflected that we have to be willing and open to discussing better means to hear from witnesses and protect them at the same time.

Barbour also detailed the International Protocol of the Documentation of Sexual Violence, outlined in the previous chapter. She explained how it was established, and how it was aimed at criminal investigators and NGOs to educate them on how to gather information from witnesses. Barbour explained that the protocol allowed for more evidence to be collected and improved the quality of treatment for victims and witnesses. She pointed to it as an example of progress in the system. In terms of the protocol's practical application, Barbour continued that it helped those on the ground to build cases, not traumatize victims via interview methods, and to gather testimony that could actually be used in court. Barbour explained that prior to the protocol, testimony collected was often lost or unusable. Interested in the other developments within the system, I asked Barbour about the advances she had seen in her experience in the ICJS. Barbour recounted that she had seen major improvements in terms of the treatment of victims in the previous years, especially with consideration for the incorporation of civil society actors. "There's been a lot of changes… a lot more consistency across the board" in the treatment of victims, she said. Barbour explained that historically, the issue of treatment of victims had largely gone under represented in the ICJS, but the efforts of those working in the system have slowly changed that. The failure to address the gender imbalance in our society, Barbour recapped, makes women doubly abused. This comment tied in with what I had read from Dixon and seen in the case studies: women are targeted for rape because they are women, and then are returned to societies and cultures that led to them being targeting in the first place without any real justice. This order building that the ICJS takes on, I observed, leaves women out of the process and fails to identify their exclusion.

At this point, I was curious about the functionality of the system and I asked Barbour about the specific steps for a sexual violence charge to go to trial. Barbour explained that "prosecutors determine what charges to bring based on availability of evidence." She continued, saying whatever evidence is made available translates to the crimes that a defendant can be charged with and convicted of. Barbour explained that, in the modern ICJS, there is a connection between crimes that are tried in the international court system and the domestic precedents and cultures where the crimes were committed. Effectively, the context in which the crime is committed is considered during the trial. This, Barbour explained, allows for more informed trials and convictions. While the policy of trying cases with consideration for the culture, place, and time has not changed the number of cases that go to the ICJS, it has created a space for experts to come together and to ensure the safety of and justice for victims, Barbour summarized.

Barbour's way of explaining the intricacies of the ICJS allowed me to better grasp the work of individual courts. I followed up, asking how each tribunal or court effected the others. Barbour explained that there is a process of self-reflection that occurs after a court has finished. She continued, giving the example of the reports written by the ICTY and ICTR after their conclusions. While Barbour said that she was impressed with the reflection done by the ICTR and ICTY, she made the point that there is still a lot that has to be done to create a more equitable system, especially with respect to gendered crimes.

Lucy Seyfarth: Foreign Affairs Officer, Office of Global Criminal Justice at U.S. Department of State

It became clear to me throughout the interviews I conducted that the ICJS is complex. There are many prosecutors operating within a single court, each there to deliver justice for

crimes committed during conflict. Wanting to better understand how those prosecutors inside the system contributed to the operations, I interviewed Lucy Seyfarth, an employee of the United States State Department with experience working in the ICJS. She clarified that she was not representing the views of the State Department in her interview. Seyfarth's interview was in the late summer, and we met at a coffee shop in D.C. I started the interview asking about her experience in the ICJS. Seyfarth outlined her career, saying that throughout her employment she had worked closely with international criminal trials and cases. She explained that it had been a conscious decision to put herself on the front lines of cases and courts.

I followed up by asking Seyfarth about her experience with gendered and sexual violence cases in the ICJS. Seyfarth described the modern use of rape in conflict as "a totally non-legal terror" tactic. She continued, saying that militant actors in modern conflicts resort to terror as a means to an end; women and girls are not themselves the targets, their societies and the lifestyles of the communities are. Fascinated by her answer, I asked if she had witnessed any changes in the treatment of gendered crimes. Seyfarth reasoned that ever since the invention of the ICC, there has not been a major shift in the way the ICJS handles sexual violence and gendered crimes. Seyfarth touched on the fact that the trials, while presided over by judges appointed from all over the world, are "large and Western driven." This answer made me think about the representation and leadership of the trials themselves, not just those being charged.

Like the others I spoke with, Seyfarth was directly involved with the testimony of victims in conflict. Interested in her experience working with victims, I asked about the social impact of rape on victims. I specified, asking about their stigmatization or isolation because of their experience. Seyfarth answered, saying that social and cultural impacts are a complicated component of sexual violence. She outlined that stigmatization can vary because of so many

factors: “Are they pregnant? Was the attack in public or private? What is the victim’s culture? What is their religion? Was there is a trial? Was there justice? Was their attacker convicted?” Seyfarth explained that each of these factors impacts a victim’s ability to return to normalcy and to achieve justice for their trauma. Seyfarth continued, describing that in many instances, victims of sexual assault are ostracized and can be discommunicated from their cultures because they speak out about it.

At this point, I was convinced of the reality – explained by both Seyfarth and Barbour as well as scholars in the field – that the failure to address the gender imbalance in our society makes women doubly abused. They are denied justice for the attacks they are victims of in the ICJS in the name of order building, and this order building leaves women out of the long-term justice process and fails to identify their societal exclusion. This harsh reality that exists for victims of gendered and sexual violence led me to ask Seyfarth about the purpose that tribunals serve. Is the justice achieved for the victim, or for broader society? Seyfarth answered my question with her own, “What is the point of criminal justice? Is it deterrence? Whatever it is, what are the consequences of victims and communities?” Seyfarth continued, saying that understanding the goal of the trial and prosecuting guilty parties is key to understanding the impact of that trial and the ICJS. I was still trying to square this circle and followed up by asking about justice generally. If we are seeking justice for those who have been attacked and wronged by the accused, then shouldn’t justice for the victim be prioritized? Seyfarth answered, observing that this is not always the case, as there is a stark difference between what is best for the victim and what is best for the larger justice seeking mission.[178] Seyfarth clarified that the whole goal of

[178] At this point in the interview, Seyfarth broke off into an explanation of the technicalities of the ICJS, including that of a Joint Criminal Enterprise: if you find that a person was in a joint criminal enterprise with X, Y, and Z they are considered jointly responsible for certain things if the court already have those facts proven. This is the reality for many of the modern ICJS cases, especially those dealing with sexual and gendered violence.

the ICJS and those working within it is to achieve justice, but there are competing arguments about how to best do that.

Seyfarth continued, outlining the disparities in the system, highlighting the experience of victims. She explained that what victims need and what victims want are prioritized in different ways; criminal justice is secondary for many people. To explain, Seyfarth posed the question, "What are the chances of an illiterate woman in Burma who was raped getting her day in court?" She answered, "Not very high." Instead, she continued, the overarching goal becomes removing perpetrators out of circulation, and making sexual and gender violence trials a means of deterrence. Seyfarth explained the need to remove the perpetrators and deliver justice, "They are treating women as a commodity, as something you can take. This is a way more serious crime than burning their house and taking land. That is a person." I was still left with a question about the direction of justice, but I pivoted back to treatment, wanting to understand the prospects for victims after their trauma.

Still wondering about the future for victims, I asked Seyfarth about stigma, and its impact on survivors. Seyfarth boiled down the issue of stigma in the ICJS into one question that she believed should be considered by actors in the system, "Is it better to be able to have your day in court or testify completely under disguise?" She explained that protecting victims often meant having them testify secretly or anonymously, something that Barbour also explained. The issue of stigma and the additional personal toll on victims of sexual violence that testifying can have is not something small, Seyfarth said. She continued that testifying can make an already traumatic experience even more so, and bring it into every facet of their life, public or private. There are arguments to both sides, both of which Seyfarth explained, but in the end, she said, it has to be a

consideration of the court and worked into the precedent. Otherwise, she concluded, you will have issues of victims being further abused and justice being lost.

The Challenge of Getting Justice for Women, as Women

Each of the individuals I interviewed for this project have first-hand experience with the ICJS as it exists today. Yet, each analyzed prominent issues in the realm of gendered and sexual crimes with a different perspective. Each emphasized the difficulty in prosecuting atrocity crimes and expressed exasperation for roadblocks within the system. For this project, I was able to interview the good guys, each of whom could speak to their personal experience achieving justice in the ICJS. Still, there were points of difference. After parsing and analyzing the interviews as a collective set of data, a few things stood out to me as a third-party observer. I went into the interviews trying to understand the world of practitioners and ambassadors. I wanted to get a sense of the work that they do and the system they exist within. The interviews served as a crucial component of my own understanding of gendered violence in the ICJS. But, none of them fully explained or answered the question of why sexual violence and rape are fundamentally different from other crimes against humanity, although some got very close.

As I have outlined throughout this paper and as I have since traced throughout the interviews, there are multiple, overlapping points of tension that are still at play in our international approach to sexual violence and the prosecution of its perpetrators. The societal inability to fully address the missing gender framework contributes to the issue of gender imbalance in the ICJS. From my analysis and evaluation for this project, I have narrowed down the prevailing factors as: our societal approach rape as a crime; international attention paid to

victims in trials and their larger demographics; persisting systematic gender bias; and the role of international actors in the system.

We Cannot Adjudicate Sexual Violence Unless We Address Gender

The way in which the ICJS handles cases of sexual and gendered violence is indicative of the larger, global conception of those crimes. The approach of the ICC and the situations therein sets the tone for how crimes are conceived around the globe. Of the practitioners I spoke to, each outlined their specific influence in the way gendered violence crimes were handled. Each also spoke to the frustration they felt from the limits of the system. All but one indicated strongly that reform to our international approach would allow us to better respond to and prevent gendered crimes and acts of sexual violence. While this was a largely agreed upon principal in concept, the means by which we reform remained diverse and incongruent between interviewees.

Stephen Rapp did not specifically call for a change in how the larger ICJS approaches crimes of sexual violence. Rapp spoke at length about his work in the system convicting those guilty of atrocity crimes. He outlined specific instances of violations and the steps to conviction. He spoke about the development of our current jurisprudence for handling sexual violence crimes and the precedents allowing for conviction in the international court system. More than his specific answers, Stephen Rapp is internationally lauded as a leader in the field of international criminal justice and has been a champion of convicting those guilty of sexual violence crimes.[179] He was clear: practitioners working within the system are committed to convicting those guilty of criminal abuses during conflict. That just doesn't necessarily mean justice for female victims. In Rapp's experience, he explained that achieving emblematic

[179] "CJA Human Rights Awards," *CJA*, cja.org/get-involved/events/cja-human-rights-awards/.

convictions – those of leaders or figure heads of organizations – was an effective deterrent for future sexual violence crimes.[180] However, these efforts did not in his explanation, include a reimagining or changing of the system in which he worked to better the justice achieved.

David Scheffer, like Rapp and Williamson, spoke about the importance of combating all atrocity crimes, specifically those of a gendered and sexual nature. Differing from that of Rapp, Scheffer argued that there are improvements we can make that will not only make the system more just but will allow for the more humane treatment of victims, which he maintained should be a priority of the ICJS. Scheffer seemed to express pride in the advancements that the ICJS had made in terms of gendered violence and reiterated that, during his tenure, he was a strong proponent of ensuring sexual violence crimes were part of the trial if there was evidence such gendered crimes occurred.

An advocate for increased work on the motivations for gendered violence during conflict, Clint Williamson spoke to our international need to create an improved system and start an evolution in thinking about sexual and gendered violence. Notably, Williamson was the only interviewee to express this view so explicitly. Williamson grounded his answers in his understanding of rape in conflict as a tool of fear. He explained that rape and sexual violence are wielded against women to attack the men of their society. But, while Williamson did not go as far as to say the prominence of rape in war is a larger issue of societal sexism, he reflected on his experience prosecuting men who used women as part of their war strategy, saying, "Trials are re-orienting to deal with these types of crimes." Williamson said he thought a change of reference and approach was a good thing and would allow for more holistic justice in the system and for

[180] Stephen Rapp, "'That's Illegal' Episode 5: Prosecuting Genocide: A Conversation with Stephen Rapp," *Global Justice Center* (2017), www.globaljusticecenter.net/blog/787-listen-to-the-fifth-episode-of-that-s-illegal. Rapp has shared this view elsewhere, including in this podcast where he spoke to his career and approach to trying cases in the ICJS.

the victims. Williamson's answers suggest there is incredible hope for the future of the ICJS and our ability to shift our conception of gendered crimes to achieve higher justice.

Lucy Seyfarth and Stephanie Barbour shared the concerns of the ambassadors. Both spoke about the improvements we have seen in the past two decades but were adamant that more has to be done. Seyfarth argued that it is not enough to just punish those who target women during conflict. Instead, she maintained that we have to prioritize justice for women and girls to even begin combatting the systematic inequality. Barbour maintained a similar position but made the claim in the context of victim representation. She argued that so long as women are not able to testify in a way that is comfortable and acceptable to them, then our system cannot claim to truly provide justice for those individuals.

The Gender Bias in the ICJS[181]

Rape is a gruesome and atrocious crime committed against women by men. That truth rests at the center of the entire essence of the crime and was summarized and reiterated by all five of the practitioners I interviewed. All of my interviewees spoke about rape, sexual mutilation, forced marriages, or similar crimes as horrific. Each has dedicated their careers to achieving justice for these atrocity crimes and has experience working with the victims of such attacks. However, not every practitioner spoke about gendered violence with the same understanding. Of the five individuals I interviewed, there was a stark difference between those who verbalized the crimes as a manifestation of bias against women, and those who just saw it as a fact of life, as something baked into the system. This ideological shift between practitioners

[181] This theme was initially two part, but I consolidated it with "Acknowledgement of who the victims were" as the two answers overlapped greatly and convey the same inability to recognize the larger issue of bias against women in our society and consequently in our ICJS.

seemed to stem from the perceived motivations behind gendered and sexual violence attacks. Some saw sexual violence as something that exists outside of the context of wartime violence. That it is something that happens not only because of the context of war, but because of other outstanding factors. Others saw sexual violence as an inevitable part of conflict, something that is a tactic of war the same as other crimes against humanity.

David Scheffer did not directly speak to bias against women in the context of wartime sexual violence during our conversation. He rooted his responses in case examples that he worked on throughout his career. In doing so, he did not voice explicitly a clarification between the motivation for sexual violence during conflict versus that for other acts of genocide or conquest. Rather, he focused on the practical measures for justice and punishment. Scheffer also pointed to the improvements that have been made and the presence of sexual and gender violence on the international stage. He considered these to be steps in the right direction for achieving justice for victims of sexual and gendered violence and did not vocalize a need to identify the root or motivation that is tied with the targeting of women during conflict.

In a similar line of thinking as Scheffer, Stephen Rapp did not voice explicitly that he viewed the crimes of rape and sexual violence as a result of the larger societal bias against women. Instead, he spoke to crimes of sexual violence as ones that are gaining momentum within the system but are not the end all be all of the ICJS. He viewed a conviction of the guilty party as the ultimate goal. Rapp explained that it was “better to get them on something then nothing.” To a larger extent than the other practitioners, Rapp displayed a resistance to understanding crimes as gendered. That is not to say he belittled the crimes or the victims. Rather, he put them on the same level as other atrocity crimes. He voiced that sexual violence

crimes were a horrific part of conflict, and those guilty of those crimes should be served justice, whatever it takes.[182]

Clint Williamson was the only former ambassador who spoke about sexual violence as an afront to women, because they were women. He went into detail about the specifics of cultures that make rape that much more of an insult to human dignity: religious condemnation, social isolation, and societal disgrace. Williamson directly addressed rape in his responses and connected the crimes to the livelihoods of women. He explained that the use of rape in conflict, even when used against men, is a fundamentally targeted act that gets to the core of the society and humanity. He outlined, in so many words, that it is a different variety of crime than other atrocity crimes because of the nature of the attacks and the motivations. Williamson continued, saying that the shame that is conferred onto victims of sexual violence is stark and cross-cultural, and has to be considered as a targeted and individual attack in the context of the ICJS.

Seyfarth and Barbour echoed Williamson's explicit designation of sexual violence as a gendered and targeted crime. Both reflected on and identified through examples how women are considered less than human when it comes to their preordained role in conflict. Both maintained that there are underlying biases that tolerate men using women as objects of war in a way that other atrocity crimes do not target men. Lucy Seyfarth described rape in conflict as a perceived inevitability of being a woman. Seyfarth argued that true progress cannot be made without understanding this view, the experience of the victim, and their role in their own society. Barbour also spoke to the evolution in thinking about justice for victims. As someone who works person-to-person with survivors of gendered violence during conflict, Barbour maintained that the way

[182] This brings us back to the early work of Susan Estrich, who wrote about the core of gender and sexual violence and the toxicity in the way we think and talk about it. It may be the case Rapp's resistance to classifying sexual violence crimes as motivated by the gender bias that feeds into the prominence of rape is a continuation of Estrich's initial theory.

our society allows rape to occur is gendered. Barbour explained, if we are to actually achieve justice for victims of these crimes, we have to be able to look beyond them in the context of previous conflicts and other crimes. Barbour continued that sexual violence in conflict should be considered in the larger picture, in connection with the wider trends that target women in conflict.

Practitioners See Their Roles as Important and Norm Defining

Practitioners in the ICJS have a large role in creating the reality of that system. Between the judges and the prosecutors, those individuals set the standards and make decisions about evidence, convictions, testimony, and sentencing. Every individual I spoke to explicitly recognized this impact in some way. Scheffer talked about his role being one to "put history on trial" and appeared proud that he oversaw some of the largest developments in the criminal classification of rape in the ICJS. Williamson said he spent his entire tenure as ambassador trying to raise the profile of sexual violence and gendered crimes to ensure they got the attention of the court and created a deterrence for future perpetrators. Rapp recalled his work as getting the "bad guys" on whatever he could, paving the way for future prosecutors and practitioners to take convictions further. Seyfarth shared with me her mantra for her work that hit at this very concept, "Is what we are doing providing for a better future?" Barbour outlined how she dedicated herself to improving the treatment of victims and witnesses to better the system throughout her career.

Each practitioner recognized their power and their influence over the system. Yet, none of them could put into words the fundamental difference between sexual violence crimes and other crimes against humanity. So, if those in the highest positions of authority cannot explicate this problem, where do we go from here?

Chapter 4: If We Want to Better Adjudicate Rape, We Have to Address It

The individuals working within the ICJS play a huge role in setting the norms for the international understanding of war crimes. The same was true during the Nuremberg Trials, when the precedent was set that even heads of state could be tried, during the ICTY and ICTR, when rape was included in crimes considered against the core of humanity, and now in the ICC. The practitioners in the system, like those I interviewed, bring with them experience prosecuting crimes in the context of their home countries and domestic laws. As I was able to learn from my interviews, practitioners are a fundamental segment of the international criminal justice process.

Rape is a notoriously difficult crime to prosecute and prove. Moreover, the structure in the ICJS is not yet there to address sexual violence and gendered crimes as fundamentally different from other crimes against humanity. There is not currently the vocabulary to push sexual and gendered violence convictions beyond a sub-category of crimes against humanity. As observed throughout the scholarship on this subject, because gendered motivations of sexual violence crimes were not included in the foundational definition of crimes against humanity, we lack a gender framework to adjudicate sexual violence crimes as gendered. Even given this structural limitation, there has been an evolution in the way we think about gendered and sexual violence crime in the past three decades. Such an evolution comes from civil society actors and those working within the system and will continue so long as we address sexual violence crimes.

The individuals I interviewed operate in different contexts and realities than I have ever experienced. The work they do and the justice they have achieved is unparalleled. These practitioners work at the highest level of adjudicating atrocity crimes and have each played a key

role in our transition towards achieving justice for victims of sexual violence. But our progress cannot stop with them. In our ICJS, there is an unnamed resistance to accepting gendered crime as distinct from other crimes during conflict, even though, as I have expounded throughout this project, that rape is fundamentally and motivationally different. There is this missing gender column no one can reconcile, and because it goes unnamed, we do not investigate it. A true acknowledgement of the implicit motivation to commit sexual and gendered violence during conflict would require us to evaluate the global treatment of gender, and to acknowledge the asymmetry in our own society. As established through the literature review, the case studies, and the interviews, the ICJS was built from precedent and context from domestic laws, and thus carries those domestic and persisting biases, including gender prejudice.

This is not a conclusion I come to lightly. It took months of research and analysis to home in on what was missing from this conversation. As I went back through my interviews with the practitioners, I was struck by how explicitly each of them could speak to the horror of sexual violence. Every practitioner at some point in their interview touched on the brutality of sexual violence in conflict. Yet, when I asked questions that probed into the gender motivations behind those attacks, the conversation remained oriented to broader justice. Gender, a key component of the issue and of the brutality in sexual violence, slipped past. It was almost like there was this missing vocabulary between the questions I was asking and the answers I was receiving. The ability to address this difference in terms of gender was absent.

All law – if it is good law – is path dependent. We do not recreate values and law out of the air. If we did, then the law would be just a symptom of society. Law is slow and incremental because it has to be. We have to be calm and adapt our legal conceptions over the long term. Thus, being path dependent and beholden to precedent is not bad thing. However, this structural

reluctance to innovate can also contribute to an inability to identify changes. Prejudices continue from one case to another and never get resolved. And what does humanity have shoved in that battered suitcase? The gender problem.

Throughout my research I repeatedly observed the challenges that the gender bias presented for individuals and institutions. It is prevalent in the leading scholarship on sexual violence, stemming all the way back to MacKinnon. In her work, MacKinnon claims that being a woman is a part of an individual's identification as a person. Thus, if a woman is discriminated against or violated because of this characteristic, she is refused humanity. While not all may agree with her broad stroke feminism, her claim here is supported by our systematic international criminal justice history and precedent and still goes somewhat unaddressed in the adjudication of sexual violence crimes. To afford women fewer rights and less access to justice that recognizes their gendered experience because of their gender is to assert that women are less human than men because of their gender. We are missing justice that recognizes the gendered experience. Women can go to court and testify against those who attacked them, but they cannot get justice for their targeting or fully escape the society that made them victims in the first place. That is a problem in my view, both for humanity and equality. MacKinnon extends this assertion, saying, "Before atrocities are recognized as such, they are authoritatively regarded as either too extraordinary to be believable or too ordinary to be atrocities."[183] We cannot allow mass rape to be ignored because it is too difficult to accept or overlooked because it is so common. Rather, we have to be able to directly address, elucidate, and analyze sexual violence crimes in the ICJS and at home.

[183] MacKinnon, *Are Women Human?,* Page 3. "If the events are socially considered unusual, the fact that they happened is denied in specific instances; if they are regarded as usual, the fact that they are violating is denied: it it's happening, it's not so bad, and if it's really bad, it isn't happening."

Of course, bias and discrimination are not limited to gender. Pervasive societal prejudice exists around religious affiliation, ethnic background, and racial differences. A natural next step on this line of questioning is the issue of race. The level of diversity in our ICJS may play into our global conception of crimes targeted against groups because of demographic characteristics. Questions about representation and cultural tolerance should be raised in connection to the structure and leadership of the ICJS to fully explore the relationship thereof. In this project, I have not been able to address these issues, but that does not mean that they are not at play.

The atrocity of rape becomes apparent when it is outside of our typical script. When, for example, we see it in the context of war, which, traditionally, we think of as a male activity, it stands out. When we are forced to confront the universality and brutality of rape in ordinary life, on the other hand, we label it as something else. We segment the crime into different parts to save our own sense of culture. Rape during conflict begs a different set of questions then rape during peace, but both stem from the same dogmatic view of gender valuation and supremacy.

Rape is a targeted and gendered crime. When it is committed against women, it is because they are women. In conflict, it is used as a means of domination, and thus can serve as a form of assault by men against men, with women serving as collateral damage. Women are attacked this way because of their gender. They are subject to crimes on the basis of their sex. That truth rests at the center of sexual violence in conflict and persists to this day. But we still fail in the ICJS to treat rape and sexual violence as a more specified and targeted crime than other crimes against humanity. We do not give convictions of rape any special designation outside of atrocity crimes, no further credence for the targeting and destruction of a person on the basis of sex. We have all the evidence pointing to the fact that rape and sexual violence are motivated by gender roles and societal conceptions of male and female, and yet we do not have the gender framework or

context to adjudicate them at any higher level. We do not yet have the vocabulary to identify and verbalize what it is about rape that is different in the ICJS because we do not have the societal context or willingness to evaluate it fully.

Even in a group of the world's leading experts on sexual violence and war crimes, not every interviewee categorized rape as a different variety of crime.[184] Throughout my interviews, the practitioners were cautiously willing to express frustration with the ICJS. They spoke of the slow-moving system, the cultural barrier between prosecutors and witnesses, and the mental and emotional toll of sorting through atrocity crime evidence. However, only a handful of them actually expressed a need for conceptual change. This follows considering the societal absence of gendered violence education. It is not that these practitioners are arguing for continued gender asymmetry. Rather, I observed, they lacked the vocabulary and framework to connect their frustrations with the gender imbalance. Again, these are people who conduct their jobs and produce justice at enormous cost to themselves. These are the good guys. They are trying to get something done here. But, even with the altruistic nature of their work, the framework of gender crimes is not there to be seriously examined and considered, and its absence limits the ability of practitioners to achieve justice.

As I mentioned throughout this project, often civil society feminist activism has been required to stimulate change. The work of Dixon, Bernard and Durham, and other civil society actors has pushed progress forward. When evolutions occur in the way that we adjudicate sexual violence crimes, they come largely because civil society actors fight for them. Wider activism

[184] Of the practitioners I interviewed, only three identified sexual violence during conflict as fundamentally different than other crimes against humanity. We can never draw a direct line between one individuals' gender and their approach to the law, but we have to note that all the participants who did not vocalize the difference are men. And of the three practitioners who did explicitly label rape as a fundamentally different crime, the majority were women. Nonetheless, this pattern exists and should be considered in our conception of the ICJS.

around rape is essential to getting justice for gendered war crimes. However, in order to achieve such activism, the public has to understand the context and history of the problem. That cannot happen until we teach and address the history of sexual violence in conflict. It cannot be left out of our curricula, nor our history books. We have to ensure that conversations about gendered violence can happen, so we do not slip backward or allow incomplete justice to be the norm.

There is gender asymmetry in the ICJS. If there were not, sexual violence and gender crimes would not be taken as de-facto parts of war. The system we currently subscribe to doesn't have a window for gender inequality to come in. This raises the same question that Lucy Seyfarth asked during her interview: What is this justice used for? After conducting this research, I argue that if we only use justice to achieve broad strokes convictions, there will always be another piece left out. And if we continue down this path, the abuse doesn't get fully recognized. Sexual violence thus continues to be lumped into a sub-category of crime without us ever addressing the implicit and fundamentally gendered motivations behind sexual crimes.

It is the responsibility of the ICJS to address these crimes. It is the responsibility of the system to achieve justice for those who have been victims to atrocity crimes. Treating sexual violence as if it is the same as any other crime against humanity is dissatisfying because it ignores the reality that it is a crime that when committed against women, it is on the basis of sex. The gender context of sexual violence is so crucial, and yet we are still not fully seeing it. The practice of law is not making laws, it is educating their use. But, if our history and our laws are permanently defined by an incomplete understanding, it is a problem.

I am not saying the only problem we have is weakness in the gender framework. But I do argue that it is one of the injustices in our international legal system. We have this inability to address the gendered nature of sexual violence crimes. Until we are able to recognize and

address this gender framework, or the lack thereof, we will not be able to fully achieve justice for sexual violence, rape, sexual mutilation, forced sterilization, or any other number of gendered violence crimes. However, rape in itself is a problem for such a conception of jurisprudence; the wars, conflicts and prevailing international dialogue only complicate it. The intricacies of war and the ICJS make justice difficult to achieve. Justice for perpetrators and justice for women are conflated to be the same thing but fail to treat gendered crimes with the same level of gravity as those of a non-gendered nature.

The ICJS deals with the worst crimes in the word. The reality of the work is full of stressful situations and massive arrays of complex crimes. In this structure, something has to give. And, gendered violence is a weak point in the system, so it gets lumped in with other crimes and rape happens again and again. I am not saying that if rape were classified as its own crime against humanity that it would disappear from conflicts across the world. However, the motivations for rape and the pervasive understanding of gender roles should be explored to be better able to address the crimes and achieve justice for victims.

And while our current system is deficient in this key area, I do not fault the people in the system. They are working at enormous cost to themselves. These are the good guys; they are trying to get something done, but the context and vocabulary to address gender bias and gendered motivations are not there. Without the right gender framework, the ability to examine the relationship between gender and crimes, practitioners' hands are tied. Without an expansive understanding, justice for victims of sexual violence cannot be achieved. We are limited by our inability to elaborate sexual violence and gendered crime. Sexual violence seems atrocious in war, but it is one of the most common crimes in the world. Rape is so embedded in our everyday

society, but so pointed in conflict. It's not that these practitioners don't get the outstanding gender asymmetry. No, it's that we, our society, doesn't get it.

We have a gender problem in the ICJS. It goes unspoken, unwritten, and unaddressed because we lack the societal and systematic context to discuss it. We have to be able to tackle the fact that on top of rape and sexual violence being an atrocious crime, it is also largely committed by men, against women because they are women. Only through directly addressing this problem can we expand equality and justice achieved for women. And we can only address the problem if we acknowledge it in our classrooms and in our daily lives.

Appendix:

1.

I. Convention for the peaceful adjustment of international differences;

II. Convention regarding the laws and customs of war by land;

III. Convention for the adaptation to maritime warfare of the principles of the Geneva Convention;

IV. Declaration to prohibit the launching of projectiles and explosives from balloons or by other similar new methods;

V. Declaration to prohibit the use of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases;

VI. Declaration to prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core or is pierced with incisions.[185]

2.

I. Convention for the pacific settlement of international disputes;

II. Convention respecting the limitation of the employment of force for the recovery of contract debts ("Drago-Porter Convention");

III. Convention relative to the opening of hostilities;

IV. Convention respecting the laws and customs of war on land;

[185] "Laws of War: Final Act of the International Peace Conference; July 29, 1899," in *The Avalon Project: Laws of War - Final Act of the International Peace Conference* (July 29, 1899), avalon.law.yale.edu/19th_century/final99.asp.

V. Convention relative to the rights and duties of neutral powers and persons in case of war on land;

VI. Convention relative to the legal position of enemy merchant ships at the start of hostilities;

VII. Convention relative to the conversion of merchant ships into war-ships;

VIII. Convention relative to the laying of automatic submarine contact mines;

IX. Convention concerning bombardment by naval forces in time of war;

X. Convention for the adaptation to maritime warfare of the principles of the 1906 Geneva Convention;

XI. Convention relative to certain restrictions with regard to the exercise of the right of capture in naval war;

XII. Convention relative to the establishment of an International Prize Court;

XIII. Convention concerning the rights and duties of neutral powers in naval war; and

XIV. Declaration prohibiting the discharge of projectiles and explosives from balloons.[186]

3.

Part I of the Protocol outlines what the Protocol is, who can use it, and how.

Part II provides an overview of CARSV, including its relationship to gender-based violence and gen- der inequality more broadly, its unique dynamics and prevalence, the grave consequences associated with sexual violence, and the obstacles faced by survivors

[186] "The Role and Importance of the Hague Conferences: A Historical Perspective," *UNIDIR* (2017), www.unidir.org/files/publications/pdfs/the-role-and-importance-of-the-hague-conferences-a-historical-perspective-en-672.pdf. Page 3.

in accessing justice. It also includes indicators, or ‘red flags’, that could signify sexual violence is occurring.

Part III deals with sexual violence under international law. This includes an overview of accountability avenues, individual versus state responsibility, and reparations.

Part IV outlines what preparation is required for practical documentation: what to do to research, prepare and set up a documentation process and understand the role of different types of evidence of sexual violence. Part IV also includes the key principle of ‘do no harm’ and suggests practical strategies that practitioners may employ in order to mitigate and address the possible risks associated with sexual violence, how to conduct threat and risk assessments, secure informed consent, work according to principles of confidentiality and refer victims and other witnesses. A chapter on safety and security is also included in this section.

Part V describes the procedures for gathering in- formation: how to conduct safe and effective inter- views, and the minimum requirements when gathering, handling and storing audio-visual, physical and documentary evidence of sexual violence.

Part VI suggests ways in which to organize, evaluate and strengthen the evidence gathered—including types of patterns to look out for and how to establish them.

Part VII is concerned with issues that require significant additional detail but should be considered as intersecting throughout the Protocol. It includes stand-alone chapters on understanding trauma, in particular ‘war rape’ trauma and its various manifestations; documenting sexual violence against male victims; and children as victims and witnesses.

Part VIII outlines the key considerations to take into account when reporting on, submitting or using CARSV information, and concludes with recommendations for future use of the Protocol.[187]

[187] Sara Ferro Ribeiro and Danaé Van der Straten Ponthoz, "International Protocol on the Documentation and Investigation of Sexual Violence in Conflict," *UK Foreign & Commonwealth Office* (2nd Edition, Mar. 2017), assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf. Page 15.

Bibliography:

"About Us," *Office of Global Criminal Justice*, U.S. Department of State, www.state.gov/about-us-office-of-global-criminal-justice/.

Askin, Kelly, "For the First Time, a Woman Judge Heads the International Criminal Court," *Open Society Justice Initiative*, 11 Mar. 2015, www.justiceinitiative.org/voices/first-time-woman-judge-heads-international-criminal-court.

Bernard, Vincent, and Helen Durham, "Sexual Violence In Armed Conflict: From Breaking The Silence To Breaking The Cycle," in *International Review of the Red Cross*, vol. 96, no. 894, 2014, pp. 427–434., doi:10.1017/s1816383115000442.

Chang, Iris, *The Rape of Nanking: the Forgotten Holocaust of World War II*, Ishi Press International, 2012. 61-80.

"Changing World, Unchanged Protection? Seventy Years of the Geneva Conventions: Speech given by ICRC President Peter Maurer to the Graduate Institute, Geneva, 13 March 2019," *International Review of the Red Cross*, vol. 100, no. 907-909, 2018, pp. 395–401., doi:10.1017/S1816383119000183.

Chappell, Louise, "A Chance for the International Criminal Court to Fix Sex Crimes Injustice," *The Conversation*, Australian Human Rights Institute, 21 Oct. 2019, theconversation.com/a-chance-for-the-international-criminal-court-to-fix-sex-crimes-injustice-88966.

"CJA Human Rights Awards," *CJA*, cja.org/get-involved/events/cja-human-rights-awards/.

Clark, Janine Natalya, "The First Rape Conviction at the ICC," in *Journal of International Criminal Justice*, vol. 14, no. 3, 2016, pp. 667–687., doi:10.1093/jicj/mqw025.

Cole, Alison, McGlynn, C. (Ed.), Munro, V. (Ed.). (2010), *Rethinking Rape Law*, London: Routledge-Cavendish, https://doi.org/10.4324/9780203852194.

"Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," in *The American Journal of International Law* 14, no. 1/2 (1920): 95-154. Accessed March 7, 2020. doi:10.2307/2187841.

Cornell, Drucilla, "Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State," *100 Yale Law Journal* (1991). https://digitalcommons.law.yale.edu/ylj/vol100/iss7/12.

"Crimes of Sexual Violence," *International Criminal Tribunal for the Former Yugoslavia*, www.icty.org/en/features/crimes-sexual-violence.

Cusack, Simone, and Lisa Pusey, "CEDAW And the Rights to Non-Discrimination and Equality," *Melbourne Journal of International Law*, vol. 14, 2013, law.unimelb.edu.au/__data/assets/pdf_file/0003/1687440/03Cusack1.pdf.

Dixon, R, "Rape as a Crime in International Humanitarian Law: Where to from Here?" *European Journal of International Law*, vol. 13, no. 3, 2002, pp. 697–719., doi:10.1093/ejil/13.3.697.

Estrich, Susan, "Rape," *The Yale Law Journal*, vol. 95, no. 6, 1986, p. 1087., doi:10.2307/796522.

"Framework of Analysis for Atrocity Crimes," United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014, *United Nations*, www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

Grant, Linda, "Exhibit Highlights the First International War Crimes Tribunal," in *Harvard Law Today*, 15 Apr. 2020, today.law.harvard.edu/exhibit-highlights-the-first-international-war-crimes-tribunal/.

Hale, Chelsea, and Meghan Matt, "The Intersection of Race and Rape Viewed through the Prism of a Modern-Day Emmett Till," *American Bar Association*, 16 July 2019, www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-intersection-of-race-and-rape/.

Iba, "Case of The Prosecutor v. Jean-Pierre Bemba Gombo," *IBA*, www.ibanet.org/ICC_ICL_Programme/ICC_CAR_Bemba.aspx.

"In Numbers," *International Criminal Tribunal for the Former Yugoslavia*, www.icty.org/en/features/crimes-sexual-violence/in-numbers.

"International Conference on Military Trials: London, 1945," *Avalon Project, Documents in Law, History and Diplomacy*, avalon.law.yale.edu/imt/jack60.asp.

Prosecutor v. Thomas Lubanga Dyilo, International Criminal Court: Situation in The Democratic Republic of The Congo, 10 July 2012, www.icc-cpi.int/CourtRecords/CR2012_07409.PDF.

The Prosecutor Versus Jean-Paul Akayesu Case No. ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 Sept. 1998, www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf.

"International Military Tribunal for The Far East: Special Proclamation by the Supreme Commander Tor the Allied Powers at Tokyo January 19, 1946," *United Nations*, www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf.

Jochnick, Chris Af, and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," in *The Development and Principles of International Humanitarian Law*, 2017, pp. 49–95., doi:10.4324/9781315086767-2.

Kaplan, Margo, "Rape Beyond Crime," *Duke Law Journal*, U.S. National Library of Medicine, Feb. 2017, www.ncbi.nlm.nih.gov/pubmed/28234443.

Kramer, Alan, "The First Wave of International War Crimes Trials: Istanbul and Leipzig," in *European Review* 14, no. 4 (2006): 441–55. doi:10.1017/S1062798706000470.

"Kunarac Et Al. (IT-96-23 & 23/1)," *International Criminal Tribunal for the Former Yugoslavia*, 8 Nov. 1999, www.icty.org/en/case/kunarac.

Kuo, Peggy, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int'l L. 305 (2002). https://scholarlycommons.law.case.edu/jil/vol34/iss3/8.

"Laws of War: Final Act of the International Peace Conference; July 29, 1899," *The Avalon Project: Laws of War - Final Act of the International Peace Conference; July 29, 1899*, avalon.law.yale.edu/19th_century/final99.asp.

"Lubanga Case," *Home*, www.icc-cpi.int/drc/lubanga.

Lukashuk, Igor I., "The Nuremberg and Tokyo Trials: 50 Years Later," in *Review of Central and East European Law*, vol. 20, no. 2, 1994, pp. 207–216., doi:10.1163/157303594x00120.

MacKinnon, Catharine A., *Are Women Human?: and Other International Dialogues*, The Belknap Press of Harvard University Press (2007).

MacKinnon, Catharine A., "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," in *Signs*, vol. 8, no. 4, 1983, pp. 635–658. *JSTOR*, www.jstor.org/stable/3173687. Accessed 19 Apr. 2020.

MacKinnon, Catharine A., *Toward a Feminist Theory of the State*, Harvard Univ. Press (1991).

"Nuremberg Trial Proceedings Vol. 1 London Agreement of August 8th 1945," *Avalon Project – Documents in Law, History and Diplomacy*, avalon.law.yale.edu/imt/imtchart.asp.

"Office of Global Criminal Justice," *U.S. Department of State*, www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/office-of-global-criminal-justice/.

Rapp, Stephen, "'That's Illegal' Episode 5: Prosecuting Genocide: A Conversation with Stephen Rapp," *Global Justice Center* (2017), www.globaljusticecenter.net/blog/787-listen-to-the-fifth-episode-of-that-s-illegal.

Ribeiro, Sara Ferro, and Danaé Van der Straten Ponthoz, "International Protocol on the Documentation and Investigation of Sexual Violence in Conflict," *UK Foreign & Commonwealth Office* (2nd Edition, Mar. 2017), assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf.

"Rome Statute of the International Criminal Court," *International Criminal Court* (2011), www.icc-cpi.int/resource-library/documents/rs-eng.pdf.

Sellers, Patricia Viseur, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation," *OHCHR* (2009), https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf.

"Summary of the Geneva Conventions of 1949 and Their Additional Protocols," in *American Red Cross* (Apr. 2011), https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf.

"Tadić, Duško," in *The Hague Justice Portal*, www.haguejusticeportal.net/index.php?id=6077.

"Tadić (IT-94-1)," *International Criminal Tribunal for the Former Yugoslavia* (14 Dec. 1995), www.icty.org/en/case/tadic#tjug.

"The Geneva Conventions of 1949 and Their Additional Protocols," *International Committee of the Red Cross* (16 Dec. 2019), www.icrc.org/en/document/geneva-conventions-1949-additional-protocols.

"The Influence of Precedent in International Law," *Brandeis Institute for International Judges*, 2007. https://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/Precedent_BIIJ2007.pdf.

"The Judges of the Court," *International Criminal Court*, (13 Apr. 2018), https://www.icc-cpi.int/Publications/JudgesENG.pdf.

"The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)," *U.S. Department of State*, U.S. Department of State, history.state.gov/milestones/1945-1952/nuremberg.

"The Tokyo War Crimes Trials," *My China News Digest*, cnd.org/mirror/nanjing/NMTT.html.

"The Role and Importance of the Hague Conferences: A Historical Perspective," *UNIDIR*, 2017, www.unidir.org/files/publications/pdfs/the-role-and-importance-of-the-hague-conferences-a-historical-perspective-en-672.pdf.

"Trial of the Major War Criminals before the International Military Tribunal," *Trial of the Major War Criminals before the International Military Tribunal: Military Legal Resources*

(Federal Research Division: Customized Research and Analytical Services, Library of Congress), The Library of Congress, 4 May 2016, www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html.

"Prosecutor v. Akayesu, Case No. ICTR-96-4, Indictment (1998)," *University of Minnesota Human Rights Library*, hrlibrary.umn.edu/instree/ICTR/AKAYESU_ICTR-96-4/Indictment_ICTR-96-4-I.html.

Zapotoczny, Walter S., "The Russian Army in Germany: 1945," in *Beyond Duty: The Reasons Some Soldiers Commit Atrocities*, Fonthill Media, 2017.

Çakmak, Cenap, *A Brief History of International Criminal Law and International Criminal Court*, Palgrave Macmillan, 2017.