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ALL ROADS LEAD TO ROME: A JURISPRUDENTIAL GENEALOGY OF FEMINISM, SEXUAL AND GENDER-BASED VIOLENCE, AND INTERNATIONAL CRIMINAL LAW

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CONNECTICUT JOURNAL
OF INTERNATIONAL LAW

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"[S]ociety codified by men decrees that woman is inferior: she can only abolish this inferiority by destroying male superiority. . . . All oppression creates a state of war. This particular case is no exception. The existent considered as inessential cannot fail to attempt to reestablish his sovereignty." —Simone de Beauvoir, *The Second Sex*[2]

"The concept of mankind's historical progress cannot be sundered from the concept of its progression through a homogenous, empty time. A critique of the concept of such a progression must underlie any criticism of the concept of progress itself." —Walter Benjamin, *On the Concept of History*[3]

Abstract

Sexual and gender-based violence is prevalent in armed conflicts throughout all corners of the world. The elevation—and recognition—of sexual and gender-based violence as violence *qua* violence is an arduous and continual struggle. Although international humanitarian and human rights law purports to proscribe sexual and gender-based violence, the language of the law often minimizes the gravity of this violence and fails to hold perpetrators accountable. This Article argues that to elevate sexual and gender-based violence crimes in the international humanitarian and criminal law hierarchy, there must be a radical reconceptualization of gender under international law. But, in order to envision the future of sexual and gender-based violence prosecutions, it is imperative to critically examine its past.

At its heart, this Article is a jurisprudential genealogy that traces the development of international feminist activism, culminating in the Women's Caucus for Gender Justice's language negotiations of the Rome Statute for the International Criminal Court. The Caucus sought to deinstitutionalize legal language from archaic heteropatriarchal norms that classify sexual and gender-based violence as chiefly a harm to honor in favor of language that emphasizes the gravity of the violence itself and actual individualized harm inflicted on victims. This Article further contends that the Caucus uniquely benefitted from the human rights wave of the 1990s and the fortuitous confluence of gender mainstreaming, international criminal tribunals, and the Rome Conference itself. A critical examination of the successes and defeats of the Caucus provides a window into the Rome Statute's inadequate conceptual dealings with gender and illuminates a way forward to recognizing sexual and gender-based violence as violence *qua* violence.

[2] SIMONE DE BEAUVOIR, THE SECOND SEX 849 (Constance Borde & Sheila Malovany-Chevallier trans., 2009).

[3] WALTER BENJAMIN, *On the Concept of History*, *in* WALTER BENJAMIN: SELECTED WRITINGS, VOLUME 4: 1938–1940 394–95 (Howard Eiland & Michael W. Jennings eds., Edmund Jephcott et al. trans., 2003).

INTRODUCTION

Throughout the history of armed conflict, sexual and gender-based violence has been treated as an inevitable consequence of war. Despite the prevalence of this violence, these acts have been relegated to the peripheral backwaters of international humanitarian law. The elevation—and recognition—of sexual and gender-based violence *qua* violence has been an arduous and continual struggle. Much of this can be attributed to the patriarchal domination of legal systems and the relative absence of women at the drafting table.[4] When sexual and gender-based violence (SGBV) was addressed in international humanitarian law (IHL), it was associated with archaic conceptions of morality that dismiss the individualized violence of the act. With the advent of the *ad hoc* tribunals of the 1990s, SGBV crimes have begun to be incorporated into the law as standalone war crimes and crimes against humanity. Further, these advancements were only achieved as a result of feminist theorists and activists advocating for the elevation of SGBV crimes. The Women's Caucus for Gender Justice (WCGJ) was formed in preparation for the Rome Conference in order to advocate for principles of gender justice and accountability for SGBV at the International Criminal Court. The progress made by the WCGJ was acutely influenced by a fortuitous confluence of events[5] in international politics and is the product of the 1990s human rights wave.[6]

The end of the Cold War distinctly altered the relationship between civil society and states: non-governmental organizations (NGOs) operated as tight networks and coupled their activism with legal action. At the same time, the human rights movement adopted anti-impunity measures and sought to prosecute human rights violators. The breakdown of multi-ethnic states and the human rights violations that followed catalyzed widespread acceptance

[4] DIANE MARIE AMANN, *Politics and Prosecutions, from Katherine Fite to Fatou Bensouda*, *in* PROCEEDINGS OF THE FIFTH INTERNATIONAL HUMANITARIAN DIALOGS 7 (Elizabeth Anderson & David M. Crane eds., 2012).

[5] For lack of a better term, the three periods of time discussed in this project will be referred to as "events." This choice of words is inspired by Michel Foucault's conception of "events" in his essay *Nietzsche, Genealogy, History*:

> An entire historical tradition (theological or rationalistic) aims at dissolving the singular event into an ideal continuity—as a teleological movement or a natural process. "Effective" history, however, deals with events in terms of their most unique characteristics, their most acute manifestations. *An event, consequentially, is not a decision, a treaty, a reign, or a battle, but the reversal of a relationship of forces, the usurpation of power, the appropriation of a vocabulary turned against those who had once used it, a feeble domination that poisons itself as it grows lax, the entry of the masked "other."* The forces operating in history are not controlled by destiny or regulative mechanisms, but respond to haphazard conflicts. They do not manifest the successive forms of a primordial intention and their attraction is not that of a conclusion, for they always appear through the singular randomness of events. . . . The world we know is not this ultimately simple configuration where the events are reduced to accentuate their final traits, their final meaning, or their initial and final value. On the contrary, it is a profusion of entangled events.

MICHEL FOUCAULT, *Nietzsche, Genealogy, History*, *in* THE FOUCAULT READER 88–89 (Paul Rabinow, ed., Vintage Books 2010) (emphasis added).

[6] Author's term.

of human rights norms[7] and the anti-impunity model as an attempt to address past wrongs. At the same time, the 1990s were marked by an explosion of international non-governmental organizations.[8] Transnational advocacy networks, whose goal is to alter the behavior of international actors by "pressuring target[s] . . . to adopt new policies, and by monitoring compliance with international standards," have become ubiquitous in activism.[9] While advocacy networks may be traced back to slavery abolition campaigns, the establishment of the United Nations and the rapid growth of NGOs catapulted transnational advocacy networks into the international spotlight during the late twentieth century. The human rights wave is the result of paradigm shifts approaching the new millennium.[10] The transnational women's network grew from the human rights wave, embracing the normative shift towards anti-impunity with specific regard to SGBV.

As this was unfolding, the transnational women's network became a powerful force at United Nations conferences and international criminal tribunals. The 1990s brought about a significant shift in human rights norms and canonized anti-impunity as a prevailing mechanism for the human rights movement. The WCGJ fortuitously arose from the confluence of these events and was capable of altering the language of the Rome Statute. Three distinct, yet interdependent, events provided the foundation for the WCGJ: gender mainstreaming at United Nations conferences, the rise of international criminal tribunals, and the Rome Conference itself. The deeply interconnected nature of these events, in conjunction with the normative shifts of the 1990s, made it possible for the transnational women's network to flourish at this point in time.

There is a wide breadth of literature on the transnational women's network at the United Nations, international criminal tribunals, and the Women's Caucus for Gender Justice; however, there is little academic work yoking together these three interconnected "events."[11] This project is at its core a jurisprudential genealogy: it seeks to tell the story of the first modern human rights network and its transformation by the consequences of the epochal ruptures of the 1990s, necessitating thick descriptions of events.[12] This Article will trace the

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[7] *See* Stefan-Ludwig Hoffmann, *Human Rights and History*, 232 PAST & PRESENT 279, 294 (2016) (stating that a response to the failure of the international community to prevent the "violent, catastrophic civil wars, [led to] the belated embrace of the idea of human rights interventionism. . . .").

[8] *See The Non-Governmental Order: Will NGOs Democratize, or Merely Disrupt, Global Governance?*, ECONOMIST (Dec. 9, 1999), https://www.economist.com/special/1999/12/9/the-non-governmental-order (estimating that international nongovernmental organizations rose from 6,000 in 1990 to 26,000 in 1996).

[9] MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 3 (1998).

[10] *See* Hoffmann, *supra* note 7, at 283 ("[T]he rise of human rights . . . can be understood in part as a result of the fracturing modern time regime.").

[11] Literature that discusses one or two of these three events covered in this project exists. For example, Janet Halley extensively analyzed the *ad hoc* tribunals and the WCGJ at the ICC but did not include a review of the transnational women's network at United Nations conferences. Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 2 (2008). This project aims to weave the three together.

[12] The concept of a jurisprudential genealogy harkens back to Foucault and Nietzsche's philosophical tradition of genealogy. This form of genealogy questions commonly understood social beliefs and looks toward the conditions of their possibilities, "requir[ing] patience and a knowledge of details, and . . . depends on a vast accumulation of source material." FOUCAULT, *supra* note 5, at 76. Genealogy is not a description of "objective"

development of international criminal tribunals and their intersection with SGBV and analyze the work of the Women's Caucus for Gender Justice to infuse feminist language into the Rome Statute to elevate the status of SGBV in the IHL hierarchy before the International Criminal Court.

This Article proceeds in four Parts. Part I will address the theoretical contours of the human rights wave and the conditions that caused its swell: humanitarian interventionism, individuals as subjects of international law, and the justice cascade. Part I will also flesh out what we mean when we talk about SGBV. Part II will examine the influence of the transnational women's network on international politics, particularly through gender mainstreaming at mid-twentieth century United Nations conferences. Part III will delve into a thick description of the development of international criminal law that endeavors to hold individual actors accountable for human rights abuses, and the evolution of jurisprudence addressing SGBV at the *ad hoc* tribunals. Finally, Part IV will trace the development of the Women's Caucus for Gender Justice and their successes and downfalls during negotiations over gender and violence, illuminating ideological schisms within the group. Additionally, this Article will argue that the International Criminal Court has largely been ineffective in meaningfully addressing SGBV in prosecutions. This Article will conclude that the conditions for the WCGJ's successes at Rome were the result of a long genealogy of feminist activism coupled with the fortuitous timing of the human rights wave—monumental paradigm shifts in human rights theory and practice. Without the human rights wave, it is unclear if the Women's Caucus for Gender Justice would have experienced the same level of acceptance into mainstream international governance discourse.

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linear events and "opposes itself to the search for 'origins'"; rather, it is an exploration of the plural and contradictory past and the deconstruction of truth. *Id.* at 77. These genealogies are a study of the confluence of vicissitudes and accidents at critical times, birthing new epochs and institutions. Nietzsche rejected the pursuit of origin (*Ursprung*) "because this search assumes the existence of immobile forms that precede the external world of accident and succession." *Id.* at 78. Rather than relying on fictive objectivity created in modernity from the purportedly suprahistorical perspective of historians, genealogy searches for processes of descent (*Herkunft*) and emergence (*Entstehung*), and understands events and contemporary practices through the result of power struggles over domination and meaning: "Genealogy . . . seeks to reestablish the various systems of subjugation: not the anticipatory power of meaning but the hazardous play of dominations." *Id.* at 83. Emergence, such as the formation of the Women's Caucus for Gender Justice or of prisons, should not be thought of "as the final term of a historical development," but rather "merely the current episodes in a series of subjugations" produced by a convergence of forces, "from substitutions, displacements, disguised conquests, and systematic reversals." *Id.* at 83, 86. "Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity instills each of its violences in a system of rules and thus proceeds from domination to domination." *Id.* at 85. This Article is an analysis of the aleatory development of prohibitions against sexual and gender-based violence is thus in part a study of the development of humanity through its history of morals and ideals pertaining to gendered violence. Consequentially, this Article is a search for the "fertile ground," the place in which the episteme—the historical conditions of a possibility of a certain discourse—changes. In this case, radical shifts in theoretical approaches to sexual and gender-based violence altered institutional discourse on the subject at the Rome Conference. Walter Benjamin's notion of crystallization aids in understanding places of epistemic shift. *See* BENJAMIN, *supra* note 3, at 396 ("Material historiography . . . is based on a constructive principle. Thinking involves not only the movement of thoughts, but their arrest as well. Where thinking suddenly comes to a stop in a constellation saturated with tensions, it gives that constellation a shock, by which thinking is crystallized as a monad.").

I. THEORIZING GENDER, VIOLENCE, AND RIGHTS IN THE *FIN DE SIÈCLE*

a. Defining Sexual and Gender-Based Violence

Phrases such as sexual and gender-based violence, violence against women, and gender violence all carry very different meanings.[13] By solely referring to certain prohibited acts as "sexual crimes," "non-sexual attacks on women or men based on their gender-defined roles"[14] are erased. Standard definitions of "sexual violence"[15] have been more readily accepted under international law than "gender-based violence"[16] due to the divisive nature of conceiving gender as anything but "biological sex." There is no international agreed upon definition of "gender-based violence,"[17] and many definitions may fall victim to biologically essentialist language that excludes cisgender men and gender non-conforming individuals from its purview. "Gender-based violence" must be imagined in an inclusive manner that does not rely on dated conceptions of gender and addresses its socially constructed nature.[18] A similar problem arises with "violence against women": while its focus on "women" incorporates gender in some form, it is also heteronormative. As for "gender violence," the term has experienced mild growth from the 1990s to today, consistent with the WCGJ's attempts to include gender violence in the Rome Statute. "Sexual and gender-based violence" is less popular, but more inclusive, than "sexual violence," "violence against women," or "gender violence." Data shows this: an n-gram graph[19] illustrates the growth of violence

[13] It is also critical to note that SGBV "including when conflict-related, often has no relation to sexual desire, but is instead linked to power, dominance and abuse of authority." Gloria Gaggioli, *Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law*, 96 INT'L REV. RED CROSS 503, 504 (2014).

[14] Halley, *supra* note 11, at 83–4 (examples of gender violence include the "impress[ion of women] into maternity. . . a form of gender enslavement. The same is true when women are impressed into providing domestic services whether on a large scale or individualized basis (forced temporary marriage) basis.").

[15] *See* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Trial Chamber, Sept. 2, 1998); Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment, ¶ 220 (Jan. 27, 2000) ("[A]ny act of a sexual nature which is committed on a person under circumstances which are coercive."); Rome Statute of the International Criminal Court, arts. 7(1), 8(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] ("Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of violence also constituting a grave breach of the Geneva Conventions.").

[16] Generally, gender-based violence can be defined as violence inflicted upon a person based on their perceived biological sex or gender identity. Gender-based violence encompasses a broader category of crimes than sexual violence, including domestic violence, rape, sexual exploitation and abuse, forced prostitution, trafficking, forced or early marriage, female genital mutilation, honor killings, and compulsory sterilization or abortion. Gaggioli, *supra* note 13, at 510. For example, the International Committee of the Red Cross defines gender-based violence as an "overall term, including sexual violence and other types of gender-specific [violence that are] not necessarily sexually-based." *Id.*

[17] *Id.* at 509–10.

[18] "If gender is the cultural meanings that the sexed body assumes, then a gender cannot be said to follow from a sex in any one way. Taken to its logical limit, the sex/gender distinction suggests a radical discontinuity between sexed bodies and culturally constructed genders. Assuming for the moment that the stability of binary sex, it does not follow that the construction of 'men' will accrue exclusively to the bodies of males or that 'women' will interpret only female bodies . . . The presumption of a binary gender system implicitly retains the belief in a mimetic relationship of gender to sex whereby gender mirrors sex or is otherwise restricted by it." JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 6 (2d ed. 1999).

[19] *See* Appendix, Figure 1.

against women (VAW) and sexual violence in the late 1970s with peaks for VAW in 1995 and 2005, the years of the Beijing and Beijing 10+ conferences. However, the term "sexual and gender-based violence" is beginning to be accepted into the mainstream and represents a more intersectional[20] approach to these crimes.

b. The Fall of the Soviet Union and the Rise of the Human Rights Wave

The embrace of individual human rights was uniquely characteristic of the new *fin de siècle*. The human rights wave of the 1990s was vital to the ultimate successes of the Women's Caucus for Gender Justice at Rome and for the transnational women's network as a whole. The human rights wave can be identified by the rapid growth of international organizations, the newfound enthusiasm for international criminal law, and the amelioration of past wrongs. Academic work pinning the inception of modern human rights in other time periods, such as the 1970s, often fails to account for the aforementioned attributes of the 1990s.[21] Locating the swell of the human rights wave in the 1990s is critical to this project's thesis: without the distinct momentum made in this era, the impact of WCGJ would likely be lessened.

The human rights wave as a post-Cold War phenomenon is aptly identified by Stefan-Ludwig Hoffmann. Hoffmann's thesis pushes against Moyn's ascription of human rights as a product of the 1970s and argues that it occurred later, in the 1990s.[22] While the human rights lexicon was present in the 1970s and 1980s,[23] it coexisted in conjunction with other "moral and political idioms like 'solidarity' and included competing notions of rights, which

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[20] "Yet intersectionality might be more broadly useful as a way of mediating the tension between assertions of multiple identity and the ongoing necessity of group politics." Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296 (1991).

[21] For example, Samuel Moyn's *The Last Utopia* argues that the rise of human rights occurred in the 1970s when human rights entered into popular use after the failed uprisings in the Eastern Bloc, such as the 1968 Prague Spring and the 1956 Hungarian Revolution. Prior to the 1970s, "human rights" was too intertwined with notions of citizenship rights of the Enlightenment, and that "[c]ontrary to conventional consumptions, there was no widespread Holocaust consciousness in the postwar era, so human rights could not have been a response to it." SAMUEL MOYN, THE LAST UTOPIA 7 (2010). Moyn bases this classification on the Helsinki Accords, President Carter's inauguration, and Amnesty International's Nobel Peace Prize, as well as:

> [T]he search for a European identity outside Cold War terms; the reception of Soviet and later East European dissidents by politicians, journalists, and intellectuals; and the American liberal shift in foreign policy in new, moralized terms, after the Vietnamese disaster. Equally significant, but more neglected, were the end of formal colonialism and the crisis of the postcolonial state[.]

Id. at 8. Without the canonization of human rights through President Carter and the détente project of the Helsinki Accords, Moyn argued that human rights would have likely remained in the peripheral backwaters of policy. *See id.* at 149 ("[W]ithout Carter, the phrase itself might never have exploded so spectacularly: even after she placed her op-ed pieces that helped Amnesty International publicize suffering prisoners in 1974, Laber recalled, 'I did not use the words "human rights" to describe our cause; it was not part of my everyday vocabulary and would have meant little to most people at that time.'"). *Id.*

[22] Hoffmann, *supra* note 7, at 282 (arguing that individual human rights as a basic concept developed after the end of the Cold War).

[23] *See id.*, at 287 ("Human rights language itself was still fairly capacious and in flux during the 1970s . . . .").

were in many ways still indebted to the legacies of socialism and anti-colonialism. . . ."[24] Individual human rights became a "contested, irreplaceable, and consequential concept in global politics"[25] in the 1990s. Between the end of the Second World War and end of the Cold War, humanitarian interventions were not rationalized with human rights language and were instead justified by *realpolitik*.[26] The emerging global human rights movement was not "the cause but the consequence of the epochal ruptures of the late twentieth century,"[27] including the disintegration of the Soviet Union and Milošević's Yugoslavia. As the old international order collapsed and a new one emerged, human rights gained legitimacy as a response.[28]

The 1990s theoretical justification of human rights was distinct from previous eras. While earlier thinkers, such as Kant,[29] traced cosmopolitanism to sovereign states and their interests, modern theorists eschewed the nation-state as "the greatest impediment to a global cosmopolitan democracy."[30] The rapid development of international criminal law seeking to hold individuals—not states—accountable for human rights violations is exemplary of this pervasive normative shift in thought. This shift is also evident in the justifications given for military intervention. For example, the Gulf War of 1990–91 was often justified as a defense of international law *vis-à-vis* Iraq's violation of Kuwait's sovereignty, while Saddam Hussein's genocidal abuses against the Kurds was not sufficiently addressed.[31] However, the Kosovo War of 1998–99 was explicitly justified as a humanitarian intervention.[32] Following the intervention of NATO in Kosovo, Jürgen Habermas penned an article on the transformation of international law into a cosmopolitan law of global citizens and "identified the dilemma of human rights politics as having to act as if a fully institutionalized global civic society already existed, even though their very promotion was the objective of the

[24] *Id.* at 282.

[25] *Id.*

[26] Hoffmann argues that this *realpolitik* reasoning includes President Carter and Secretary Kissinger's adoption of human rights language at Helsinki and in United States foreign policy broadly. *See id.* at 285 ("Between the end of the Second World War and the early 1990s there was not a single humanitarian, political or military intervention that was justified through human rights.").

[27] *Id.* at 282.

[28] *Id.* at 290.

[29] *Id.* at 285 ("[H]uman rights were closely tied to the idea of sovereignty or, to put this more generally, to the political participation in a democratically constituted polity."). For example, Kant argued in *Toward Perpetual Peace* for the creation of a league of states whereby states organize for the realization of world peace. *See generally* IMMANUEL KANT, KANT'S PERPETUAL PEACE: A PHILOSOPHICAL PROPOSAL (Helen O'Brien trans., 1927) (positing six preliminary articles that attempt to reduce the likelihood of war).

[30] Hoffmann, *supra* note 7, at 290.

[31] Of course, this was not the only justification for the involvement of the United States. Other economic interests, like oil, were also clearly at play. *See, e.g.*, Hoffmann, *supra* note 7, at 291–92 ("The United States led a multilateral coalition against Iraq, sanctioned by the United Nations after the sovereignty of one of its member states had been violated. This was the immediate justification given for the intervention, as well as clearly identified economic interests (in particular, control over the stability of oil procurement. . . ."); Paul W. Kahn, *Lessons for International Law from the Gulf War*, 45 STAN. L. REV. 425, 425 (1993) ("[The Gulf War] marked one of the few occasions on which there was a deliberate invocation of international law to justify military force.").

[32] *See* Hoffmann, *supra* note 7, at 292 ("[Kosovo] was the first war waged in the name of human rights in order to prevent genocide.").

military action."[33] For supporters like Habermas, this military intervention was as much moral as it was legal. Václav Havel invoked a similar argument:

> *This war places human rights above the rights of the state*. The Federal Republic of Yugoslavia was attacked by the alliance without a direct mandate from the UN. This did not happen irresponsibly, as an act of aggression or out of disrespect for international law. It happened, on the contrary, out of respect for the law, for a law that ranks higher than the law which protects the sovereignty of states. *The alliance has acted out of respect for human rights, as both conscience and international legal documents dictate*.[34]

Thus, the human rights spoken of in the 1990s are distinct through the valuation of individuals' moral rights over state sovereignty.

A cocktail of factors were responsible for the swell of the human rights wave in the early 1990s: movements for Holocaust remembrance, the violent civil wars in Rwanda and Yugoslavia, the CNN effect, and the Habermasian favoring of individual human rights over state sovereignty.[35] In both Rwanda and Srebrenica, the failure of United Nations peacekeeper intervention was an "expression of the United Nations' political failure and thereby the end of hopes placed in the organization to become more of a world government."[36] This failure to prevent and end wars led to the "belated embrace of the idea of human rights interventionism by the generation of baby boomers and student protesters."[37] The connection of Srebrenica to Holocaust remembrance—genocide to human rights—was historically new.[38]

As humanitarian intervention entered a new era, so did international human rights law. The atrocities of Rwanda and Yugoslavia also sparked "the emergence of a new international criminal law and its institutions, and possibly the most significant legal accomplishment in human rights of the two decades since Bosnia."[39] Alongside the *ad hoc* tribunals, the Vienna Declaration adopted by the World Conference on Human Rights in 1993 "constituted the resurgence of the debate about the universality of human rights."[40] In contrast to the human rights conventions drafted between the 1960s and 1980s, which focused on decolonization, conventions throughout the 1990s distinctly centered on the criminal prosecution of "past wrongs"[41] and anti-impunity measures. This fundamental shift swept up the formation of the

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[33] *Id.* at 297.

[34] *Id.* at 297–98 (emphasis added); *see also* Václav Havel, *Kosovo and the End of the Nation-State* (Apr. 29, 1999) *in* N.Y. REV. BOOKS, (June 10, 1999) (categorizing the Kosovo bombings as an instance in which the human rights of Kosovo Albanians were valued above "national interests").

[35] *See* Hoffmann, *supra* note 7, at 292–93, 297 (surveying developments in the 1990s that led to the normative acceptance of human rights).

[36] *Id.* at 294.

[37] *Id.*

[38] *Id.* at 295.

[39] *Id.* at 298.

[40] *Id.* at 299.

[41] *Id.*

International Criminal Court in the human rights wave and propelled the Court and anti-impunity to the forefront of human rights discourse.

Kathryn Sikkink identifies the move to prosecute perpetrators of human rights abuses as a development of the early 1990s, aligned with Hoffmann's thesis. Sikkink's "justice cascade" characterizes the "shift in the *legitimacy of the norm* of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm."[42] Sikkink uses "cascade" to capture "how the idea started as a small stream, but later caught on suddenly, sweeping along many actors in its wake."[43] Despite the increased number of human rights treaties, "it began to appear that human rights violations were getting worse, not better."[44] This was in part due to the failure to prevent human rights abuses and impunity provided to human rights violators, especially high-ranking government officials.[45] Anti-impunity prosecutions developed to strengthen human rights law: "Human rights prosecutions give teeth to the law because they can put formerly powerful people behind bars. If human rights law didn't work because it lacked strength, this new form of enforcement should help improve compliance."[46] Sikkink found that before the mid-1980s, prosecutions were stagnant, but "[b]y the early 1990s, the number of such events began a steep increase . . . the rapid diffusion of [the justice cascade] follow[ed] almost immediately after the end of the Cold War and with the fall of the Soviet Union,"[47] corroborating Hoffmann's argument.

Anti-impunity[48] is valued by most human rights advocates; however, anti-impunity has not been met without criticism. Karen Engle expressed her concern with the human rights movement's rapid shift towards criminal law, arguing that "the turn to criminal law was not an obvious trajectory for either the human rights movement or international law," and perhaps this embrace "has taken place with little systemic deliberation about the aims of criminal law or about its pitfalls."[49] The conflation of anti-impunity with human rights advocacy is ultimately harmful, as many view opposition to anti-impunity measures to also mean an opposition to human rights.[50] The relationship between human rights and anti-impunity has "helped shape the direction of human rights advocacy as well as both international human rights and international criminal law."[51] Anti-impunity may also

[42] KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 5–6 (2011).

[43] *Id.*

[44] *Id.* at 20.

[45] *See id.* ("[S]ome activists argued that as long as individuals were not held personally responsible, there would be no strong incentives for changing behavior.").

[46] *Id.* at 15.

[47] *Id.* at 35.

[48] Commonly seen as the attempt to hold violators of international humanitarian law or human rights law criminally accountable for their actions. *See* KAREN ENGLE, ZINAIDA MILLER & D.M. DAVIS, ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 15 (2017) ("[T]he human rights movement has . . . become almost synonymous with the fight against impunity. That is, to support human rights has increasingly meant to favor criminal accountability for those individuals who have violated international human rights or humanitarian law. It has also come to mean opposing amnesty laws that might preclude such accountability.").

[49] Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1071 (2015).

[50] *Id.* at 1119.

[51] *Id.*

"provide[] a way for all sides to avoid overt discussion of distribution, even while deploying in their political struggles the criminal justice system, a potentially potent weapon of which the human rights movement has long been critical."[52]

II. WOMEN'S RIGHTS AS HUMAN RIGHTS: GENDER MAINSTREAMING IN GLOBAL GOVERNANCE

a. Gender at the United Nations

Women's Caucuses are prime examples of a modern activist network. The transnational women's network[53] began to coalesce during the drafting of the Declaration for the Elimination of All Forms of Discrimination Against Women in 1967 and reached its peak during the 1990s at United Nations conferences. Networks are "forms of organization characterized by voluntary, reciprocal, and horizontal patterns of communication and exchange."[54] Networks provide sources of reliable information for outsiders: "they are organized to promote causes, principled ideas, and norms, and they often invoke individuals advocating [for] policy changes that cannot be easily linked to a rationalist understanding of their 'interests.'"[55] Communication between networks takes place in a "dense web" of formal and informal connections within the group.[56] While advocacy networks date back to the nineteenth century, contemporary networks are radically different and more far-reaching than their historic counterparts due to technological advancements.[57] Without the organizing of the transnational women's network at United Nations conferences, it is unlikely that the WCGJ would have been primed to form at Rome and exert strong influence over gender issues.

The contemporary use of the word "network" originated with the women's movement in the United States coining the phrase "old boys' network"[58] as a critique of sexism. "Women's network" was later coopted by women's groups, and entered into popular use around 1975, the year of the First World Conference on Women in Mexico City.[59] Women's caucuses were initially limited in scope, but after twenty years, the transnational women's network wielded considerable influence at conferences.[60] Violence against Women became

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[52] *Id.* at 1127.

[53] Transnational women's networks in the context of this project refers to the sprawling group of women that organized at the United Nations Conferences (Part III), the *ad hoc* tribunals (Part IV), and at the Rome Conference (Part V).

[54] KECK & SIKKINK, *supra* note 9, at 8.

[55] *Id.* at 8–9.

[56] *Id.* at 9.

[57] *Id.* at 10, 14.

[58] *Id.* at 167.

[59] For example, the International Feminist Network, Latin American and Caribbean Feminist Network against Domestic and Sexual Violence, Asian Women's Research and Action Network. *See id.* at 167 (noting that many gender equality organizations are named "networks.").

[60] The WCGJ was a direct outgrowth of Women's Caucuses. Women's Caucus for Gender Justice, *About the Women's Caucus* (last visited Jan. 4, 2020), http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/aboutcaucus.html.

an organizing issue for women's advocacy networks relatively recently.[61] By the mid-1990s, VAW exploded into one of the most discussed international women's issues, as evidenced by its central role in the Platform for Action at the United Nations Conference on Women in Beijing in 1995.[62] In the same decade, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994, both including limited SGBV crimes under their jurisdiction. These strategies developed by the women's network influenced the way the WCGJ advocated for the inclusion of SGBV provisions at the Rome Conference in 1998. The following subsection traces the development of the transnational women's network VAW campaigns at United Nations conferences and the organizing strategies utilized by the transnational women's network to mainstream gender[63] into the final documents of the conferences.

b. The Transnational Women's Network at United Nations Conferences (1975–1995)

The influence of women's networks in transnational politics greatly expanded between the early 1970s and mid-1980s. After lobbying by the Women's International Democratic Federation and others, the Commission on the Status of Women recommended that the General Assembly declare 1975 International Women's Year. This resulted in the First World Conference on Women and the United Nations Decade for Women conferences in Copenhagen and Nairobi.[64] Gender equality groups had a considerable impact on the agenda of both gender-centric conferences and other issue-based conferences.

The Mexico City Conference[65] was fundamental to the development of the international women's movement as the first United Nations conference dedicated solely to women. The participation of NGOs was very limited, "with only two representatives per accredited NGO permitted to participate on a limited basis. . . ."[66] Mexico City was fertile ground for activists

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[61] Prior to VAW's emergence in the 1980s, the women's movement focused primarily on discrimination. The original Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), drafted throughout the 1970s and adopted in 1979, does not make any reference to VAW. In the early 1980s, VAW was incorporated into social justice discussions and rose to the forefront of United Nations activity in 1985.

[62] *See* KECK & SIKKINK *supra* note 9, at 166 ("By the mid-1990s [VAW] had become the most important international women's issue. At the UN Conference on Women in Beijing in 1995, violence against women was a 'centerpiece of the platform,' one of four issues given special prominence.").

[63] *See, e.g.*, AMY BARROW, *Women, Peace and Security: Mainstreaming Gender in Transitional Justice Processes*, *in* WOMEN AND TRANSITIONAL JUSTICE: THE EXPERIENCE OF WOMEN AS PARTICIPANTS 37 (Lisa Yarwood ed., 2012):

> Gender mainstreaming is the process of assessing the implications of legislation, policies or programmes on both men and women at all stages of design, implementation and monitoring. In contrast with other gender equality initiatives such as equal treatment, the central purpose of gender mainstreaming is to achieve equality of outcome rather than equality of opportunity. . . .

[64] Elisabeth Jay Friedman, *Gendering the Agenda: The Impact of the Transnational Women's Rights Movement at the UN Conferences of the 1990s*, 26 WOMEN'S STUD. INT'L F. 313, 317 (2003).

[65] This Article refers to United Nations conferences by the city in which they took place.

[66] Friedman, *supra* note 64, at 317.

to form strong networks, despite these restrictions.[67] Lucille Mair, the Secretary General of the Copenhagen Conference, reflected: "Mexico City focused on some of the fundamental issues . . . [b]ut it also did something that, while less tangible, may be in some ways more important than anything else: It established a network of concern."[68] When Mexico City occurred, domestic violence was still too recent in discourse to become a central focus of the conference.[69] The next year, "two thousand women from forty countries spoke out on family violence, wife beating, rape, prostitution, female genital mutilation, murder of women, and persecution of lesbians" at the First International Tribune on Crimes against Women.[70]

Keck and Sikkink trace the origins of the network to a series of meetings at the United Nations Women's Conference in Copenhagen. Charlotte Bunch, a feminist organizer at Copenhagen reflected:

> We observed in that two weeks of the forum that the workshops on issues related to violence against women were the most successful . . . they were the workshops where women did not divide along north-south lines, that women felt a sense of commonality and energy in the room . . . you get a chance to deal with difference, and see culture, and race, and class, but in a framework where there was a sense that women were subordinated and subjected to this violence everywhere, and that nobody has the answers. So northern women couldn't dominate and say we know how to do this, because the northern women were saying: "our country is a mess; we have a very violent society." So[,] it created a completely different ground for conversation. . . . It wasn't that we built the network in that moment. It was just the sense of that possibility.[71]

This newfound sense of possibility culminated in the first explicit mention of SGBV in an official United Nations document. The Report of the World Conference of the United Nations Decade for Women referenced "domestic and sexual violence against women"[72] and called for the ratification and implementation of Convention on the Elimination of all Forms

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[67] *About IWTC*, INT'L WOMEN'S TRIB. CTR. https://www.iwtc.org/63/index.html (last visited May 13, 2020).

[68] The International Women's Tribune Centre (IWTC) was established during Mexico City. After the conference concluded, the IWTC used their mailing list to increase accessibility of information and advocacy tools. In 1998, this mailing list grew to 16,000 individuals and groups representing women from 160 countries. ARVONNE S. FRASER, U.N. DECADE FOR WOMEN: DOCUMENTS AND DIALOGUE 71 (1987).

[69] Around the time of Mexico City, the first domestic violence shelters opened in London and the United States, and discussion of domestic violence as international issue was featured in Fran Hosken's *Women's International Network* in 1975. KECK & SIKKINK, *supra* note 9, at 175.

[70] *Id.*

[71] *Id.* at 177.

[72] "Legislation should also be enacted and implemented in order to prevent domestic and sexual violence against Women. All appropriate measures, including legislative ones, should be taken to allow victims to be fairly treated in all criminal procedures." Rep. of the World Conference of the United Nations Decade for Women: Equality, Development, and Peace, ¶65 , U.N. Doc. A/CONF.94/35 (July 30, 1980).

of Discrimination Against Women.[73] Similar to Mexico City, a surge of organizing around VAW arose after Copenhagen concluded.[74]

After ten years of development, Violence against Women was on the agenda for the 1985 World Conference on Women in Nairobi. Following trends set by Mexico City and Copenhagen, Nairobi attracted a larger number of women.[75] At the NGO forum, activists formed the International Network against Violence against Women, a network of communication, and the International Women's Rights Action Watch, a Convention for the Elimination of All Forms of Discrimination Against Women watchdog group.[76] By Nairobi,

> [A]dvances in gender-based critiques of development theory and practice showed how women's oppression can only be understood contextually, by taking into account women and men's positions within specific countries, cultures, and economies. From a focus on identifying oppression (and fighting over its various forms), women moved to strategizing over ways to confront its various manifestations, whatever their original causes.[77]

Governments then adopted the Forward-Looking Strategies for the Advancement of Women, which linked peace to the elimination of VAW in the public and private spheres.[78] Nairobi served as an important stepping stone for the emergence of networks in the transnational women's movement.[79] Months after Nairobi, the General Assembly adopted the first resolution addressing domestic violence.[80]

The formidable presence of women at United Nations conferences was not limited to those under the purview of the Decade for Women. In 1992, the Conference on Environment and Development was held in Rio, where women's groups maintained a definitive presence.[81] Activists employed new strategies to advocate for gender issues in the genderless Agenda 21. The Women's Environment and Development Organization (WEDO), founded

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[73] *Id.* at ¶ 62.

[74] In 1981, participants at the first Feminist Encounter for Latin America and Caribbean decided to hold the "Day against Violence against Women" on November 25th in memory of three sisters that were murdered by the Trujillo dictatorship. *Id.* at 178. Later, a coalition of Latin American feminist organizations held similar commemorations that contributed to the international "16 Days of Activism against Gender Violence" campaign. The campaign is now an annual event practiced internationally by NGOs and UN Women. United Nations Women, *16 Days of Activism against Gender-Based Violence*, https://www.unwomen.org/en/what-we-do/ending-violence-against-women/take-action/16-days-of-activism (last visited Feb. 25, 2020).

[75] 14,000 women from 150 nations attended the NGO forum at Nairobi. KECK & SIKKINK, *supra* note 9, at 169.

[76] *Id.* at 179.

[77] Friedman, *supra* note 64, at 318.

[78] United Nations: Division for the Advancement of Women, *Information Note: The United Nations Work on Violence Against Women*, http://www.un.org/womenwatch/daw/news/unwvaw.html (last visited Mar. 17, 2020).

[79] These networks include the International Women's Rights Action Watch, the Latin American Committee for Defense of Women's Rights, the Asia-Pacific Forum on Women, Law and Development, and the Women in Law and Development in Africa.

[80] G.A. Res. 40/36, U.N. Doc. A/RES/40/36 (Nov. 29, 1985).

[81] The women's tent at the NGO forum, Planeta Femea, was the largest venue at the conference and attracted 1,500 people. Friedman, *supra* note 64, at 320.

by Bella Abzug, sponsored the World Women's Congress for a Healthy Planet. When faced with exclusion, women's groups "creat[ed] their own opportunities for mobilization around the more general opportunity of the conference [and] advocates organized the largest-ever NGO preparatory conference for a UN meeting, with 1,500 participants."[82] Women used "tribunal[s] to offer public testimony about women's connection to environmental issues" and an "insider/outsider" advocacy strategy, which "simultaneously mobiliz[ed] advocacy networks to bring pressure from outside governmental arenas and coordinat[ed] lobbying inside them."[83] In addition to strategical innovations, a Women's Caucus was established as a group to lobby for gender issues throughout the conference.[84] Precedent setting was a key strategy of the Caucus: when lobbying delegates to include women's rights in Agenda 21, "the Caucus assembled 'precedent setting' information from previous UN documents" that supported the Caucus' mission to demonstrate that their positions were "built on accepted norms within the UN, not new rights."[85] This strategy, according to Friedman, "was a clear effort to mainstream the women's rights message while countering objections to it."[86] These efforts were ultimately successful: while the draft Agenda 21 contained only two references to women, by the conclusion of Rio, the chapter, "Global Action for Women Towards Sustainable and Equitable Development," was added with 172 references to women.[87] Strategies for gender inclusivity, developed by activists, permeated conferences where VAW was the focus and depicts the effect that the transnational women's network can have on conference delegates.

The next year, the World Conference on Human Rights was held in Vienna, and women made up half of the 3,000 NGO participants.[88] Women's groups prepared meticulously for Vienna with national data generation, media contracts, and governmental lobbying through the coordination of NGOs.[89] Keck and Sikkink cite this work as an example of "a network's ability to draw attention to issues, set agendas, and influence the discursive positions of both states and international organizations."[90] Leaders of the community "worked closely with international advocates to insure [sic] the representativeness of the movement and its message[]" in order to ensure the intersectionality of the transnational women's network.[91] The Global Campaign for Women's Human Rights was created to unite ninety NGOs in making the international community focus on VAW in Vienna.[92]

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[82] *Id.*

[83] *Id.*

[84] Chen writes that the successes of gender mainstreaming can be attributed to the formation of Women's Caucuses, where "[m]embers negotiated with official delegations to ensure that the draft document incorporated women's concerns throughout." Martha Alter Chen, *Engendering World Conferences: The International Women's Movement and the United Nations*, 16 THIRD WORLD Q. 477, 486 (1995). Women's Caucuses "provided a bridge between the official deliberations and the parallel NGO deliberations." *Id.* at 482.

[85] Friedman, *supra* note 64, at 320.

[86] *Id.*

[87] *Id.*

[88] KECK & SIKKINK, *supra* note 9, at 187.

[89] NGOs included: the Center for Women's Global Leadership, International Women's Tribune Center, and the International Women's Rights Action Watch. Friedman, *supra* note 64, at 321.

[90] KECK & SIKKINK, *supra* note 9, at 186.

[91] Friedman, *supra* note 64, at 321.

[92] *Id.*

Prior to Vienna, the Center for Women's Global Leadership (CWGL) organized an effective petitioning campaign calling for the recognition of women's rights as human rights.[93] The petition was sponsored by over 800 groups and garnered 300,000 signatures from 123 countries before the beginning of the conference.[94] At the same time, the United Nations officially recognized satellite meetings "by holding several international gatherings that issued statements and reports included in the official documentation of the conference."[95] The CWGL also directly engaged with governments in the preparatory process in order to guarantee the inclusion of women's human rights language in Vienna. The Women's Caucus coordinated lobbying efforts by uniting upwards of 200 participants and made six plenary presentations at the governmental conference to present the demands of gender equality advocates.[96] The extraordinary engagement efforts by the CWGL had allowed them to have a direct impact on the language of the final document.

The Women's Caucus used the insider/outsider strategy to ally with the United Nations Development Fund for Women (UNIFEM) through Roxanna Carillo, a former CWGL staff member and the head of UNIFEM's women's rights program. Cardillo and the CWGL frequently met during Vienna, ensuring contact between NGOs and delegates.[97] Like in Rio, the CWGL designed the Tribunal on Violations of Women's Human Rights, which featured testimony by women from all regions of the world on the daily, widespread abuse of women's rights.[98] The Tribunal was featured in Vienna's NGO forum, where women delivered "personal testimony of devastating human rights abuses to a distinguished panel of judges. Hundreds of spectators observed the day-long Tribunal, and its conclusions were presented as part of the official record of the governmental conferences."[99] However, the Tribunal also revealed the difficulty in unifying the vast global abuses faced by women in one coherent "frame."[100] At the Tribunal, women suggested that their abuse was caused by a variety of factors: "sexism, religious belief, and poverty—and blamed a range of actors, from husbands to state agents to the structure of global capitalism."[101] Fierce debates broke out within NGO workshops over the role that legal remedies and the state should play in the women's rights movement and the protection of women.[102] As a result of the transnational women's network's mainstreaming efforts, the Vienna Declaration and Programme of Action is rife with discussions of women's human rights.[103] Vienna affirmed the progress

[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] The language of Section 1, Paragraph 18 recalls the "women's rights are human rights" mantra and explicitly discussed sexual and gender-based violence:

> The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. … Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international

made at Rio, which would not have been possible without the strong network of women's advocates at United Nations conferences that had been growing since Mexico City.

Women's rights advocates convened the following year at the International Conference on Population and Development in Cairo. Similar to Rio and Vienna, activists were able to exert influence on the conference in a way that framed the agenda to include gender issues. Advocates linked controlling population growth to reproductive health access. Friedman argues that activists "were responsible for the switch from a framing of population issues as focused on controlling population growth to inextricably tied to the promotion of women's rights, both reproductive and other. . . ."[104] Gender justice NGOs quickly formed a Women's Caucus before government preparatory processes to add women's rights issues to the conference's agenda[105] and ran many a number of visibility campaigns.[106]

At Cairo, NGOs were granted a larger level of involvement by the Secretary General. Not only were NGOs allowed to "attend even informal consultations, but [the Secretary General] also gave them leave to intervene during closed door sessions . . . [and] incorporated their written statements in draft governmental documents."[107] In addition to attending the conference separately, NGOs were often a part of governmental delegations. For example, half of the United States' delegates were women's advocates including leading women's health advocates.[108] This Women's Caucus was the largest yet with approximately 400 to 500 women attending their meetings.[109] As a result, language was added to the final document that addressed the role of women in population growth.[110] During conference

> trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 18, U.N. Doc. A/CONF.157/23 (June 25, 1993). The document also addresses the "systematic rape women in war situations," and links systematic rape directly to refugees and displacement. *Id.* at ¶ 28. Similarly, the document expresses concern over "violations of human rights during armed conflicts, affecting the civilian population, especially women[.]" *Id.* ¶ 29. The third section of this document addresses the "equal status and human rights of women" in nine thorough paragraphs, condemning SGBV: "All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response." *Id.* ¶ 38.

[104] Friedman, *supra* note 64, at 322.

[105] *Id.*

[106] In 1992, advocates formed the Women's Voices '94 Alliance and wrote the "Women's Declaration on Population Policies." The International Women's Health Coalition (IWHC) circulated the statement and collected signatures from over 2,200 individuals and organizations amongst 100 countries. *Id.* The IWHC also held the "Declaration of the Reproductive Health and Justice" conference nine months prior to Cairo, which attracted 215 women from seventy-nine countries for an NGO version of the governmental preparatory committee. *Id.*

[107] *Id.*

[108] AMY J. HIGER, *International Women's Activism and the 1994 Cairo Population Conference*, *in* GENDER POLITICS IN GLOBAL GOVERNANCE 137 (Mary K. Meyer & Elizabeth Prügl eds., 1999).

[109] Compare to the "Pro-Life" Caucus, which attracted around fifteen members. Friedman, *supra* note 64, at 323.

[110] The fourth of fifteen principles in the final document reads: "Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development related programmes." Rep. of the International Conference on Population and Development, at 12, U.N. Doc. A/CONF.171/13/Rev.1 (1995). The

presentations, "nearly every delegation head mentioned the role of women, women's empowerment, women's education, and women's rights as central to the purpose at hand."[111] Organizers at Cairo fundamentally impacted the agenda at a conference on population and development to include provisions on women's rights and violence against women.

In 1995, the Fourth World Conference on Women convened and attracted an unprecedented 17,000 participants and 30,000 activists.[112] Beijing highlighted the rapid growth of the international women's rights movement in the twenty years since Mexico City. Where discourse on domestic violence was too new to breach Mexico City's agenda, Beijing delegates found themselves in an intense debate over a wide range of subjects, including VAW. The continuous mainstreaming of gender at United Nations conference had an effect at Beijing: "it was clear that the term 'gender mainstreaming' had achieved great popularity. It appeared throughout the lengthy Platform for Action as a strategy to redress women's unequal position in twelve areas of concern. . . ."[113] However, the conference itself also experienced substantial disagreement amongst delegations in comparison to the first three World Conferences on Women. Martha Alter Chen, writing at the end of the final Preparatory Committee, noted that "on the eve of the Fourth World Conference . . . there were signs of a well-organised and well-financed backlash"[114] against the promises made at Rio, Vienna, and Cairo. Chen traces these challenges back to the Preparatory Committees held prior to Beijing.[115] NGOs faced accessibility restrictions and the drafting process itself was cumbersome and inefficient.[116] After the final Preparatory Committee, thirty-five percent of the Draft Platform of Action was marked with square brackets, each marking a point that at least one state was unwilling to accept and indicated that further negotiations and amendments would occur in Beijing.[117] The Draft Platform was also introduced late into the final Preparatory Committee, "leaving little time for delegations to prepare positions" on the text.[118] Additionally, "the preparatory process itself [was] sufficiently participatory that minority voices [could] slow down, derail, or obstruct the process."[119] This "disagreement illustrated just how fragile the global consensus around women's human rights was going into the Beijing meeting."[120]

Although Beijing was anticipated to be the most contentious women's conference to date, the transnational women's network had also developed effective lobbying strategies and organized far beyond Mexico City. NGOs carefully monitored bracketed issues and

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fourth chapter of the report is entitled "Gender Equality, Equity, and Empowerment of Women" and VAW is explicitly discussed eight times. *Id.* at 22–27.

[111] HIGER, *supra* note 108, at 137.

[112] United Nations Women, *The Beijing Platform for Action: Inspiration Then and Now*, http://beijing20.unwomen.org/en/about (last visited Mar. 17, 2020).

[113] Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1, 3 (2005).

[114] Chen, *supra* note 84, at 490.

[115] *See id.* (discussing disagreement amongst delegations on the Draft Platform of Action).

[116] *See id.* ("The final Beijing PrepCom, held in New York in March 1995, was marred by restrictions on NGO access and accreditation as well as cumbersome, inefficient and divisive drafting processes.").

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] KECK & SIKKINK, *supra* note 9, at 188.

recommended language to government delegations. At times, "government delegations incorporated language suggested by NGOs directly; [at other times] governments consulted with NGOs to shape their positions on issues."[121] The ultimate goal of Beijing was to "protect[] the gains made against the newly powerful countermovement [and against their agenda], while trying to ensure some implementation for the new frames of the 1990s."[122] This countermovement was a coalition of countries with strong Catholic and Islamic leadership that formed after the increased visibility of the women's network at Vienna and abortion issues at Cairo.[123] At Beijing, WEDO coordinated a Linkage Caucus as an attempt to preserve the progress made by the network.[124] The Linkage Caucus created three advocacy documents: "recommendations on bracketed language; a chart of precedents from other UN documents and conferences legitimating specific NGO demands; and a Pledge for Gender Justice."[125] Lobbying occurred informally at coffee breaks and in hallways due to limited NGO access to the government working groups actually negotiating the bracketed language.[126] Cultivated relationships between advocates and delegates were key to maintaining lines of communication, especially when access to the governmental conference was limited.[127]

The Platform for Action at Beijing was the most contested of all statements of the discussed international conferences.[128] Similar to the Rome Conference, the two most disputed issues were the use of the word *gender* (as opposed to sex) and perceived "threats" to the family. Catholic states, led by the Holy See, "objected to the feminist use of the word [gender], which distinguishes between biological sex and the roles, expectations, and actions of socialized men and women."[129] The progressive use of gender, according to many conservative delegations, opened the floodgates for alternate definitions of gender that operate outside of biologically essentialist norms.[130] Twenty countries made reservations on parts of the Platform deemed to be incompatible with Islamic law, including issues of reproductive justice, homosexuality, and inheritance.[131] Catholic countries expressed similar reservations on parts of the Platform that challenged the "traditional" nuclear family, homosexuality, and abortion bans.[132] Catholic and Islamic countries again formed blocs on these issues, which persisted after the conclusion of Beijing at the Rome Conference.

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[121] *Id.*

[122] Friedman, *supra* note 64, at 324.

[123] *Id.* at 324.

[124] *Id.* at 324 ("WEDO coordinated a 'Linkage Caucus' to ensure that gains made by women at prior UN conferences would not be lost.").

[125] *Id.* at 324.

[126] *Id.*

[127] *Id.*

[128] SALLY BADEN & ANNE MARIE GOETZ, *Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing*, *in* WOMEN, INTERNATIONAL DEVELOPMENT, AND POLITICS: THE BUREAUCRATIC MIRE 44 (Kathleen Staudt ed., 1997).

[129] Friedman, *supra* note 64, at 325.

[130] *Id.* at 323 ("While claiming to promote an agenda that also supported gender equality, this coalition specifically attacked those rights that threatened the hegemony of a 'traditional' conception of gender relations.").

[131] *Id.* at 326.

[132] *Id.*

Most feminist issues were preserved, and some were furthered, despite the threat presented by numerous states to the advances made by the women's network in prior conferences. With regard to the use of "gender," Annex IV to the Platform for Action specified, "the word 'gender' as used in the Platform for Action was intended to be interpreted and understood as it was in ordinary, generally accepted usage."[133] This vague statement replaced the disputed definition in the draft Platform but allowed for some level of interpretation beyond biological essentialism. The final Platform made notable advancements in the areas of sexual and reproductive health, anti-choice abortion laws, rape as a war crime, and the rights of girls.[134] WEDO claims that in sum, sixty-seven percent of recommendations made by NGOs on the bracketed text were incorporated into the final Platform for Action.[135]

c. Conclusion

In the span of twenty years, the transnational women's network managed to influence the United Nations far beyond the scope of the World Conferences on Women. In 1975, Mexico City documents made no explicit reference to VAW, but by Beijing in 1995, VAW was a centerpiece of the final document. Mainstreaming VAW would have simply been impossible without the organizing work by the transnational women's network. The success of the women's network in "gendering the agenda" at non-gender centric conferences was due to the development of mainstreaming strategies: specialized women's networks, extensive preparatory work, precedent setting, tribunals, and insider/outsider advocacy. By Beijing, these practices were decisively a part of the women's network repertoire. The advancement of mainstreaming strategies also emboldened the opposition to respond similarly, forcing the two groups into a framing contest. Understanding the development of the transnational women's network at United Nations conferences is pivotal to understanding the role of the Women's Caucus for Gender Justice at the Rome Conference.

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[133] Rep. of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Add.1 (Oct. 27, 1995).

[134] Paragraph 96 of the Platform includes "[the] right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence" as a human right of women. *Id.* at ¶ 96. Paragraph 106(k) addresses reproductive rights and urges governments to "consider reviewing laws containing punitive measures against women who have undergone illegal abortions." *Id.* at ¶ 106(k). Section E discusses sexual and gender-based violence in depth. Paragraph 132 declares that "rape, including systematic rape, sexual slavery and forced pregnancy require a particularly effective response." *Id.* at ¶ 132. Paragraph 135 states:

> The impact of violence against women and violation of the human rights of women in such situations is experienced by women of all ages … who are victims of acts of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. *Id.* at ¶ 135.

Likewise, Paragraph 131 deems rape, including systematic rape in war, "[m]assive violations of human rights . . . are abhorrent practices that are strongly condemned and must be stopped immediately, while perpetrators of such crimes must be punished." *Id.* at ¶ 131. The platform links SGBV in conflict to the importance of equity in the peace process and suggests "increas[ing] the participation of women in conflict resolution at the decision-making levels" as a means to alleviating this phenomenon. *Id.* ¶ 141.

[135] Friedman, *supra* note 64, at 325.

III. SHIFTING PARADIGMS OF SEXUAL AND GENDER-BASED VIOLENCE UNDER INTERNATIONAL LAW

This section delves into a thick description of the justice cascade and the development of international criminal law, culminating in an analysis of landmark cases that impacted how the International Criminal Court has prosecuted SGBV crimes. The formulation of *ad hoc* tribunals, riding the human rights wave of the 1990s, was a key contributing factor to the passage of the Rome Statute. The history of tribunal formation must be parsed out in order to understand both the WCGJ's incorporation of SGBV crimes and the establishment of the Court itself. The rapid development of international criminal tribunals in the 1990s is exemplary of Sikkink's justice cascade and Hoffmann's temporal postulation of the rise of human rights idealism, both necessary for the Women's Caucus for Gender Justice's existence.

a. Rape and the Laws of War: From Cicero to Lincoln

Attempts to regulate wartime behavior have been documented as early as 500 B.C.E.,[136] but for much of history, SGBV has been sidelined due to the conception of women as property. Even further, rape was often considered a legitimate spoil of war.[137] By the end of the Middle Ages, the normative legitimacy of wartime rape began to be reconsidered.[138] In Hugo Grotius' *De Jure Belli ac Pacis*, one of the most substantial contributions to

[136] KELLY DAWN ASKIN, CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 19 (1997) (discussing informal wartime regulations in Cicero's *Marcus Tullius, Cicero's Three Books of Offices, or Moral Duties*).

[137] SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 33 (1975).

[138] Both Richard II (1385) and Henry V (1419) introduced bans on wartime rape. Tuba Inal, Development of Global Prohibition Regimes: Pillage and Rape in War (July 2008) (unpublished Ph.D. dissertation, the University of Minnesota) (on file with the University of Minnesota digital conservancy) (citing Richard II's proclamation in 1385 banning rape in army codes); Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993). In the fourteenth century, Lucas de Penna advocated for the protection of noncombatants during wartime, including from rape. RICHARD SHELLY HARTIGAN, THE FORGOTTEN VICTIM: A HISTORY OF THE CIVILIAN 50 (1982) ("In war, the belligerents are not at liberty to act without restraint. Soldiers may not be given license to murder, rob, plunder, rape, or constrain civilians; those who do such things should be as severely punished as if the crimes had been committed during peacetime."). A century later, Alberico Gentili reiterated de Penna's sentiments: "It is not lawful to do this wrong [rape], even if it is sometimes lawful to kill women. . . . If a woman fights, why should she not allow war to be made upon her?. . . . But there is no reason why she should suffer so signal an insult [as rape]." ASKIN, *supra* note 136, at 22. In fifteenth century England, Gerrard Winstanley, founder of the radical Protestant group known as the Diggers, advocated for rapists to face capital punishment. GERRARD WINSTANLEY, THE WORKS OF GERRARD WINSTANLEY 599 (George H. Sabine ed., 1965) ("If a man lie with a woman forcibly, and she cry out, and give no consent; if this be proved by two Witnesses or the mans confession, he shall be put to death and the woman let go free; it is robbery of a womans bodily Freedom."). Winstanley locates the equality of men and women in the ability of all genders to reason, a radically progressive belief for his time. *See* GERRARD WINSTANLEY ET AL., THE TRUE LEVELLERS STANDARD 6 (1939) ("In the beginning of Time, the great Creator Reason, made the Earth to be a Common Treasury . . . And the Reason is this, Every single man, Male and Female, is a perfect Creature of himself; and the same Spirit that made the Globe, dwels in man to govern the Globe; so that the flesh of man being subject to Reason, his Maker, hath him to be his Teacher and Ruler within himself, therefore needs not run abroad after any Teacher and Ruler without him, for he needs not that any man should teach him, for the same Anoynting that ruled in the Son of man, teacheth him all things.").

international law, rape was condemned as an "uncivilized act" in civilized nations[139] that "[does not] contribute to safety or to punishment, and . . . consequentially [rape] [should] not go unpunished in war any more than in peace."[140] While these statements by philosophers and jurists were certainly a step in the right direction, their words did very little to actually prevent wartime rape, and substantial legal advancements were not made until centuries later.

The eighteenth and nineteenth centuries brought about small, though tangible, advancements in international law that addressed SGBV. In 1863, Columbia Professor Francis Lieber attempted to codify the customary law of war during the American Civil War.[141] The Lieber Code, signed into law by President Lincoln, were specific instructions to regulate the conduct of Union soldiers. The Code explicitly referenced sexual violence in Article 44, which prohibits rape as a capital crime.[142] The Lieber Code deeply impacted the international community's efforts to regulate warfare and was a precursor to the Hague Conventions of 1899 and 1907.

Article 46 of the Hague Convention of 1907 borrowed some of Article 44's language, but notably eliminated any explicit reference to rape or sexual violence. Instead, Article 46 states: "Family honour and rights, the lives of all persons, and private property, as well as religious convictions and practice, must be respected."[143] While Article 46 may be read to include SGBV through the family honor and rights language, the article has rarely been interpreted in this manner.[144] The absorption of SGBV under family and honor rights that tends to emphasize moral notions of chastity and honor over the physical acts of violence and is still pervasive in contemporary international law.[145] The Hague Conventions laid a

[139] Of course, I must note that the concept of "uncivilized" and "civilized" societies is a racist social construct that harkens back to colonialism and imperialism, whereby the domination and subjugation of non-Western societies was typically "legitimated" by characterizing the colonized as uncivilized and barbaric. For further reading, *see generally*, FRANTZ FANON, BLACK SKIN, WHITE MASKS (Richard Philcox trans., 1952) (considering the project of colonialism and the existential experience of racialized subjectivity); EDWARD W. SAID, ORIENTALISM (1978) (applying post-structuralism to scholarship on orientalism); ÉTIENNE BALIBAR & IMMANUEL WALLERSTEIN, RACE, NATION, CLASS: AMBIGUOUS IDENTITIES (Verso, 1991) (analyzing the intersection of race, class, and nationalism); ACHILLE MBEMBE, ON THE POSTCOLONY (2001) (exploring the relationship between power and subjectivity in postcolonial Africa); GAYATRI C. SPIVAK, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988) (criticizing Western academics for making logocentric assumptions about the colonial experience).

[140] 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 657 (Francis W. Kelsey et al. trans., 1995).

[141] Meron, *supra* note 138, at 425.

[142] *Id.* Article 44 states: "All wanton violence committed against persons in the invaded country . . . all rape . . . [is] prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense." *General Orders No. 100: The Lieber Code*, Instructions for the Government Armies of the United States in the Field art. 44, (Apr. 24, 1863).

[143] Convention IV: Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277.

[144] Meron, *supra* note 138, at 425.

[145] *See, e.g.*, Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 HEALTH & HUM. RTS 17, 28–29 (2007) ("Historically, the compelling (and sympathetic) image of 'rape victim' as an innocent female in need of solace for her destroyed innocence/chastity operates against [the empowerment of survivors as citizens able to participate in policy formation]. Traditional health-based approaches to sexuality—especially female sexuality—have colluded with this paradigm, treating the female body as vessel, not actor.").

weak foundation for prosecuting SGBV whose vestiges continually deemphasize the gravity of the violence and reinforces dated gender norms.

b. The Post-War Landscape: The IMT, IMTFE, and Geneva Conventions

The atrocities of the First and Second World Wars galvanized the first international criminal tribunals dedicated to post-war justice. The Allied powers began to explore the possibility of prosecuting the Axis Powers in October of 1941.[146] Nearly two years later, the United Nations War Crimes Commission was formed in London and shortly thereafter, the Allied Powers issued the Moscow Declaration, committing to "united action, pledged for the prosecution of the war against their respective enemies, will be continued for the organization and maintenance of peace and security."[147] On August 8, 1945, the International Military Tribunal (IMT) was created to prosecute prominent members of Nazi Germany. The IMT's jurisdiction extended to three crimes: crimes against peace, war crimes, and crimes against humanity. Crimes against peace was defined by the Charter as "namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[148] Where crimes against peace relate to the waging of a war itself, both war crimes and crimes against humanity refer to the treatment of individuals. The Charter classifies war crimes as violations of customs or laws of war, and clearly lists out a number of several actions that are considered war crimes.[149] Similarly, the Charter defines crimes against humanity as a number of acts committed against a civilian population, without the condition of ongoing war.[150] The Charter leaves room for the inclusion of "other inhumane acts," but SGBV is absent from the listed crimes and the categories of persecuted groups. In comparison to the Lieber Codes, which preceded the IMT by over eighty years, the Charter did very little to incorporate SGBV crimes. Due to the influence of the Hague Conventions on the Charter, it is unsurprising that SGBV was overlooked at this point in history. SGBV crimes were absent in the Charter and prosecutions, despite ample evidence of these crimes in the concentration camps.[151] Although the IMT never pursued SGBV charges, the ability to prosecute these crimes was granted by Control Council Law No. 10 (CCL No. 10). CCL No. 10 was established in 1945,

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[146] *From Nuremberg to The Hague: Teaching from the Past - Challenges for the Future,* NUREMBERG ACADEMY, http://www.nurembergacademy.org/fileadmin/media/pdf/From_Nuremberg_to_The_Hague.pdf (last visited Jan. 5, 2020).

[147] Joint Four-Nation Declaration art.1, Moscow Conference, Oct. 1943.

[148] Charter of the International Military Tribunal art. 6(a), Nuremberg Trial Proceedings Volume 1.

[149] *Id.* at art. 6(b) ("[M]urder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.").

[150] *Id.* at art. 6(c) ("Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal[.]").

[151] *See* NAZI CONCENTRATION CAMPS (National Archives and Records Administration 1945) (documenting concentration camps as they were found upon liberation).

prior to the Nuremberg trials, and empowered the authorities occupying Germany to continue prosecutions of war criminals. CCL No. 10 did not substantially deviate from the Nuremberg Charter, but crimes against humanity was updated to include rape.[152] The formal inclusion of rape in crimes against humanity was a major milestone for the recognition of SGBV as a crime under IHL, regardless of how few perpetrators were prosecuted.

The International Military Tribunal for the Far East (IMTFE) was founded in 1946 as the IMT's Pacific Theater counterpart. Like the IMT, the IMTFE prosecuted three crimes: crimes against peace, war crimes, and crimes against humanity. The IMTFE Charter did not include rape as a crime against peace or crime against humanity. The IMTFE's definition of war crimes departed from the IMT's extensive list and instead simply reads: "namely, the violations of the laws or customs of war."[153] At the IMTFE, perpetrators were actually charged for SGBV crimes,[154] but rape was deemphasized: survivors did not testify,[155] some perpetrators charged with rape as a war crime were acquitted,[156] and only a single paragraph was dedicated to the Rape of Nanking, in spite of the recognition that 20,000 rapes occurred during the first month of occupation.[157]

The Geneva Conventions and Additional Protocols were adopted in the aftermath of the Second World War as an attempt to prevent future atrocities by codifying proscribed acts during war. The four Geneva Conventions, adopted in 1949, protects four classes of people: wounded and sick soldiers on land; wounded and sick soldiers at sea; prisoners of war; and civilians. Common Article 3 to the Geneva Conventions addressed for the first time "situations of non-international armed conflict includ[ing] traditional civil wars, internal armed conflicts that spill over into other States or internal conflicts in which third States or a multinational force intervenes alongside the government."[158] Common Article 3 therefore allows SGBV to be prosecuted in internal conflicts, like the Rwandan Civil War. SGBV is not limited to international armed conflicts and manifests itself in all armed conflict.

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[152] "Murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." Nuremberg Trials Final Report Appendix D, Control Council Law No. 10 (Dec. 20, 1945) (emphasis added).

[153] Special Proclamation: Establishment of an International Military Tribunal for the Far East, art. 5(b), Jan. 19, 1946, T.I.A.S. No. 1589.

[154] *See* Meron, *supra* note 138, at 426 ("[S]ome Japanese military and civilian officials [were found] guilty of war crimes, including rape, because they failed to carry out their duty to ensure their subordinates complied with international law.").

[155] Richard J. Goldstone & Estelle A. Dehon, *Engendering Accountability: Gender Crimes Under International Criminal Law*, 19 NEW ENG. J. PUB. POL'Y 121, 123 (2003).

[156] William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 69 (1973).

[157] Goldstone & Dehon, *supra* note 155, at 123. ("The IMFTE did recognize that '[a]pproximately 20,000 cases of rape occurred within the city [of Nanking] during the first month of occupation,' but it devotes only one paragraph of its judgment to the gender crimes infamously memorialized as the 'Rape of Nanking.' Rape was subsumed under general charges of command responsibility for the atrocities committed in Nanking, and the conviction of General Iwane Matsui for war crimes and crimes against humanity was based in part on evidence of rape committed by his troops. The equally notorious forcing of thousands of 'comfort women' into prostitution in Japanese military brothels was, however, ignored by the IMTFE.").

[158] *The Geneva Conventions of 1949 and their Additional Protocols*, INT'L COMM. RED CROSS (Oct. 29, 2010), https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm.

The Fourth Geneva Convention and Common Article 3 made progress in addressing SGBV. Under the Fourth Geneva Convention, Article 27 explicitly forbids some SGBV crimes: "Women Shall be especially protected against any *attack on their honour*, in particular against rape, enforced prostitution, or any form of indecent assault."[159] The First and Second Additional Protocols also address SGBV, but with peculiar language. Article 76 of Protocol I is dedicated to the protection of women as "*object[s]* of special respect."[160] Likewise, Protocol II prohibits "outrages upon *personal dignity*, in particular . . . rape, enforced prostitution, or any other form of indecent assault. . . ."[161] The language of the Geneva Convention provisions related to women relies heavily on notions of "honor" and "dignity" as opposed to the gravity of the violent crimes themselves. This linkage places an undue emphasis on the degradation of honor and distances the violent crime from the perpetrator, minimizes the physical and psychological harms of the crime, and reinforces harmful stereotypes of women. Although some SGBV crimes are enumerated in the Geneva Conventions, they are not considered grave breaches subject to universal jurisdiction. The failure of the Geneva Conventions to incorporate SGBV as a grave breach and the inappropriate focus on SGBV as chiefly a violation of honor in a foundational IHL document burdened future tribunals.

c. The Second Wind: Ad Hoc Tribunals

After the IMT and IMTFE concluded, there was a lull in international tribunals until the 1990s. Throughout the twentieth century, IHL largely disregarded the gravity of SGBV. This was to be expected as "these laws were written by men drawing heavily on the male chivalric tradition and were interpreted by male military lawyers, judges, and governmental experts, in an age when rape was placed on the same footing as plundering, and was considered to be an inevitable consequence of war."[162] This mentality began to shift with the advent of the International Criminal Tribunals for the former Yugoslavia and Rwanda, which actively sought to prosecute SGBV perpetrators.[163]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) indicated that SGBV would be prosecuted since its inception in 1993.[164] Secretary General Boutros Boutros-Ghali highlighted the "widespread and systematic rape and other forms of sexual assault, including enforced prostitution"[165] in his report on the proposed tribunal. Boutros-

[159] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War part III art. 27, Aug. 12, 1949, 75 U.N.T.S. 287 (emphasis added).

[160] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 76(1), June 8, 1977, 1125 U.N.T.S. 3 (emphasis added).

[161] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(2)(e), June 8, 1977, 1125 U.N.T.S. 609 (emphasis added).

[162] Goldstone & Dehon, *supra* note 155, at 123.

[163] Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45, 46–47 (1997).

[164] Prior to the ICTY's formation, the Security Council passed Resolution 798 in 1992 stating that the Council was "[a]ppalled by reports of the massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina." S.C. Res. 798 (Dec. 18, 1992).

[165] Rep. of the S.C., at ¶ 48, U.N.Doc. 48 S/25704 (May 3, 1993).

Ghali went further than his predecessors when he noted that "the nature of the crimes committed and the sensitivities of victims of rape and sexual assault, due consideration should be given in the appointment of staff to the employment of qualified women"[166] when staffing the Office of the Prosecutor. Rape is explicitly enumerated as a crime against humanity in the ICTY Statute[167] and reiterates the widespread nature of SGBV by expressing "its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law . . . including reports of . . . massive, organized, and systematic detention and rape of women."[168]

The ICTR Statute emphasized the role of SGBV in armed conflict and built upon the avenues available for prosecuting these crimes. While the ICTY Statute solely listed rape as a crime against humanity, the ICTR Statute includes SGBV as war crimes and crimes against humanity. Article 4 of the ICTR Statute includes "rape, enforced prostitution and any form of indecent assault"[169] as outrages upon personal dignity. However, the ICTR Statute narrowly defines armed conflict in the context of crimes against humanity.[170] By adopting this definition, the ICTR Statute inherently restricted the breadth of SGBV that could be prosecuted.

In addition to the advancements made by the ICTY and ICTR Statutes, each tribunal heard groundbreaking cases that addressed SGBV. These cases aided in defining relationships between SGBV and crimes against humanity, war crimes, genocide, and torture. This section will discuss cases that contributed to the evolving connections between SGBV and international criminal law which, in turn, impacted the prosecution of these crimes at the International Criminal Court.

The indictment in *Prosecutor v. Dragan Nikolić* initially did not address SGBV crimes. Nikolić was the Serbian Commander of the Sušica detention camp, which housed as many as 8,000 Muslim detainees between May and October 1992.[171] The decision against investigating SGBV at Sušica was short-lived. When the trial started, "evidence began to emerge that many of the women detained in the camp were subjected to sexual assaults, including rape."[172] In response to this evidence, the three Trial Chamber judges stated:

> The Trial Chamber feels that the Prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolić with rape and other forms of sexual assault, either as a

[166] *Id.* at art. 15(B)(88).

[167] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia at 6 (Sept. 2009), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (compilation of original U.N. resolutions)

[168] *Id.* at 17.

[169] S.C. Res. 955, art. 4(e) (Nov. 8, 1994).

[170] *See id.* at art. 3 ("[C]ommitted as a part of a widespread or systemic attack against any civilian population on national, political, ethnic, racial or religious grounds. . . .").

[171] *Case Information Sheet: 'Sušica Camp' (IT-94-2) Dragan Nikolić*, International Criminal Tribunal for the Former Yugoslavia, http://www.icty.org/x/cases/dragan_nikolic/cis/en/cis_nikolic_dragan.pdf (last visited May 9, 2019) [hereinafter *Case Information Sheet: Sušica Camp*].

[172] Goldstone & Dehon, *supra* note 155, at 123–24.

> crime against humanity or as grave breaches [of the Geneva Conventions] or as war crimes.[173]

The language of this statement is notable due to its indication that "rape and other forms of sexual assault" could be charged as a grave breach of the Geneva Conventions. While Nikolić was not charged with war crimes, he was convicted of "[p]ersecutions on political, racial and religious grounds, murder, *sexual violence*,[and] torture"[174] as crimes against humanity.

Prosecutor v. Anto Furundžija was the third case completed by the ICTY and was another key case that included SGBV crimes. Furundžija was a local Commander of the Croatian Defense Council (HVO) and faced charges of war crimes as a result of his involvement in the torture, rape, and sexual assault of a woman during HVO interrogation. The sole charge in *Furundžija* was rape as a war crime under Article 4(2)(e) of the Additional Protocol II of the Geneva Conventions, which problematically includes rape as an outrage of personal dignity. In *Furundžija*, and in other cases, women lawyers and judges played a pivotal role in prosecuting SGBV. In particular, Hildegard Uertz-Retzlaff and her all-women prosecuting team were instrumental in aggressively pursuing SGBV charges.[175] The case was brought to the Appeals Chamber in 2000, which stated:

> With regard to the issue of the reaffirmation by the International Tribunal of rape as a war crime, the Appeals Chamber finds that the international community has long recognized rape as a war crime. In the *Čelebiči* judgment, one of the accused was convicted of torture by means of rape, as a violation of the laws or customs of war. This recognition by the international community of rape as a war crime is also reflected in the Rome Statute where it is designated as a war crime.[176]

Goldstone and Dehon argue that based on this statement, "the Appeals Chamber does not consider the finding in *Furundžija* to categorize rape as a subset of outrages against personal dignity."[177] The Appeals Chamber insinuated that "rape is now considered to be a self-standing war crime"[178] through the direct reference to Article 8(2)(b)(xxii) and Article 8(2)(e)(vi), where forms of SGBV are categorized as free-standing war crimes, independent of "personal dignity." This decision by the Appeals Chamber is crucial in the elevation of SGBV crimes as it signals a normative acceptance of SGBV as a free-standing war crime.

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[173] Prosecutor v. Nikolić, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 33 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 20, 1995).

[174] *Case Information Sheet: Sušica Camp*, *supra* note 171, at 1.

[175] Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE WESTERN RES. J. INT'L L. 305, 313–14 (2002).

[176] Prosecutor v. Furundžija, IT-95-17/1-A, Judgement, ¶ 210 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

[177] Goldstone & Dehon, *supra* note 155, at 126.

[178] *Id.* at 127.

Further, this indicates a broader recognition of the Rome Statute's more progressive definition of SGBV as a free-standing war crime.[179]

Rape as free-standing a war crime was affirmed in *Prosecutor v. Dragoljub Kunarac, et al*. *Kunarac* was "the first indictment in the history of international war crimes prosecutions with charges based solely on crimes of sexual violence against women."[180] Over the course of the trial, the charges were repeatedly amended. Initially, the sixteen counts of rape were listed as crimes against humanity and, "[i]n line with prosecutorial strategy at that stage, when rape was the basis for war crimes charges, it was subsumed under torture and outrages against personal dignity."[181] The indictment was amended to add six counts of rape as a violation of the laws or customs of war in addition to the two existing personal dignity charges.[182] The charges were again amended to include seven counts of rape as a war crime.[183] *Kunarac* expanded the definition of rape to include all instances in which consent is not voluntarily given[184] and held for the first time that sexual slavery is a crime against humanity.[185] Again, these charges were the result of the efforts of Uertz-Retzlaff and other women, who "sought to charge sexual violence under different criminal headings, including enslavement, to reflect the diverse nature of sexual violence. . . ."[186]

The ICTY also made history in *Prosecutor v. Zejnil Delalič* by prosecuting rape as a form of torture. In this case, the Office of the Prosecutor "began to take imaginative steps to prosecute gender crimes as war crimes and grave breaches of the Geneva Conventions."[187] Goldstone and Dehon argue that the most successful strategy in elevating SGBV crimes to grave breaches of the Geneva Conventions has been to use these crimes as evidence of *actus reus* for recognized grave breaches.[188] Under this approach, SGBV is charged as a constituent crime to a recognized grave breach. An SGBV crime is dependent on the commission of an enumerated grave breach and thus limited to instances of SGBV that occurs concurrently with a grave breach. Instead, a new category inclusive of SGBV crimes as free-standing grave breaches should be created.

Strategically charging SGBV as a constituent crime was piloted in *Delalič*, where repeated incidents of rape were charged as torture. The Trial Chamber accepted this logic, ruling that "the rape of any person [is] a despicable act which strikes at the very core of human dignity and physical integrity."[189] The Trial Chamber held that rape constituted a form of torture because the rapes were "committed with an intent to discriminate against

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[179] *See infra* Part V.B.

[180] Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, 13 EUR. J. INT'L L. 697, 697 (2002).

[181] Goldstone & Dehon, *supra* note 155, at 127.

[182] *Id.*

[183] *Id.*

[184] Dixon, *supra* note 180, at 700.

[185] Goldstone & Dehon, *supra* note 155, at 129.

[186] MICHELLE JARVIS & NAJWA NABTI, *Policies and Institutional Strategies for Successful Sexual Violence Prosecutions*, *in* PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 77 (Serge Brammertz & Michelle J. Jarvis eds., 2016).

[187] Goldstone & Dehon, *supra* note 155, at 125.

[188] *Id.*

[189] *Id.*

'Muslims in general' and 'the victim in particular.'"[190] Goldstone and Dehon highlight the relationship between SGBV and torture:

> Rape specifically was not enumerated in the list of grave breaches, possibly because it was not considered to be a crime of violence of the type deserving of the greatest liability under the Conventions gender crimes recognized as grave breaches are subject to universal jurisdiction. This development allows for gender crimes to be prosecuted by domestic courts, which could facilitate the domestic implementation of the substantive and procedural advances made by the Tribunals in their analysis and prosecution of gender crimes.[191]

The recognition of rape as torture by the ICTY paved the way for SGBV crimes to be charged as a constituent element to a grave breach, thus elevating SGBV by association. This recognition is significant because "it reverses the dismissive attitude toward crimes perpetuated mostly against women that resulted in none of the provisions specific to women in the Geneva Conventions being designated as 'grave breaches.'"[192]

The roundabout manner of charging rape as a constituent grave breach, while a major advancement, does not go far enough in elevating SGBV. SGBV should be enumerated as free-standing grave breaches, thereby including more forms of violence and subjecting perpetrators to universal jurisdiction. Further, the fact that the torture in *Delalič* took the form of rape suggests that the victim was also discriminated against based on her gender identity. Gender discrimination was explicitly dismissed when the ICTY "held that complainants were 'taken out' to be raped 'on the basis *only* of their Muslim ethnicity,' and that the Muslim men and women in Foca were 'killed, raped or severely beaten' and the '*sole reason* for this treatment was their Muslim ethnicity.'"[193] This ruling highlights the ongoing need for a more intersectional approach to SGBV. By "oscillat[ing] between essentialisms of gender and race,"[194] the ICTY failed to encapsulate the complex identities of the victims, whose experiences were informed by race *and* gender. The ICTY chose to identify the "Muslim civilian population" as the general victims of these gendered attacks instead of recognizing that SGBV was committed against Muslim women because of their dual identities.[195]

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[190] Dixon, *supra* note 179, at 702.

[191] Goldstone & Dehon, *supra* note 155, at 126.

[192] *Id.* at 125–26.

[193] Dixon, *supra* note 180, at 701.

[194] *Id.* Biological essentialism denies the unique interaction multiple, intersectional identities that individuals possess in favor of viewing identities as monolithic and discrete. Angela Harris articulates this in her critique of Catharine MacKinnon's "gender essentialism—the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). Harris argued that when feminist legal theorists proffered a unified "women's experience" "in the attempt to extract an essential female self and voice from the diversity of women's experience, the experience of women perceived as 'different' are ignored or treated as variations on the (white) norm." *Id.* at 615.

[195] Dixon, *supra* note 180, at 701.

Prosecutor v. Jean-Paul Akayesu[196] at the ICTR affirmed for the first time that SGBV crimes may constitute genocide. Like *Nikolić*, *Akayesu* did not initially include charges of SGBV crimes,[197] which were only added when witness testimonies that indicated the pervasive presence of SGBV in the commune where Akayesu was the mayor and supported the commission of these crimes.[198] Judge Navantham Pillay, the only woman judge at the ICTR at the time, advocated for the indictment to be amended to include SGBV charges.[199] Like many of the prior SGBV cases, the ICTR relied on the outdated "outrages upon personal dignity" language, but also recognized that "rape committed with the aid of a public official is torture."[200] This decision was monumental because any form of SGBV had yet to be held as constituting genocide.[201]

For the first time in history, an international war crimes tribunal successfully convicted a defendant guilty of genocide where SGBV was a critical component of the genocide charge.[202] Askin outlines just how monumental the *Akayesu* decision was for the prosecution of SGBV:

> (1) the trial chamber recognized sexual violence as an integral part of the genocide in Rwanda, and found the accused guilty of genocide for crimes that included sexual violence; (2) the chamber recognized rape and other forms of sexual violence as independent crimes constituting crimes against humanity; and (3) the chamber enunciated a broad, progressive international definition of both rape and sexual violence.[203]

The international criminal tribunals made significant progress in bringing substantial prosecutions of SGBV crimes to the fore. Patricia Viseur Sellers reflects, "[t]he *ad hoc* [t]ribunals by trying and convicting perpetrators [of SGBV crimes] fomented a legal climate beyond [its] jurisdiction that [made it conducive to draft] several sex-based crimes [into] the Rome Statute of the ICC."[204] As the ICTY and ICTR were unfolding, momentum for a permanent international criminal court grew, and the drafting process for the Rome Statute ran concurrently to some prosecutions at both tribunals.[205] Due to the involvement of WCGJ members in the *ad* hoc tribunals, many of the arguments used at Rome reflect the *ad* hoc

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[196] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

[197] Goldstone & Dehon, *supra* note 155, at 124.

[198] *Id.*

[199] *Id.*

[200] Diane Marie Amann, *Prosecutor v. Akayesu. Case ICTR-96-4-T*, 93 AM. J. INT'L L. 195, 197 (1999).

[201] "With regard, particularly, to … rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such." Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

[202] *See* Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 105–110 (1999) (surveying the indictment, trial, and judgment of Jean-Paul Akayesu).

[203] *Id.* at 107.

[204] PATRICIA VISEUR SELLERS, *Individual(s') Liability for Collective Sexual Violence*, *in* GENDER AND HUMAN RIGHTS 163 (Karen Knop ed., 2004).

[205] Halley, *supra* note 11, at 9.

drafting process outcomes. For example, the WCGJ borrowed lines from *Čelebići* when advocating for the admission of rape in the Rome Statute's list of grave breaches.[206] The WCGJ's ability to take hold of the anti-impunity momentum that spurred the creation of the *ad hoc* tribunals was necessary to their overall success at Rome. As a result, the Court was influenced by the advances—and downfalls—of the tribunals and, in turn, some *ad hoc* tribunal cases were influenced by the Rome Statute's more progressive SGBV provisions. The timing of the justice cascade and the preeminence of the transnational women's network by the United Nations conferences of the 1990s was not a coincidence. Both events were the result of the "epochal ruptures of the late twentieth century"[207] and, without these events, it is unlikely that the WCGJ would have been able to impact the Rome Statute's language on SGBV so deeply.

IV. FROM PERIPHERAL BACKWATERS TO THE FORE: FEMINIST ACTIVISM IN ROME

This Part is a critical examination of the Women's Caucus for Gender Justice's role in the foundation of the International Criminal Court. The WCGJ was founded as a direct outgrowth of the transnational women's network after its successes at United Nations conferences. This piece of the story was the fortuitous confluence of three events brought about by the human rights wave: gender mainstreaming, the justice cascade, and the creation of the International Criminal Court. Like the Parts before, it is essential to tell the story of becoming, that is, engage deeply with the temporally and legally complex events that aided in the establishment of the Court through thick description. The issues that the WCGJ fought for at negotiations were wide-sweeping, and for the sake of brevity, this Part will focus on language modifications that sought to fundamentally alter how the law conceptualizes SGBV.[208]

a. Establishing an International Criminal Court: A Short History

The concept of an international criminal court was far from new by the time that Trinidad and Tobago proposed its creation to the United Nations General Assembly in 1989, with direct efforts in recent history spanning as early as 1899 with the First Hague Convention for the Settlement of International Disputes.[209] Almost a hundred years after the First Hague

[206] *See id.* at 12, 67 (noting the strategy of referencing ICTY and ICTR decisions when negotiating the Rome Statute).

[207] Hoffmann, *supra* note 7, at 282.

[208] The Women's Caucus for Gender Justice also impacted procedural issues involving gender, but those issues are not the subject of this project. *See, e.g.*, Halley, *supra* note 11, at 36, 107–08 (surveying various procedural initiatives undertaken by the WCGJ); Goldstone & Dehon, *supra* note 155, at 136–37 (discussing WCGJ's gender mainstreaming efforts on the Rules and Procedures of Evidence of the ICC).

[209] In 1907, the Second Hague Convention dealt with obligatory arbitration and received support from major world powers, including the United States, Great Britain, and Russia. During the interwar period, the League of Nations sought to establish the Permanent Court of International Justice with proposals from Allied powers "containing various international rules of individual culpability for human rights abuses and aggression." STEVEN C. ROACH, POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW 21 (2006).

Convention, the International Law Commission produced a draft statute for the International Criminal Court.[210] Throughout 1995 and 1997, preparatory committees met six times to write the draft statute, and in June of 1998, 168 state delegations and several delegates from international organizations met in Rome to negotiate the document.[211] When the conference began, the draft statute was riddled with over 1,700 square brackets, each marking points of disagreement between states.[212]

During the conference, progressive states formed the Like-Minded Group (LMG), "an ad hoc group of states [that] work[ed] on the draft and advance[d] the idea of a permanent court."[213] The Like-Minded Group was largely comprised of "middle powers that were not directly involved in any conflicts, and had relatively little historical baggage to compromise the credibility of their search for humanitarian solutions."[214] The LMG

> conceived of themselves as depoliticized in an important sense: they lacked strong political interests and strategic entanglements in many parts of the world. Because they were not global powers, they thought of themselves as more able to construct international architecture that would be perceived as fair and legitimate by the rest of the world . . . [and] powerful states with complex interests had limited ability to advance impartial international justice.[215]

The Permanent Five (P5), however, remained wary of the statute and sought to preserve their Security Council privileges.[216] In response, the P5 suggested that the Security Council should control the new court as an effort to insulate their citizens from criminal accountability and were met with great resistance.[217] William Pace, the leader of the Coalition for the International Criminal Court, warned that "some countries . . . want the court to be controlled by the Security Council, reducing the ICC to a sham status of a 'permanent' *ad hoc* tribunal; one which would dispense international criminal justice only to the small and weak countries, never to violators in powerful nations."[218] In the summer of 1997, Singaporean diplomats offered an important compromise between P5 nations and the LMG: The Council could possess limited powers over the Court, and if the Council agrees that a particular inquiry would be counterproductive, they could halt investigation for a certain period of time.[219] The Security Council could refer cases to the Court, but P5

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[210] *Id.* at 33.

[211] *Id.* at 32–33.

[212] ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 463 (2005) ("[T]he draft Statute which was before the conference was far from a finalised text, containing around 1,700 square brackets representing points of disagreement and different alternatives for the wording of previsions.").

[213] DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS 38–39 (2014).

[214] Philippe Kirsch & John T. Holmes, *The Birth of the International Criminal Court: The 1998 Rome Conference*, 36 CAN. Y.B. INT'L. L. 8 (1999)

[215] BOSCO, *supra* note 213, at 39.

[216] *Id.* at 40–41.

[217] *Id.* at 41.

[218] *Id.*

[219] *Id.* at 42–43.

members could not block cases on their own.[220] In response, the P5 proposed a second compromise with language "prevent[ing] the court from exercising jurisdiction over the 'official actions' of nonmember states and would include a broad opt-out provision."[221]

Elections in P5 nations conveniently strengthened the possibility for the Court's success: President Clinton was reelected; Britain's Labouur Party won a landslide majority, and the French Pluralist Left won a majority in the National Assembly.[222] Soon after, Britain joined the LMG, and France decided that it "had to end up on the 'right' side of negotiations, but that the concerns of the military had to be addressed."[223] Despite hopes of American cooperation accompanying the reelection of President Clinton, most advocates were aware that major powers would not support the Court. Richard Dicker of Human Rights Watch recalled:

> There was at least an implicit recognition that a number of heavyweights were going to remain outside the court and that the imperative was to push the negotiation across the finish line . . . and even with the disadvantage of several heavyweights on the outside, rely on the momentum that the like-minded group would provide, rely on that quantitative mass and the sense of momentum, to pull along those heavyweights who were not so favorably disposed.[224]

On July 17, 1998, the Rome Statute was adopted in a vote of 120-7 with 21 abstentions.[225] The final version of the Rome Statute reflected the compromises, "requiring the ICC to obtain Security Council permission to proceed and precluding the Security Council from any ability to stop investigations."[226] This allows the Security Council to perform its Chapter VII duties while preventing the P5 from unilaterally abusing their veto power to halt investigations.[227] Almost fifty years after the International Military Tribunals, "the most powerful states were losing their grip on the mechanisms of international justice."[228]

b. The Road to Rome: Negotiating Sex, Gender, and Violence

By the mid-1990s, NGOs became an integral component of United Nations negotiations. During the first Preparatory Committee (PrepCom1), the Coalition for the International

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[220] *Id.*
[221] *Id.* at 49–50.
[222] *Id.* at 43.
[223] *Id.*
[224] *Id.*
[225] FANNY BENEDETTI, KARINE BONNEAU & JOHN L. WASHBURN, NEGOTIATING THE INTERNATIONAL CRIMINAL COURT: NEW YORK TO ROME, 1994–1998 142 (2013).
[226] CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 157 (2005).
[227] ROACH, *supra* note 209, at 32.
[228] BOSCO, *supra* note 213, at 51.

Criminal Court (CICC) was founded as a network to coordinate pro-ICC NGOs.[229] In addition to advocating for the creation of the Court, the CICC worked to include NGOs in preparatory committees and the conference itself. Throughout the preparatory committees, the CICC found allies in the LMG and, at the third meeting of PrepCom1, NGOs were permitted to register for all informal and formal meetings.[230] By the Rome conference, the United Nations allowed the participation of NGOs, and NGO input became valued as expert information as opposed to lobbying.

> The reputation that NGOs earned as reliable and knowledgeable sources of information, prepared to engage in a professional way about the subject matter of ICC issues, greatly contributed to the receptiveness of states to their positions and assisted the good working relationships that evolved between many NGOs and state delegations.[231]

The 316 NGO members of the CICC split into four working groups, including one on gender issues: the Women's Caucus for Gender Justice.[232]

The Women's Caucus for Gender Justice was a direct outgrowth of the transnational women's network solidified at UN conferences. At Rome, the Women's Caucus for Gender Justice emerged as the leading feminist group credited for incorporating a "stronger gender perspective throughout . . . [the Rome Statute's] text"[233] and advocated for feminist reform.[234] The WCGJ was an officially recognized coalition of over 300 NGOs, human rights activists, and lawyers that lobbied for feminist issues, including the expansion of language surrounding SGBV.[235] Many of the activists on the WCGJ were legal scholars that actively documented their work in law review articles, providing a unique window into the movement's *modus operandi*.[236] Bedont and Hall-Martinez credit the WCGJ's success to their "persistent lobbying efforts,"[237] and that "[w]omen's rights activists viewed the negotiations for the ICC as a historic opportunity to address the failures of earlier international treaties and tribunals to properly delineate, investigate, and prosecute wartime violence against women."[238] Within

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[229] Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE 1, 8–9 (1999).

[230] *Id.* at 23.

[231] Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L. J. 243, 272 (2006).

[232] Halley, *supra* note 11, at 21.

[233] Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 396 n.73 (2000).

[234] Halley, *supra* note 11, at 23 ("[The WCGJ] consolidated a coherent platform for feminist reform and lobbied hard in the Rome Statute negotiations."). Many of the core members of the WCGJ, such as Rhonda Copelon, Hillary Charlesworth, Barbara Bedont, Katherine Hall-Martinez, Valerie Oosterveld, among others, are academics that meticulously documented their experiences and strategies in law review articles. *Id.* at 42. Some WCGJ members were also members of their state's delegation, like Canadian lawyer Valerie Oosterveld, and were able to influence state support of their issues from the inside. *Id.* at 105.

[235] Nicole Eva Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 425 (1998).

[236] Halley, *supra* note 11, at 23.

[237] Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 69 (1999).

[238] *Id.* at 66.

the scope of SGBV, the WCGJ had two goals: elevate SGBV crimes in the international humanitarian law hierarchy and influence the language of the Rome Statute itself to embrace a progressive understanding of gender.[239] The following subsection will begin by exploring the goals of the WCGJ throughout Rome and conclude with an analysis of how these goals have been realized in practice.

i. Defining Gender and Gender Violence

The WCGJ started at the proverbial drawing board for their first major language negotiation: defining "gender" and "gender violence." Bedont and Hall-Martinez stated their rationale for the use of "gender" over "sex" in the Rome Statute:

> The Women's Caucus pushed for the term "gender" as opposed to "sex" because the latter is restricted to the biological differences between men and women, whereas gender includes differences between men and women because of their socially constructed roles. Similarly, "gender crimes" is preferable to "sexual violence" because it includes crimes which are targeted at men or women because of their gender roles which may not have a sexual element.[240]

"Gender violence" subsumes "sexual violence," as "sexual violence" cannot encompass the expansive forms of violence that people face as a result of social constructs surrounding gender.[241] The inclusion of "gender violence" into the Rome Statute also addresses actions that affect men and LGBTQ+ people. For example, men face gender-based persecution "when young boys are either killed to prevent their becoming soldiers or coerced and humiliated into becoming killers."[242] The United Nations has generally experienced great difficulty in negotiating mutually agreed upon definitions of gender,[243] and the Rome conference was not an exception.

The strife associated with negotiating gender issues is not unique to the Rome Statute. For example, in Elisabeth Friedman's survey of gender mainstreaming at United Nations conferences, she found that an alliance is often formed between states with strong religious leadership.[244] These states tend to rally against language "that could be seen as promoting

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[239] "[T]hey wanted authoritative enumeration of sexual crimes in their own terms. They wanted to establish that rape, sexual violence, and sexual slavery are IHL/ICL crimes. They wanted these sexual crimes to be lodged as high up in the hierarchy of IHL/ICL codification as they could get them, and in terms that derive from their shared feminist understanding of them." Halley, *supra* note 11, at 49–50.

[240] Bedont & Hall-Martinez, *supra* note 237, at 68.

[241] Halley, *supra* note 11, at 82. An example of gender violence could include the "impress[ion of women] into maternity a form of gender enslavement. The same is true when women are impressed into providing domestic services whether on a large scale or individualized basis (forced temporary marriage)[.]" *Id.* at 84.

[242] *Id.* at 84.

[243] *See supra* Part III.

[244] *See* Friedman, *supra* note 64, at 323 ("Led by the Vatican, a coalition of countries and conservative NGOs engaged the transnational women's rights movement in a framing contest on women's rights. While claiming to

legal abortion or harming the traditional family structure."[245] The WCGJ and more progressive states struggled against those that wished to further a more traditional understanding of "gender" (defining "gender" in a manner that would equate it to "sex"). As a result, a "peculiar and circular"[246] definition of "gender" was drafted: "For the purposes of this Statute, it is understood that the term 'gender' refers to the *two sexes*, male and female, *within the context of society*."[247] The resulting quixotic article both emphasizes a biologically essentialist conception of "gender" and infers that this biologically essentialist conception of gender can be analyzed through social constructs. Oosterveld asserts that the United Nations has avoided defining gender due to the lack of consensus over the meaning of gender,[248] and Article 7(3) demonstrates that gender "is undertheorized in international law."[249] The WCGJ's structural feminist[250] definition of gender was unpopular, especially with conservative states. As a result, other WCGJ agenda items were at risk: "The dispute regarding terminology [of gender] threatened the inclusion of certain gender crimes, of a non-discrimination clause, and of special protective measures under the procedural provisions."[251]

ii. Honor, Dignity, and the Geneva Conventions

The pervasive language surrounding SGBV as a crime against the "honor" and "dignity" of a woman was another target for the WCGJ, who sought to elevate these crimes to a grave breach. The CUNY Clinic Memorandum[252] outlined a feminist project for a new court, which argued for the inclusion of SGBV crimes as a grave breach[253] *vis-à-vis* torture, as seen in *Delalić*:

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promote an agenda that also supported gender equality, this coalition specifically attacked those rights that threatened the hegemony of a 'traditional' conception of gender relations.").

[245] *Id.*

[246] Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L. J. 217, 236 (2000).

[247] Rome Statute, *supra* note 15, at art. 7(3) (emphasis added).

[248] Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 66 (2005).

[249] *Id.* at 82.

[250] "Sexual violence, whether directed against women or men, is usually a form of gender violence, since it is an attacked [sic] based on and intended to destroy one's gender identity, whether masculine or feminine. That is, women are raped … to control and destroy them as women and to signal male ownership over them as property; men are raped to humiliate them though [sic] forcing them to experience the position of women and, thereby, rendering them, according to the prevailing stereotypes, weak and inferior." Halley, *supra* note 11, at 85–86 (quoting a recommendation by the WCGJ). For example, the WCGJ offered a distinctly structural interpretation of the *Tadić* case: "[A] man was tortured when another prisoner was forced to bite off his testicle. The sexual organs of the man were targeted in order to take away his male identity and to make him like a woman." *Id.* at 86.

[251] Bedont & Hall-Martinez, *supra* note 237, at 68.

[252] Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN'S L.J. 171 (1994).

[253] *See id.* at 237 ("Every act of rape in war—whether a consequence of indiscipline, retaliation, or genocidal policies—is a 'grave breach,' a principle that has been recently reaffirmed by international scholars at the International Committee of the Red Cross.").

> Within the framework of "grave breaches" against the civilian population recognized by the Fourth Geneva Convention, rape, forced prostitution and forced pregnancy are not simply crimes against "honor," but also crimes of violence. They constitute forms of "willful torture and inhumane treatment" and they "willfully caus[e] great suffering or serious injury to body or health."[254]

Further, SGBV should also be charged as a grave breach in order to individualize the crime as opposed to a crime against humanity, which implies that the crime was predominantly a harm suffered by society.[255] Categorizing SGBV as an honor crime divorces the physical and psychological violence inflicted on victims and reorients the focus to an abstract conception of honor. This approach deemphasizes the actual violence of the crimes and distances the perpetrator from the crime: "[t]he outdated and potentially harmful message that these violent, physical crimes were to be evaluated based on the harm done to the victims' honour, modesty, or chastity"[256] is detrimental to a true rebuke of SGBV. The WCGJ sought to send the "radical" message that sexual violence is *violence*: SGBV "is a sexual *assault*; it is *violent* and *physical*; it causes *physical and emotional (or physical and psychological) harm*; it is *painful*."[257] Whereas the current IHL lexicon "assume[d] that women should be protected from sexual crimes because they implicate a woman's honor, reinforcing the notion of women as men's property rather than because they constitute violence."[258]

The WCGJ was only partially successful in their endeavor. The Rome Statute incorporated "outrages upon personal dignity," but removed both SGBV and "honor" from the provision. Article 8(2)(b)(xxi) is dedicated to personal dignity violations as a war crime, but does not explicitly mention any act of SGBV.[259] Article 8(2)(b)(xxii) is devoted entirely to SGBV: "rape, sexual slavery, enforced prostitution, forced pregnancy … enforced sterilization, or any other form of sexual violence also constituting a grave breach" may be prosecuted by the Court.[260] This development, while certainly not ideal for the WCGJ, "[t]his characterization of sexual violence is . . . important to the ICC's capacity to indict sexual violence crimes in multiple ways."[261] For the first time, SGBV crimes were delinked from antiquated notions of morality.

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[254] *Id.*

[255] HILLARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 315–21 (2000).

[256] Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L. L. 605, 613 (2004).

[257] Halley, *supra* note 11, at 59.

[258] Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 386 (1999).

[259] Rome Statute, *supra* note 15, art. 8(2)(b)(xxi).

[260] *Id.* at art. 8(2)(b)(xxii).

[261] Bedont & Hall-Martinez, *supra* note 237, at 72.

iii. (En)forced Pregnancy

The idea to introduce forced pregnancy as a SGBV crime likely originated from feminist activists.[262] The WCGJ's recommendation to include forced pregnancy as a crime launched the WCGJ into conflict with the Holy See who "sought to delete enforced pregnancy from the draft statute on the ground that it threatened to criminalize enforcement of national laws discouraging or criminalizing abortion."[263] To quell tension in order for forced pregnancy to move forward, the WCGJ sought to limit the scope of the crime.[264] First, the WCGJ specified that "forced pregnancy" is "a violent crime, committed with a violent intent."[265] Second, the WCGJ narrowed its scope: "rape or other sexual abuse carried out with the intent or having the effect of making a woman pregnant and/or confining, controlling, or coercing a pregnant woman because she is pregnant."[266] The final definition reads: "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."[267] While this is weaker than the original proposal by the WCGJ, as it focuses solely on confinement (spatial-based) and excludes coercion and control (power-based), the language still represents a step forward in recognizing forced pregnancy as a crime against humanity.

iv. Enforced Prostitution and Sexual Slavery: The Consent Schism

Reforms involving enforced prostitution and sexual slavery, unlike previous objectives, illuminate the ideological rift between structuralist and liberal feminists. Structuralist feminists tended to support the view that all sex work, regardless of consent, constitutes sexual slavery and often conflate enforced prostitution, trafficking, and sexual slavery, denying the agency of sex workers to consent to commercial sex.[268] On the other hand, liberal

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[262] Halley, *supra* note 11, at 88.
[263] *Id.* at 89.
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] Rome Statute, *supra* note 15, at art. 7(2)(f).
[268] *See* Halley, *supra* note 11, at 90–91 ("[B]y structuralist I mean that a commitment to the view that the subordination of women is coextensive with male/female relations is their *structure*. In a fully structuralist feminist view of sexuality, *no* sexual interaction between a man and a woman is free from the effects of male domination."). The conflation of sex trafficking with slavery dates back to the moral campaigns of the nineteenth century. Similar claims were made by second wave feminists, who often improperly forged links between chattel slavery and sex work. *See, e.g.*, Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 338–39 n. 7 (2006) (summarizing different ideological approaches to sex work); TERESA BILLINGTON-GREIG, THE TRUTH ABOUT WHITE SLAVERY 429, 443 (1913) (disputing the historical existence of white slavery as "an epidemic of terrible rumours … a campaign of sedulously cultivated sexual hysterics."); CAROLE PATEMAN, THE SEXUAL CONTRACT 203–04 (1988) (comparing sex work to slavery); KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 40 (1979) ("Female sexual slavery is present in ALL situations where women or girls cannot change the immediate conditions of their existence; where regardless of how they got into those conditions they cannot get out; and where they are subject to sexual violence and exploitation."); Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 22 (1993) (arguing for the application of the Thirteenth Amendment to sex work).

feminists differentiated between consensual sex work and enforced prostitution.[269] The schism between the two ideologies is evident in Oosterveld's[270] "Sexual Slavery and the International Criminal Court," which documents the effort by structural feminists to retire "enforced prostitution" in favor of "sexual slavery": some felt "that sexual slavery is a broader, more sensitive—and therefore more useful—term that encompasses or replaces enforced prostitution,"[271] whereas "[o]thers argue that both sexual slavery and enforced prostitution are different terms with different elements, and that enforced prostitution should not be considered to be subsumed within sexual slavery."[272] Because the WCGJ was composed of both structuralist and liberal feminists, the group was often prevented from endorsing language due to a lack of consensus on terminology.[273] In this instance, the

[269] *See* Halley, *supra* note 11, at 92 ("There is a sharp divide between feminists who see 'sexual slavery' and those who see 'bargained-for exchange' when a woman accepts money or some other benefit in exchange for having sex . . . [the latter] seek reforms that limit criminalization of the pimp's and John's activities to instances in which the woman is coerced, and leave open the category of 'nonforced prostitution.'"). Thomas described the structuralist approach to consensual sex work as follows:

> Structuralists called for a definition that included all commercial sex automatically within the ambit of sex trafficking—an explicit finding of coercion would not be necessary since, according to the structuralist approach, all commercial sex was necessarily coercive. The structuralist proposal also called for an explicit statement disregarding any manifestation of apparent consent by the trafficking victim. Just as one cannot legally consent to one's own enslavement, consent could not be a basis for validating commercial sex since it was "female sexual slavery."

Halley et al., *supra* note 268, at 98.

[270] Who, according to Halley, was "one of the Rome process's liberal feminists," but "she supported structuralist reforms in structuralist terms. She argued for a shift to autonomy that would strengthen the liberal feminist variant." Halley, *supra* note 11, at 100.

[271] Oosterveld, *supra* note 256, at 618 (2004) (summarizing the liberal feminist approach to sexual slavery and enforced prostitution). For example, Askin argued that "while '(en)forced prostitution' is usually the term used when women are forced into sexual servitude during wartime, the term 'sexual slavery' more accurately identifies the prohibited conduct[.]" KELLY D. ASKIN, *Women and International Humanitarian Law*, *in* 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 41, 48 n. 29 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

[272] Oosterveld, *supra* note 256, at 618.

[273] The December 1997 Recommendations used language to describe trafficking without explicitly using the word: "enslavement and slavery-like practices in all their forms, including by sale, deception, coercion, or threat." Halley, *supra* note 11, at 93. At the March 1998 Preparatory Committee, the WCGJ actively opposed using the term trafficking "[b]ecause of the need for review of the international definition of trafficking, the Women's Caucus suggest[ed] instead that the crime be described as 'trade in and coercive or deceptive transportation of persons.'" *Id.* The ideological struggle between liberal and structural feminists is painfully evident in the December 1997 Recommendations, which attempted to incorporate both ideologies without adequately mediating between the diametrically opposed positions on sex work:

> [S]exual enslavement has been diminished by calling it only "enforced prostitution."
>
> The term "enforced prostitution" muffles the degree of violence, coercion and control that is *characteristic of sexual slavery*. It suggests that sexual services are provided as part of an exchange albeit one coerced by the circumstances. When, as in the Geneva Conventions, forced prostitution is equated within the "performance" of degrading acts, the term also suggests that sexual services are offered rather than brutally exacted. It hides the fact that *this is rape*, serial rape, physically invasive and psychologically debilitating in the extreme, and

resulting language used a blend of structural and liberal approaches to enforced prostitution and sexual slavery, highlighting the tension between the two in the Caucus.[274] But, curiously, these ideological disagreements were more muted than those on trafficking, where disagreements within the WCGJ were very public.[275] Ultimately, the Women's Caucus for Gender Justice adopted a more structural approach to the debate, arguing that enforced prostitution and sexual slavery have, in the past, been conflated and that the same should not be codified in the Rome Statute.[276] Articles 7 and 8 include both sexual slavery and enforced prostitution as enumerated crimes against humanity and war crimes. Structural feminists experienced some defeats with regard to sexual slavery: the phrase "trafficking in persons, in particular women and children" was employed to define "enslavement" under Article 7(2)(c), which the WCGJ actually actively opposed throughout the drafting process.[277] Similarly, enforced prostitution is still featured in both Article 7 and 8 alongside sexual slavery, despite structuralist WCGJ efforts to retire the phrase. However, the inclusion of sexual slavery alongside enforced prostitution was a net gain for the WCGJ.[278]

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that *women are reduced to and sexually bludgeoned as property*, and that *they are completely under the control of the perpetrator*.

> History has taught us that *most* so-called "forced prostitution" during armed conflict constitutes sexual slavery.

Id. at 95. Halley writes: "In denouncing enforced prostitution *as* sexual slavery, identifying it with rape, and insisting that women participate in it 'completely under the control' of male attackers, the WCGJ merges enforced prostitution *into* rape and sexual slavery." *Id.* But, however, the recommendations "proceed to a conclusion that *most* forced prostitution is sexual slavery [and] open up the possibility that *some* acts of forced prostitution are *not* enslaving or the equivalent of rape." *Id.* This contradictory statement attempts to advance both liberal and structural positions without meaningfully remediating ideological conflict.

[274] Halley notes this is evident in a WCGJ report, *Gender Justice and the ICC*:

> The Causus' [sic] structure has been fundamental to creating a document that reflects the consensus of participants in the Women's Caucus who have attended the Preparatory Committee meetings, and many others, throughout the world, who participated in inspiriing [sic], developing, vetting or subscribing to the recommendations. This means that on particular points, some individuals or groups may differ with the Caucus's position but, on the whole, the Core Principles which form part of these recommendations, are supported by thousands of men and women around the world . . . .

Id. at 97 n. 351.

[275] In the enforced pregnancy versus sexual slavery debate, documents like *Gender Justice and the ICC* alluded at disagreement within the Caucus but, according to Halley, "[w]hat is so striking is how muted these disagreements were. In the context of trafficking, opposed camps exist and are willing to go public with their disagreements." *Id.* at 97.

[276] *See* Oosterveld, *supra* note 256, at 620–22 (outlining the arguments made by the WCGJ favoring the use of "sexual slavery" over "enforced prostitution).

[277] *See* Halley, *supra* note 11, at 93 ("[T]he WCGJ at first advocated alternative language and then actually *opposed* the inclusion of trafficking in the statute.").

[278] "[Sexual slavery] can be charged as a war crime in international and internal conflicts as a crime against humanity. It remains to be seen how feminists inside the ICC and those putting pressure on it from the outside will manage the structuralist/[liberal] tension in the WCGJ's interpretations of this crime." *Id.* at 108.

v. Application and Conclusion

The negotiations over SGBV terminology undertaken by the WCGJ were key to shifting the normative perception of gender at the Court. One method of recognizing gender justice is through the enumeration of crimes[279] with language affirming the gravity of SGBV. Recognizing gender inequities involves "changing the gender status order, deinstitutionalizing sexist value patterns and replacing them with patterns that express equal respect for women."[280] The WCGJ sought to dismantle heteropatriarchal institutions by redefining war crimes, crimes against humanity, and genocide in a manner that dispels of archaic conceptions of gender, while elevating SGBV in the criminal hierarchy. Prior to the involvement of feminist activists in international criminal tribunals, the "existing formal codes either ignored the sexual and gender dimensions of international crimes altogether or diminished their seriousness by categorizing them as acts related to 'honour and dignity' rather than grave breaches of international law[.]"[281] The WCGJ was partially successful in language-shifting: SGBV may be prosecuted as standalone crimes; honor and dignity language has been divorced from SGBV; and SGBV crimes have been enumerated as an act of war crimes,[282] crimes against humanity,[283] and genocide.[284]

In practice, adherence to the formal rules of the International Criminal Court with regard to SGBV has been far from perfect. During its first decade, the Court went without prosecuting any SGBV crimes. In *Prosecutor v. Thomas Lubanga Dyilo*, the OTP was presented with the opportunity to prosecute SGBV crimes perpetuated against child soldiers. Despite the testimony of thirty-one eyewitnesses "that sexual violence appeared to be an integral component of the attacks against the civilian population,"[285] the OTP refused to add SGBV charges. The OTP conceded that SGBV was committed, but did not believe that it reached the threshold of a pattern or policy.[286] In *Prosecutor v. Germain Katanga*, the OTP for the first time charged SGBV as crimes against humanity and war crimes, including rape and sexual slavery.[287] The Trial Chambers acquitted Katanga of rape and sexual slavery, but ultimately found him guilty of other war crimes and crimes against humanity.[288] While advocates for gender justice have made strides in altering the language of SGBV and elevating its gravity in the Rome Statute, in practice, the Court has been much less progressive in applying these normative shifts to international humanitarian law language.[289]

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[279] LOUISE CHAPPELL, THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT 87 (2016).

[280] NANCY FRASER, *Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation*, *in* REDISTRIBUTION OR RECOGNITION: A POLITICAL-PHILOSOPHICAL EXCHANGE 21 (Nancy Fraser et al. eds., 2003).

[281] CHAPPELL, *supra* note 279, at 92.

[282] Rome Statute, *supra* note 15, at art. 8.

[283] *Id.* at art. 7.

[284] *Id.* at art. 6.

[285] CHAPPELL, *supra* note 279, at 111 (quoting Brigid Inder).

[286] *Id.* at 111–12.

[287] *Id.* at 119.

[288] *Id.* at 119–20.

[289] *Id.* at 103–29 (surveying progress, or lack thereof, of SGBV prosecutions before the ICC).

V. CONCLUSION

For the majority of international humanitarian jurisprudence, the gravity of SGBV has been relegated to the peripheral backwaters of international criminal prosecutions. During the post-war international military tribunals, widespread SGBV crimes were barely addressed, and when they were, the actual, individualized harm and extent of the crimes were minimized. SGBV has historically been linked to outdated "family honor" provisions in foundational IHL documents, which emphasize moral transgressions over the physical and psychological harm inflicted on victims. This characterization of SGBV as principally a damage to honor additionally reinforces harmful gender stereotypes and distances the perpetrator from the violent crime itself. Moreover, the failure of the Geneva Conventions to explicitly enumerate any act of SGBV as a grave breach signals that these crimes are lower on the IHL hierarchy and are not subject to universal jurisdiction.

Women lawyers and jurists led the process of elevating SGBV in the international criminal tribunals by prosecuting perpetrators for SGBV as free-standing crimes against humanity and war crimes, and as components of genocide. Most notably, the strategy of using SGBV to prove the *actus reus* of grave breaches and subsequently charging SGBV as a constituent crime was developed at the tribunals. This has been vital in the mission to enumerate SGBV as free-standing crimes and elevate these crimes in the IHL hierarchy. At the Rome Conference, feminist lawyers and activists formed the WCGJ and embarked on the radical endeavor to expand the language surrounding SGBV and deinstitutionalize the language from its patriarchal roots. Their endeavor was partially successful: SGBV was effectively delinked from honor provisions and a more expansive list of SGBV crimes are under the purview of the Court. However, the Rome Statute's definition of gender is circular and tainted by biological essentialism and much of the feminist language was diluted in favor of a more moderate approach.

The story of the Women's Caucus for Gender Justice is a fascinating study of the state of human rights in the 1990s: a unique confluence of events in international governance provided the WCGJ with a fortuitous opportunity to institutionalize gender into the Rome Statute with a surprising level of success. The WCGJ benefitted from the paradigmatic furor of the human rights wave, the product of distinct epochal ruptures of the *fin de siècle*. This era can be characterized by the valuation of individual human rights over state sovereignty and anti-impunity as an "explanatory framework for understanding what had just happened."[290] In the rush to salvage the international community's failures to prevent genocide, the prosecution of past wrongs was ingrained in international criminal law as a model, first at the *ad hoc* tribunals and then at the International Criminal Court. A new thirst for prosecution materialized, and the Women's Caucus for Gender Justice seized that opportunity to infuse more progressive language on gender into the Rome Statute.

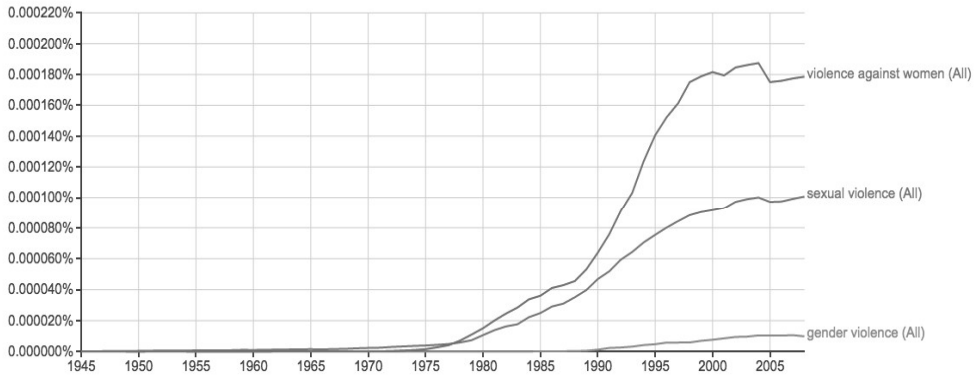
In order to fully elevate the status of SGBV, there must be a considerable normative shift in the language used to conceptualize SGBV. It is imperative to unequivocally and authoritatively affirm SGBV as free-standing grave breaches of the Geneva Conventions. This need can only be fully achieved by a dramatic reconceptualization of SGBV and gender under IHL. While this goal is lofty, it may be achieved in a variety of ways. First, existing

[290] Hoffmann, *supra* note 7, at 282.

treaties may be amended to modernize language and enumerate SGBV as a grave breach. Second, criminal tribunals such as the International Criminal Court may broaden SGBV interpretations through its case law, as witnessed at the international criminal tribunals. Third, more progressive language on SGBV may be drafted into new bodies of IHL, such as the new convention on crimes against humanity currently being drafted by the International Law Commission. Finally, and most radically, an entirely new treaty that adopts WCGJ language on gender and SGBV could be constructed. Given the divisive debates over language related to gender in the relatively recent negotiation of the Rome Statute, this is the least practical option. Proponents of gender justice must make continual legal strides to elevate SGBV, eliminate archaic language linking SGBV to honor, embrace an intersectional definition of gender, and recognize sexual and gender-based violence as violence *qua* violence.

APPENDIX

Figure 1



This n-gram illustrates the increasing popularity of terms related to sexual violence. Both "sexual violence" and "violence against women" take off in use in the late 1970s, shortly after the Mexico City Conference, which failed to adequately address VAW. The use of VAW then rapidly increases beginning around 1987, during the apex of talks regarding VAW at United Nations conferences, particularly at Beijing, and briefly dips at 2000. Sexual violence is comparatively less popular, but steadily grows in use overtime. Gender violence, on the other hand, is used very infrequently and only begins to leave the x-axis after 1990, and slowly gains in usage throughout the 1990s and 2000s. SGBV all together was so unused that it could not be graphed.

Figure 2

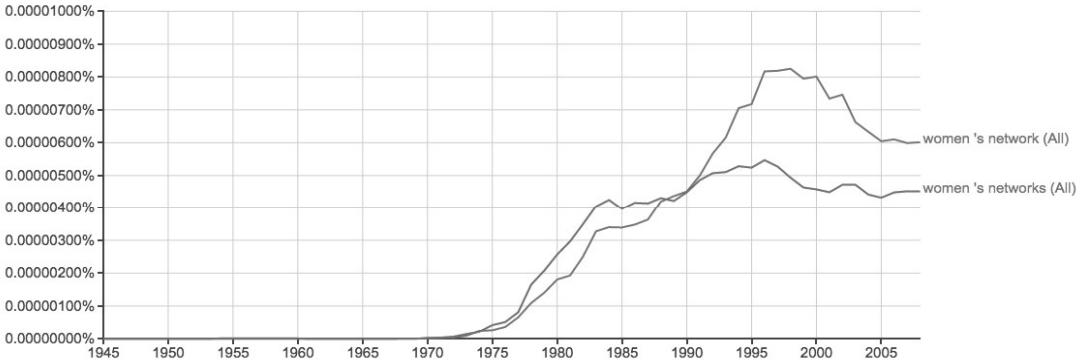


Figure 2 conveys the steady rise in the term "women's network(s)." The two are graphed separately in order to allow for variation between the singular and plural. In the early 1970s, the term enters use and experiences a sharp incline after 1975, the year of Mexico City. "Women's network" (singular) continues to rise and peaks in 1996, a year after Beijing. "Women's networks" (plural) is used less than its singular form, but still experiences growth until 1996. After which, the usage of "women's network(s)" tends to wane.

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