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Mainstreaming Gender: The Influence of Women's Networks on Prosecuting Sexual Violence at the International Criminal Court

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Mainstreaming Gender:
The Influence of Women's Networks on Prosecuting Sexual Violence at the International
Criminal Court

Senior Project Submitted to
The Division of Social Studies
of Bard College

by
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Abstract

The fall of the Soviet Union in combination with the failures of the international community to intervene in the genocides of the former Yugoslavia and Rwanda spurred a new enthusiasm for human rights as a wholly independent movement, termed the human rights wave. This paradigm shift, identified by Stefan-Ludwig Hoffmann, was an embrace of human rights rooted in the redemption of past wrongs. This project is structured as a jurisprudential genealogy that will explore the human rights wave in the context of the Women's Caucus for Gender Justice, a facet of the transnational women's network, and their quest to mainstream sexual and gender based violence into law at the International Criminal Court.

Timing was essential to the Women's Caucus for Gender Justice's formation before the Rome Conference. At the same time as the human rights wave characterized by Hoffmann emerged, a furor for anti-impunity prosecutions engulfed the focus of the international community. These two phenomena came together at a time in which organizing at the United Nations over gender issues was about to reach a fever pitch. The thirst for anti-impunity sparked a renewed interest in international criminal tribunals, resulting in the *ad hoc* tribunals and the International Criminal Court forming throughout the 1990s. This project argues that the confluence of these aforementioned events provided the Women's Caucus for Gender Justice with a fortuitous opportunity to ride the human rights wave and institutionalize gender in a way that other activists would not be able to accomplish in contemporary times.

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This period of time provided fertile ground for the strengthening of the human rights movement. The unique development of this era, termed the ‘human rights wave’,⁴ is the result of the epochal ruptures of the late twentieth century.⁵ The transnational women’s network was the first modern network to grow from the fresh ground of the human rights wave. This network embraced the normative shift towards anti-impunity and over time incorporated sexual and gender based violence (SGBV) into their agenda. Their decision to advocate for the designation of SGBV as an international crime culminated in the foundation of the Women’s Caucus for Gender Justice (WCGJ) at the Rome Conference. This phenomenon would not have been possible without the confluence of significant ‘events’⁶ in the world. The nexus of NGO influence at United Nations conferences and the newfound model of anti-impunity that resulted in the creation of international criminal tribunals made it possible for the transnational women’s network to ride the human rights wave.

The inclusion of SGBV into international humanitarian law, while not perfect, has been institutionalized into conceptions of what constitutes human rights violations. This project problematizes the normalized and asks how the WCGJ was able to develop as a robust network. Moreover, the WCGJ serves as an intriguing case study on the rise of human rights wave of the 1990s. During this period of time, as Stefan-Ludwig Hoffmann will argue, epochal ruptures catalyzed the re-evaluation of human rights and IHL — the breakup of the Soviet Union and the failure of humanitarian interventions — while international human rights groups shifted to the anti-impunity model for operations. As this was unfolding, the transnational women’s network

⁴ Author’s term.

⁵ Referring to the breakup of the Soviet Union and Yugoslavia, as well as the many failed humanitarian interventions of the late 1980s and early 1990s. See page 17.

⁶ For lack of better terms, the three periods of time discussed in this project will be referred to as ‘events’.

became a powerful force at United Nations conferences and international criminal tribunals were institutionalized. I argue that the 1990s brought about a significant shift in thinking about human rights and canonized anti-impunity as a prevailing mechanism for the human rights movement. The WCGJ fortuitously arose from the confluence of these events, and given the post-Cold War political and institutional climate, was capable of altering the language of the Rome Statute. This particular situation is rather peculiar — SGBV was not an obvious choice for the transnational women's network to adopt, nor were anti-impunity based innovations for international criminal law. It is critical to investigate the development of the WCGJ and their actions in order to explain the timing of the human rights wave in the 1990s.

In order to understand the specifics of three distinct, yet interdependent, events that provided for the foundation from which the Caucus emerged to adequately analyze the Women's Caucus for Gender Justice. These three events are each subject to discussion in individual chapters: the transnational women's network's mainstreaming of Violence against Women into 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. Given that the confluence of these three events are a reaction to a significant normative change in human rights, it is very unlikely that this phenomenon could be recreated in current times without a similar paradigm shift. The result of the transnational women's network's work was the mainstreaming of both Violence against Women and gender at non-women centric United Nations conferences, and the creation of sexual and gender based violence as a crime under international humanitarian law.

There is a wide breadth of literature on the transnational women's network at the United Nations, the rise of criminal tribunals, and the Women's Caucus for Gender Justice; however, little academic work yoking together these three interconnected events exists.⁷ As the International Criminal Court has gotten its sea legs and begins prosecutions, it is increasingly necessary to return to the work of the WCGJ and the transnational women's network as a whole. This project is at its core a jurisprudential genealogy — it seeks to tell the story of the first modern human rights network that was transformed by the consequences of the epochal ruptures of the 1990s. The nature of a jurisprudential genealogy necessitates thick descriptions of events. This project will specifically analyze the work of the Women's Caucus for Gender Justice to infuse feminist language into the Rome Statute in order to elevate the status of sexual and gender based violence in the international humanitarian law (IHL) hierarchy before the International Criminal Court (ICC). In addition to providing a robust timeline of a new era, this project will also investigate the reproducibility of this phenomenon: can other networks model their activism after the progression of the Women's Caucus for Gender Justice, or was the key to the WCGJ's success their ability to ride the human rights wave of the post-Cold War era? I argue that due to the incredibly unique convergence of events, it is highly unlikely that a similar outcome can be achieved in contemporary times.

⁷ Literature that discusses one or two of the three processes covered in this project exists. Janet Halley, for example, extensively covered both the *ad hoc* tribunals and the WCGJ at the ICC in "Rape at Rome," but did not include a review of the transnational women's network at United Nations conferences. This project aims to weave the three together.

Defining Sexual and Gender Based Violence

A concrete conception of the terminology used in this paper is vital, as phrases like sexual and gender based violence, Violence against Women, and gender violence all carry very different meanings. This project deals with sexual and gender based violence, while also making reference to the movement against Violence against Women (VAW). These terms are, for the most part, interchangeable, but I have opted to use SGBV to describe the crimes discussed in this project, except for when referring to specific documents on VAW.⁸ The need to use SGBV becomes especially apparent in Chapter 3 when addressing the WCGJ's attempt to incorporate 'gender violence' into the Rome Statute. Solely referring to SGBV crimes as sexual crimes erases "non-sexual attacks on women or men based on their gender-defined roles"⁹ and insufficiently encompasses the full range of crimes discussed. Within this, the project will focus on SGBV crimes in the context of crimes against humanity and war crimes, and the mechanisms of IHL that emerged with the intent to end impunity for perpetrators.

The phrase 'sexual and gender based violence' is unpopular in comparison to sexual violence, Violence against Women, or even gender violence. Data shows this: an n-gram graph¹⁰ illustrates the growth of 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. As for gender violence, the term is mostly unused, but it experienced mild growth in the 1990s to today, consistent with the WCGJ's attempts to include gender violence in the Rome Statute.

⁸ This will primarily occur in Chapter 1.

⁹ Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law," *Michigan Journal of International Law* 30 (2008), 83.

¹⁰ See Appendix, Figure 1.

Rape and other forms of sexual and gender based violence have classically¹¹ been associated as a natural byproduct of war, stemming from the conception of women and girls as the property of men. The aim of members in the transnational women's network has been to depict SGBV itself as a serious war crime and crime against humanity. In this past century alone, there are numerous instances in which SGBV has been used to further military objectives — the rapes of 60,000¹² Bosnian women in the former Yugoslavia, of 250,000 to 500,000¹³ women during the Rwandan genocide, and of 20,000¹⁴ Chinese women during the Nanking Massacre. A 2004 Médecins Sans Frontières report noted the that “systematic rape was used as part of the strategy of ethnic cleansing.”¹⁵ The slowly developing push to criminalize and prosecute SGBV by many in the transnational women's network, coupled with the growing involvement of civil society in United Nations became a transformative aspect in the international tribunals.

¹¹ In the *Bible*: (1) “Their infants will be dashed to pieces before their eyes; their houses will be plundered, and *their wives will be ravished*.” Isaiah 13:16, describing the conquest of Babylon (emphasis added). (2) “For I will gather all the nations against Jerusalem to battle, and the city shall be taken and the houses looted and *the women raped*; half the city shall go into exile, but the rest of the people shall not be cut off from the city.” Zechariah 14:2, on the sufferings of Jerusalem (emphasis added).

¹² “Conflict Profiles: Bosnia,” Women Under Siege Project, last modified 8 February 2012, <http://www.womenundersiegeproject.org/conflicts/profile/bosnia>.

¹³ “Conflict Profiles: Rwanda,” Women Under Siege Project, last modified 8 February 2012, <http://www.womenundersiegeproject.org/conflicts/profile/rwanda>.

¹⁴ This statistic is hotly debated, but the IMTFE estimates that 20,000 rapes occurred in the first month of occupation. See: Judgment of November 4 1948, *International Military Tribunal for the Far East*, 495.

¹⁵ “Enough is Enough, Sexual Violence as a Weapon of War,” Médecins Sans Frontières - United States of America, last modified 7 March 2004, <http://www.doctorswithoutborders.org/news-stories/ideaopinion/enough-enough-sexual-violence-weapon-war>.

Gender at the United Nations

The Women's Caucuses, the group of focus in this project, is a prime example of a modern activist network. The transnational women's network¹⁶ began to coalesce during the drafting of the Declaration for the Elimination of All Forms of Discrimination Against Women in 1967, but reached its organizing peak during the early to mid 1990s at particular United Nations conferences, to be covered in Chapter 1. Networks are formed voluntarily and are characterized by horizontal patterns of communication. Particularly in the case of the transnational women's network, networks provide sources of reliable information for outsiders: "they are organized to promote causes, principled ideas, and norms, and they often invoke individuals advocating policy changes that cannot be easily linked to a rationalist understanding of their 'interests.'"¹⁷ The communication between networks takes place in a dense web of informal and formal connections from within the group. Keck and Sikkink argue that while advocacy networks date back to the nineteenth century, contemporary networks are radically different and more far sweeping than their historic counterparts, given advances in technology. Without the robust organizing done by the transnational women's network at United Nations conferences beginning in 1975, it is unlikely that the Women's Caucus for Gender Justice would have been primed to form at Rome and exert strong influence over issues of gender.

The concept of a Women's Caucus did not begin with the Women's Caucus for Gender Justice: Women's Caucuses originated at prior United Nations conferences and became the dominant mode of organization for the transnational women's network. The International

¹⁶ Transnational women's networks in the context of this project refers to the sprawling group of women that organized at the United Nations Conferences (Chapter 1), the *ad hoc* tribunals (Chapter 2), and the Rome Conference (Chapter 3).

¹⁷ Margaret Keck and Kathryn Sikkink, *Activists beyond Borders*, (Ithaca: Cornell University Press, 1997), 9.

Criminal Tribunal for the former Yugoslavia experienced a similar situation. Unlike the Women's Caucuses at UN conferences or the WCGJ, the *ad hoc* tribunals were influenced on issues of gender by a small number of legal experts. Two groups of experts issued reports on sexual and gender based violence in an attempt to impact United Nations insiders as the statutes were drafted.¹⁸ The Women's Caucus for Gender Justice, much like the groups at the ICTY, was comprised of many feminist legal experts. The WCGJ was a subgroup of the Coalition for the International Criminal Court, but was autonomous and ran between 1997 and 2003.¹⁹ Beginning with the first Preparatory Committee (PrepCom), the WCGJ was the only coalition for NGOs concerned with women's issues, and by the third meeting of PrepComI, the WCGJ was officially recognized. The WCGJ describes themselves as "a network of individuals and groups committed to strengthening advocacy on women's human rights and helping to develop greater capacity among women in the use of International Criminal Court and other mechanisms that provide women avenues of and access to different systems of justice."²⁰ The WCGJ credits its origin as a last-minute organizing attempt at the first PrepCom that drew inspiration from the Women's Caucuses preceding it at Vienna, Cairo, and Beijing.²¹ Members of the WCGJ tended to be legal experts and often self-reported on their experiences in law reviews.²² The

¹⁸ The Women in the Law Project (WILP), consisting of Laurel Fletcher, Karen Musalo, Diane Orentlicher, and Kathleen Pratt published "No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia" in the *Hastings Women's Law Journal*. Jennifer Green, Rhonda Copelon, Patrick Cotter, and Beth Stephens published "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," also in the *Hastings Women's Law Journal*.

¹⁹ After 2003, the Women's Caucus for Gender Justice reinvented itself as the Women's Initiative for Gender Justice, framed as an accountability network for the ICC on gender issues.

²⁰ "About," Women's Caucus for Gender Justice, accessed 20 April 2017, <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/aboutcaucus.html>.

²¹ Ibid.

²² Rhonda Copelon, Barbara Bedont, Katherine Hall-Martinez, Pam Spees, Valerie Oosterveld, among others, are all examples of feminist scholars involved in the WCGJ.

WCGJ intensely lobbied governments to mainstream gender and include sexual and gender based violence language in the Rome Statute. While the WCGJ was a feminist group, their ideology was not accepted by all feminists. For the most part, the WCGJ ascribes to structural feminism. Janet Halley, the Royall Professor of Law at Harvard Law School, characterizes the WCGJ's approach to structural feminism as "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."²³ As we shall see, this approach was not readily accepted by both government delegations and liberal feminist members of the WCGJ. This project is first and foremost a jurisprudential genealogy, but this contentious version of feminism is not beyond critique.

The Women's Caucus for Gender Justice would not have been able to firmly establish itself at the Rome Conference without the deep history of gender mainstreaming at previous United Nations conferences by the transnational women's network. Gender mainstreaming was developed at the Nairobi Conference to incorporate women's issues into the agendas of conferences and statutes of tribunals. Prior to the use of this strategy, gender was separated as subsets of other issues — honor,²⁴ family, culture — and were not taken into the core of rights movements. As opposed to the segregation of women's issues as "marginalized, [to the] peripheral backwater[s] of specialist women's institutions,"²⁵ gender mainstreaming strives for the institutional normalization of gender. Gender mainstreaming was formally defined in the

²³ Janet Halley, "Rape at Rome," 91.

²⁴ The effect of linking honor and gender shall be discussed in this project, beginning with Hague Convention VI and continuing until the Rome Conference itself. See Chapters 2 and 3.

²⁵ Hilary Charlesworth, "Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations," *Harvard Human Rights Journal* 18 (2005), 1.

Beijing Platform for Action from the Fourth United Nations World Conference on Women²⁶ and has since become codified into United Nations policy.²⁷ In the Office of the Special Advisor on Gender Issues and Advancement of Women's "Gender Mainstreaming: An Overview," the Special Advisor adds that gender mainstreaming is not mutually exclusive with "specific targeted interventions to address women's empowerment and gender equality."²⁸ Gender mainstreaming is a strategy towards achieving gender equality implemented in different fashions dependent on the activity. This strategy is quite straightforward: in creating any planned actions or policies, the gendered implications should be assessed and UN committees should strive for an increased representation of women. Since being brought into the Beijing Platform for Action, the concept of gender mainstreaming can be spotted throughout the international system. The World Health Organization, the U.N. Development Programme, the U.N. Educational, Scientific, and Cultural Organization, the Food and Agricultural Organization, the World Bank, and the International Labour Organization have all included gender mainstreaming into their policies.²⁹ Even further, gender mainstreaming has been incorporated into official European Union policy, and often adopted at the national level.³⁰ As we shall see in Chapter 3, the Women's Caucus for Gender Justice at Rome is a striking example of gender mainstreaming in action, and seriously aided the group's objectives.

²⁶ Ibid. 2.

²⁷ Office of the Special Adviser on Gender Issues and Advancement of Women, *Gender Mainstreaming: An Overview* (New York: United Nations, 2002), <http://www.un.org/womenwatch/osagi/pdf/e65237.pdf>.

²⁸ Ibid. vi.

²⁹ Charlesworth, "Not Waving but Drowning," 3.

³⁰ Ibid. 3.

Janet Halley coined the term ‘Governance Feminism’ in 2006³¹ to describe a new style of feminist mobilization that rose to power in the 1990s, first “incremental[ly] but by now [is the] quite noticeable installation of feminists and feminist ideas in actual legal-institutional power.”³² Halley describes how GFeminist legislation ‘piggybacks’ onto existing structures of power and influences them to adopt feminist slants. This process can clearly be seen in the United Nations conferences to be covered in Chapter 1, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda in Chapter 2, and the International Criminal Court in Chapters 3. Janet Halley’s “Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law” is a similar genealogy of GFeminists in the 1990s and their influence on the series of new international criminal tribunals. Halley’s article is critical of GFeminism and the structuralist-feminist ideology that prevailed in the Women’s Caucus for Gender Justice. Halley had few qualms with the achievements of GFeminism at Rome — the inclusion of women into international humanitarian law and international customary law (ICL). Instead, she is critical of the feminist universalism that guided the WCGJ. Halley defines structural feminism:

In this view women are not a particular group of humanity but a universe of their own. In the new feminist universalist worldview, humanitarian law and international criminal law norms relating to armed conflict could be about *women* ... It made ever more sense to look at the eruption of ethno-nationalist conflict in the Balkans, for instance, and to see and show it as a *war against women*. And it made ever more sense to describe that war without any acknowledgement that men died in it.³³

³¹ See: Janet Halley, *Split Decisions* (2006).

³² Janet Halley, Prabha Kotiswaran, Hila Shamir, Chantal Thomas, “From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism,” *Harvard Journal of Law and Gender* 29 (2006), 340.

³³ Halley, “Rape at Rome,” 6-7.

Halley's main critique is of feminist universalism's reduction of complex ethno-national conflicts³⁴ to a 'war-against-women' mentality that seemingly sought to erase the suffering of men.

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

This project argues that the concerted embrace of human rights as a wholly independent movement coincided with the beginning of the 1990s. The timing of this was essential to the foundation Women's Caucus for Gender Justice, and the transnational women's network as a whole. The human rights wave of the 1990s can be characterized in many respects: the dramatic increase of international organizations, the newfound enthusiasm for anti-impunity and international criminal law, a focus on 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 aspects of the 1990s. Locating the swell of the human rights wave in the 1990s is critical to the thesis of this project: without the distinct momentum made in this era, the impact of the WCGJ would likely be drastically lessened.

Samuel Moyn's widely popular book, *The Last Utopia*, differentiates modern human rights from older conceptions of rights, like those of the French and American Revolutions. Moyn identifies the rise of human rights as occurring in the 1970s — not from the Enlightenment or reactions to the Holocaust. Moyn does not deny that human rights may be traced to earlier philosophical ideas. Instead he asserts that the 1970s was when it entered into popular use after the failed uprisings in the Eastern Bloc, such as the 1968 Prague Spring in

³⁴ Most striking in Yugoslavia.

Czechoslovakia and the 1956 Hungarian Revolution.³⁵ Prior to the 1970s, ‘human rights’ struggles like those in the Eastern Bloc were too heavily intertwined in citizenship rights within the nation-state to succeed. Moyn also refutes the argument that human rights grew out of a reaction to the Holocaust: “Contrary to conventional consumptions, there was no widespread Holocaust consciousness in the post-war era, so human rights could not have been a response to it.”³⁶ Moyn asserts that after the failure of capitalism, socialism, and anti-colonialism, the idea of human rights was the last utopian front. Moyn identifies 1977, and the years surrounding it, as the “year[s] of shocking and altogether unpredictable prominence of human rights.”³⁷ This classification is based off of three key events: the Helsinki Accords, President Jimmy Carter’s inauguration, and Amnesty International’s Nobel Peace Prize win. Carter’s moral infusion of human rights into U.S. foreign policy placed the language of human rights onto a widely received national platform.³⁸ The détente project of the Helsinki Accords in 1975, two years prior, infused human rights into the so-called “Third Basket” of the Helsinki Final Act.³⁹ Moyn identifies a number of catalysts for the explosive popularity of human rights in the 1970s:

The 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.⁴⁰

³⁵ Ibid. 136.

³⁶ Samuel Moyn, *The Last Utopia* (Cambridge: Harvard University Press, 2012), 8.

³⁷ Ibid. 13.

³⁸ “Without 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.” Ibid. 149.

³⁹ Ibid. 150.

⁴⁰ Ibid. 8.

Moyn argues without the ‘canonization’ of human rights with Helsinki and Jimmy Carter, human rights would have likely remained on the peripheral backwaters of policy.⁴¹

Moyn’s argument, while an alluring story, places the human rights wave twenty years too early and leaves out key parts of human rights history. In respect to the Holocaust, Moyn fails to discuss the Nuremberg (IMT) and Tokyo (IMTFE) trials’ contribution to international humanitarian law by prosecuting crimes against individual people at the international level. *The Last Utopia* makes little reference to the explosion of human rights organizations and the founding of international criminal tribunals, both phenomena of the post-Cold War era. Moyn’s book neglects to discuss the inception of the transnational women’s network that timidly began at the Mexico City Conference in 1975 and reached a fever pitch in the 1990s. If we are to take into account the pivotal role the transnational women’s network played as a movement and as the first modern network, Moyn’s framework cannot be convincingly be utilized. Instead, it is necessary to view the explosion of human rights, or the human rights wave, as an event of the early 1990s.

The human rights wave as a post-Cold War phenomenon is aptly identified by Stefan-Ludwig Hoffmann in his “Human Rights and History.” Hoffmann’s thesis pushes against Samuel Moyn’s ascription of the rise of human rights to the 1970s and asserts it actually occurred in the early 1990s. While human rights terminology was present in the 1970s and 1980s, it coexisted in conjunction with other “moral and political idioms like ‘solidarity’ and included competing notions of rights, which were in many ways still indebted to the legacies of socialism and anti-colonialism.”⁴² The 1990s was the point in time where the notion of individual human

⁴¹ Ibid. 149.

⁴² Stefan-Ludwig Hoffmann, “History and Human Rights,” *Past and Present* 232 (2016), 282.

rights became a “contested, irreplaceable, and consequential concept of global politics.”⁴³ Prior to the early 1990s and following the Second World War, Hoffmann argues that no humanitarian, military, or political intervention was rationalized with the language of human rights and were due to *realpolitik* reasons.⁴⁴ The emerging global human rights movement was not “the cause but the consequence of the epochal ruptures of the late twentieth century”⁴⁵ — including the disintegration of both the Soviet Union and the collapse of Milošević’s Yugoslavia.

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 of the twenty-four hour news cycle, and the Habermasian favoring of individual human rights over state’s rights to sovereignty.⁴⁶ In both Rwanda and Srebrenica, the inability of UN peacekeepers to intervene 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.”⁴⁷ It was the political failure of international organizations in handling the collapse of multi-ethnic states and the following civil wars that led to the “belated embrace of the idea of human rights interventionism by the generation of baby boomers and student protesters.”⁴⁸ The connection of Srebrenica to Holocaust remembrance — human rights violations to genocide — was historically new.⁴⁹

⁴³ Ibid. 282.

⁴⁴ This would include President Carter and Henry Kissinger’s adoption of human rights language at Helsinki and in U.S. foreign policy broadly. Ibid. 285.

⁴⁵ Ibid. 282.

⁴⁶ Ibid. 296.

⁴⁷ Ibid. 294.

⁴⁸ Ibid. 294.

⁴⁹ Ibid. 295.

Hoffmann illustrates the effect of the post-Cold War emergence of individual human rights idealism on the theoretical approach to humanitarian intervention by using the Kosovo War (1998-9) as an example. Within this context, Hoffmann references the work of both Jürgen Habermas and Vaclav Havel. Following NATO's military intervention, Habermas penned an article regarding the transformation of international law into a 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 military action.”⁵⁰ Likewise, Havel used a similar line of argument in a speech before the Canadian Senate and House of Commons:

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.⁵¹

Hoffmann argues that this indicates the ‘breakthrough’ of human rights, in the late 1990s as opposed to the 1970s.

At the same time as humanitarian intervention began a new era, so did international humanitarian and human rights law. Just as how the atrocities in Rwanda and Yugoslavia served as a catalyst for intervention justified by human rights breaches, they 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.”⁵² Alongside the *ad hoc* tribunals, the subject of Chapter 2, the Vienna Declaration adopted by the World Conference on

⁵⁰ Ibid. 297.

⁵¹ Ibid. 297-8.

⁵² Ibid. 298.

Human Rights in 1993 “constituted a resurgence of the debate about the universality of human rights.”⁵³ In contrast to the human rights conventions produced between the 1960s and the 1980s that focused on decolonization, conventions throughout the 1990s distinctly centered on the criminal prosecution of ‘past wrongs’⁵⁴ and anti-impunity measures. This fundamental shift in the way in which human rights are approached swept up the formation of the International Criminal Court in the human rights wave and propelled the Court and anti-impunity to the forefront of international criminal law. It is essential to adopt Hoffmann’s positive historical revisionist account of the human rights movement in order to examine the development of the transnational women’s network and the Women’s Caucus for Gender Justice.

Kathryn Sikkink identifies the move to prosecute perpetrators of human rights abuses as a development of the early 1990s, aligning with Hoffmann’s representation of the emergence of human rights idealism. In describing this trend, Sikkink coins the term ‘the justice cascade,’ which 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.”⁵⁵ Sikkink uses the term ‘cascade’ for this trend to capture “how the idea started as a small stream, but later caught on suddenly, sweeping along many actors in its wake.”⁵⁶ Three kinds of prosecutions emerged from the justice cascade: international, foreign, and domestic.⁵⁷ This project focuses on the first category, international,⁵⁸ but does not examine the subset of hybrid

⁵³ Ibid. 299.

⁵⁴ Ibid. 299.

⁵⁵ Kathryn Sikkink, *The Justice Cascade*, (W.W. Norton & Company: New York, 2011), 5.

⁵⁶ Ibid. 5.

⁵⁷ Ibid. 4-5.

⁵⁸ “International trials happen when states, typically acting on behalf of the United Nations, set up tribunals such as the ICTY and the ICC.” Ibid. 4.

criminal tribunals.⁵⁹ Despite the increased amount of human rights treaties entering into force, “it began to appear that human rights violations were getting worse, not better.”⁶⁰ This was likely the result of the failure of the international community to prevent human rights abuses and the lasting impunity that existed for human rights violators, especially high-ranking state officials. Anti-impunity human rights prosecutions developed to strengthen human rights law as an attempt to remedy this. Sikkink writes: “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.”⁶¹ Sikkink uses a large dataset⁶² to convey her justice cascade and notes that “the rapid diffusion of [the justice cascade] follows almost immediately after the end of the Cold War and with the fall of the Soviet Union in 1989-91,”⁶³ corroborating Hoffmann’s argument.

In contemporary times, anti-impunity⁶⁴ measures have become a principle tenet of most participating in human rights advocacy; however, this has not been met without criticism. Karen Engle expresses her concern with the human rights movement’s rapid shift towards criminal law — coinciding with the human rights wave of the 1990s — in her article, “Anti-Impunity and the Turn to Criminal Law in Human Rights.” Engle argues that “the turn to criminal law was not an obvious trajectory for either the human rights movement or international law,” and that perhaps this embrace “has taken place with little systematic deliberation about the aims of criminal law or

⁵⁹ For example, the Special Court for Sierra Leone or the Regulation 64 Panels in the Courts of Kosovo. These tribunals combine domestic and international legal processes.

⁶⁰ Ibid. 15.

⁶¹ Ibid. 15.

⁶² See: Figure 1.1: The Justice Cascade. “Looking at the graph, one can see that until the mid-1980s, an increase in prosecutions is hardly noticeable. By the early 1990s, the number of such events began a steep increase.” Sikkink, *The Justice Cascade*, 21.

⁶³ Ibid. 21.

⁶⁴ Commonly seen as the attempt to hold violators of international humanitarian law or human rights law criminally accountable for their actions.

about its pitfalls.”⁶⁵ The conflation of anti-impunity with human rights advocacy is ultimately harmful, as many view the expression of opposition to anti-impunity measures to also mean an opposition to human rights.⁶⁶ Not only have the two been densely intertwined, but the relationship between human rights and anti-impunity has “helped shape the direction of human rights advocacy as well as international human rights and international criminal law.”⁶⁷ In addition to the significant amount of resources and time used by the *ad hoc* tribunals and the ICC, Engle worries that anti-impunity “provides a way for all sides [in conflict] 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.”⁶⁸

While Karen Engle’s concerns over the turn towards anti-impunity may be warranted to an extent, this project aims to analyze the contributions of the transnational women’s network to prosecuting sexual and gender based violence at the International Criminal Court, a process that is inevitably linked to the justice cascade. Although this process is not without its flaws, the inclusion of SGBV language in the Rome Statute is a net gain for the transnational women’s network. This project seeks to form a genealogy of the transnational women’s network and international criminal tribunals. Timing was essential to the involvement of the transnational women’s network in drafting the Rome Statute. I argue that in viewing the 1990s through the lens of both Hoffmann and Sikkink, it is possible to understand the phenomena of the human rights wave as the result of the confluence of three major world events. In the early to mid 1990s,

⁶⁵ Karen Engle, “Anti-Impunity and the Turn to Criminal Law in Human Rights,” *Cornell Law Review* 100 (2015), 1070.

⁶⁶ *Ibid.* 1118.

⁶⁷ *Ibid.* 1119.

⁶⁸ *Ibid.* 1127.

the transnational women's network solidified its strength at UN conferences just as the idea for the International Criminal Court took off. The influence of transnational women's networks at the *ad hoc* tribunals informed their approach to SGBV at Rome. I will engage with the specific changes in the language of the Rome Statute — and lack thereof — that can be traced back to the Women's Caucus for Gender Justice. Finally, Chapter 4 will examine cases before the ICC with regards to convictions and charges on the basis of SGBV crimes. By parsing through these three major, interconnected events I will attempt to convey one way that advocacy networks may affect issue-specific legal change, and whether or not this experience may be replicated.

Chapter 1: Mainstreaming Gender at the United Nations

“If there is one message that echoes forth from this conference, let it be that human rights are women’s rights and women’s rights are human rights once and for all.”

- Hillary Rodham Clinton⁶⁹

Margaret Keck and Kathryn Sikkink write in *Activists beyond Borders* that the contemporary usage of the word ‘network’ began with the women’s movement in the United States coining the phrase “old boy’s network.”⁷⁰ This term originated from a critique of sexism, but women’s groups went on to build upon and use the word ‘network’ to describe their actions.⁷¹ ‘Woman’s network’ entered into popular use around 1975, the year of the First World Conference on Women in Mexico City, and experienced a peak in popularity in 1995, the period of time surrounding the Fourth World Conference on Women in Beijing.⁷² At United Nations conferences, women’s networks manifested themselves as Women’s Caucuses formed by women’s rights NGOs. Women’s networks were initially limited in scope at Mexico City, but after twenty years, the transnational women’s network wielded considerable influence at conferences. The strategies developed by the women’s network influenced the way in which the Women’s Caucus for Gender Justice advocated for the inclusion of provisions on sexual and gender based violence at the Rome Conference in 1998. This chapter traces the development of the transnational women’s network at United Nations conferences, with specific regard to their campaign against Violence against Women. It is essential to this project to explore the

⁶⁹ Hillary Clinton, “Remarks to the UN Fourth World Conference on Women Plenary Session,” United Nations Fourth World Conference on Women, Beijing, 5 September 1995.

⁷⁰ Keck and Sikkink, *Activists beyond Borders*, 167.

⁷¹ 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: Keck and Sikkink, *Activists beyond Borders*, 167.

⁷² See Appendix, Figure 2.

foundation of the transnational women's network. Without the network's adoption and eventual integration of VAW as a key issue to the United Nations, the WCGJ would have likely faced a steeper uphill battle in incorporating SGBV. The Women's Caucus for Gender Justice was a direct outgrowth of the Women's Caucuses to be discussed in this chapter. The WCGJ website itself credits their formation to the highly organized work done at the UN that brought together women's activists for Rome.⁷³

Violence against Women as an issue women's advocacy networks fought against began relatively recently in organizing history. Prior to its emergence in the 1980s, the women's movement primarily focused 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 Violence against Women. In the early 1980s, Violence against Women became integrated into social justice discussions and rose to the forefront of United Nations activity in 1985. By the mid-1990s, Violence against Women had exploded into one of the most discussed international women's issues, evidenced in its presence as a centerpiece of the Platform for Action at the United Nations Conference on Women in Beijing in 1995.⁷⁴ At the same time, the UN Security Council established two *ad hoc* tribunals: the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994), which included limited sexual and gender based violence crimes under their jurisdiction. This chapter will examine VAW and women's organizing at United Nations conferences itself, as well as the organizational strategies utilized by the

⁷³ See page 13.

⁷⁴ Steven Mufson, "UN Women's Meeting Settles Key Disputes," *Washington Post*, 14 September 1995, p. A15.

transnational women's network to mainstream gender into the final documents of the conferences.

Discrimination and the Early Foundations of Violence against Women

Long before the United Nations existed, women's organizing networks grew their roots in abolitionism of the 1800s and the international campaign for women's suffrage.⁷⁵ Although suffrage and abolition took place much earlier than the movement against VAW, Elisabeth Friedman argues in "Gendering the Agenda: The Impact of the Transnational Women's Rights Movement at the UN Conferences of the 1990s" that both movements were defined by their relations with the international community. According to Friedman, "The suffrage movement ... was bolstered by international meetings, and frequent travel and communications between activists helped the spread of ideas."⁷⁶ Women's groups lobbied the League of Nations on issues of equality, and in 1928 the foundation of the Inter-American Commission on Women "was one of the groups instrumental in getting the provision on equal rights for women into the UN Charter, and recommending the formation of the UN Commission on the Status of Women."⁷⁷ Twenty years later, the UN Economic and Social Council (ECOSOC) took the Inter-American Commission's advice into account and established the Commission on the Status of Women in 1946.

In "Transnational Networks on Violence against Women," Margaret Keck and Kathryn Sikkink identify the second wave of women's organizing as beginning in the 1960s and early

⁷⁵ Keck and Sikkink, *Activists beyond Borders*, 168.

⁷⁶ Elisabeth Friedman, "Gendering the Agenda: The Impact of the Transnational Women's Rights Movement at the UN Conferences of the 1990s," *Women's Studies International Forum* 26 (2003), 317.

⁷⁷ Keck and Sikkink, *Activists beyond Borders*, 168.

1970s, concurrent with second wave feminism. Many women began organizing on international women's rights after they experienced subordination to men in student, civil rights, liberation, and anti-authoritarian movements.⁷⁸ In addition to establishing NGOs centered on women's issues, women involved themselves in the United Nations. The Commission on the Status of Women (CSW) drafted the Declaration on the Elimination of Discrimination against Women (DEDAW).⁷⁹ DEDAW's eleven articles deal with issues of discrimination, including a woman's right to vote,⁸⁰ access to education,⁸¹ and generally abolishing existing discriminatory laws.⁸² DEDAW served as the precursor to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which the CSW immediately began to draft after the adoption of DEDAW. CEDAW was successfully adopted in 1979 and entered into force in 1981. Like DEDAW, this convention dealt with discriminatory practices against women, which was defined as "any exclusion or restriction on the basis of sex ... in the political, economic, social, cultural, civil, or any other field."⁸³ Both DEDAW and CEDAW refrained from referencing VAW. Between the 1960s and early 1970s, discrimination and equality were the focus of transnational women's movements in the United States, Europe, and the United Nations system as a whole.⁸⁴

⁷⁸ Friedman, "Gendering the Agenda," 317.

⁷⁹ Adopted in 1967.

⁸⁰ General Assembly resolution 22/63, *Declaration on the Elimination of Discrimination against Women*, A/RES/22/63 (7 November 1967), <http://www.un-documents.net/a22r2263.htm>, Article 4.

⁸¹ Ibid. Article 9.

⁸² Ibid. Article 2.

⁸³ General Assembly resolution 34/180, *Convention on the Elimination of All Forms of Discrimination against Women*, A/RES/34/180, 18 December 1979, <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>, Article 1.

⁸⁴ Keck and Sikkink, *Activists beyond Borders*, 168.

The Transnational Women's Network at UN Conferences (1975-1995)

The influence of women's groups in transnational politics greatly expanded between the early 1970s and mid-1980s. After lobbying by the Women's International Democratic Federation and others, the CSW recommended that the UN General Assembly declare 1975 the International Women's Year. This made way for the First World Conference on Women to be held in Mexico City, as well as the subsequent declaration of 1976-1985 as the UN Decade for Women.⁸⁵ The UN Decade for Women established two conferences dedicated entirely to women's issues: the World Conference of the UN Decade for Women in Copenhagen (1980) and the World Conference to Review and Appraise the Achievements of the UN Decade for Women in Nairobi (1985). Women's groups had a considerable impact on the agenda of both gender-centric conferences and other issue-based conferences.

The First World Conference on Women: Mexico City (1975)

The Mexico City Conference⁸⁶ was fundamental to the development of the international women's movement as the first UN conference solely dedicated to women. The participation of NGOs — that will prove to be pivotal in their advocacy — was very limited, “with only two representatives per accredited NGO permitted to participate on a limited basis.”⁸⁷ Despite the restrictions on the capabilities of NGOs, Mexico City was fertile ground for activists to form strong networks. One such network, the International Women's Tribune Centre (IWTC), was established during the conference. After the conference concluded, the IWTC used their mailing list to increase accessibility to information and advocacy tools. In 1998, this mailing list grew to

⁸⁵ Friedman, “Gendering the Agenda,” 317.

⁸⁶ This project refers to United Nations conferences by the city in which they took place.

⁸⁷ Ibid. 317.

16,000 individuals and groups representing women from 160 countries.⁸⁸ “Mexico City focused on some of the fundamental issues ... but it also did something that, while less tangible, may be in some ways more important than anything else: It established a network,”⁸⁹ Lucille Mair, the Secretary General of the Copenhagen Conference, reflected. In addition to establishing the beginnings of a strong, effective network of women’s rights activists, Keck and Sikkink identify the streamlining of CEDAW’s ratification as a major success of Mexico City.

Around the time of Mexico City, the first domestic violence shelters opened in London and the United States (in 1971 and 1974, respectively), and discussion of domestic violence as a serious international issue began in Fran Hosken’s *Women’s International Network (WIN) News* in 1975. When Mexico City occurred, domestic violence was still too new to become a center point of the conference. Shortly after, the March 1976 First International Tribune on Crimes against Women was held in Brussels, where “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.”⁹⁰ While the World Plan of Action adopted at Mexico City failed to explicitly discuss violence, the initial networks formed at the conference would prove to be essential in furthering the campaign against VAW.

The World Conference of the United Nations Decade for Women: Copenhagen (1980)

Keck and Sikkink trace the origins of the international network on Violence against Women to a series of meetings at the UN Women’s Conference in Copenhagen in 1980.⁹¹

⁸⁸ *The Tribune: A Women and Development Quarterly*, newsletter 45 (July 1990).

⁸⁹ Arvonne Fraser, *U.N. Decade for Women: Documents and Dialogue* (Boulder: Westview, 1987), 71.

⁹⁰ Keck and Sikkink, “Transnational Networks on Violence against Women,” 175.

⁹¹ *Ibid.* 177.

Charlotte Bunch, an organizer for a set of panels on international feminist networking at the NGO forum held in conjunction with Copenhagen reflects:

We observed that in two weeks of the forum that the workshops on issues related to sexual violence against women were the most successful ... they were 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, 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 complete different ground for conversation... It wasn't that we built the network in that moment. It was just the sense of that possibility.⁹²

This newfound sense of possibility on an issue that seemed to cross the north/south divide culminated in the first explicit mention of domestic and sexual violence in an official United Nations document. The Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace makes mentions to 'domestic and sexual violence against women' in the Legislative Measures section. This section states: "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."⁹³ The document calls for the ratification and implementation of CEDAW, the protection of women's political rights worldwide, decries discrimination, and denounces the gendered effects of apartheid.⁹⁴ Similar to the case of Mexico City, after the conference in Copenhagen concluded, there was a surge of organizing around VAW. One of the first occurrences of this was in 1981, where participants at the first Feminist Encounter for Latin America and Caribbean proposed to honor the anniversary of three sisters murdered by the

⁹² Ibid. 177.

⁹³ General Assembly resolution 35/136, *World Conference on the United Nations Decade for Women*, A/RES/35/136 (11 December 1980), <http://www.un-documents.net/a35r136.htm>.

⁹⁴ Ibid.

Trujillo dictatorship by holding the “Day against Violence against Women” on November 25th.⁹⁵ Following suit, a coalition of Latin American women’s organizations held similar commemorations that contributed to the international campaign, “16 Days of Activism against Gender Violence.” This campaign, originating from groups in the global south, is now an annual event practiced internationally by NGOs and UN Women.⁹⁶

The Third World Conference on Women: Nairobi (1985)

After ten years of development, Violence against Women was finally on the agenda for the 1985 Third World Conference on Women in Nairobi. Following the trend of Mexico City and Copenhagen, Nairobi attracted an increased number of women, with 14,000 women from 150 countries attending Nairobi’s NGO forum.⁹⁷ There, activists formed the International Network against Violence against Women (INAVAW), a network of communication, and the International Women’s Rights Action Watch (IWRAP), a group established to monitor CEDAW. By the time of Nairobi, Elisabeth Friedman writes:

Advances 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.⁹⁸

⁹⁵ Keck and Sikkink, “Transnational Networks on Violence against Women,” 178.

⁹⁶ “16 days of activism,” United Nations Women, accessed 20 April 2017, <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/take-action/16-days-of-activism>.

⁹⁷ Keck and Sikkink, “Transnational Networks on Violence against Women,” 180.

⁹⁸ Friedman, “Gendering the Agenda,” 319.

From Nairobi, governments adopted the Forward-Looking Strategies for the Advancement of Women.⁹⁹ The Forward-Looking Strategies was integral in linking peace to the elimination of Violence against Women in both the public and the private sphere,¹⁰⁰ with eight paragraphs specifically addressing VAW. This general consensus on framing by the time of Nairobi served as an important stepping-stone for the emergence of networks in the transnational women's movement.¹⁰¹ These networks include IWRAW, the Latin American Committee for Defense of Women's Rights (CLADEM), the Asia-Pacific Forum on Women, Law and Development (APWLD), and Women in Law and Development in Africa (WiLDAF).

After Nairobi, the transnational women's network set off an unprecedented chain of United Nations action related to VAW. Months after Nairobi, the UN General Assembly adopted a resolution addressing domestic violence for the first time at the behest of a CSW recommendation to ECOSOC.¹⁰² Although the language in Resolution 4036 airs on the side of gender neutral, the writers cite Resolution 9 adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which "called for the fair treatment of women by criminal justice system"¹⁰³ and the recommendations made in Nairobi. The implementation of Resolution 4036 required an Expert Group Meeting on Violence in the

⁹⁹ United Nations, The World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development, and Peace, *The Nairobi Forward-Looking Strategies for the Advancement of Women* (15-26 July 1985), <http://www.un.org/womenwatch/confer/nfls/Nairobi1985report.txt>.

¹⁰⁰ 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>.

¹⁰¹ Ibid. 318.

¹⁰² General Assembly resolution 40/36, *Domestic violence*, A/RES/40/36 (29 November 1985), <http://www.un.org/documents/ga/res/40/a40r036.htm>.

¹⁰³ Ibid.

Family, which put an emphasis on women and stipulated that “domestic violence as a global phenomenon which was significantly underreported.”¹⁰⁴

The United Nations Conference on Environment and Development: Rio (1992)

The strong presence of women at UN conferences was not limited to those emerging from the UN Decade for Women. In 1992, the Conference on Environment and Development was held in Rio, where women’s groups maintained a definitive presence. The women’s tent at the NGO forum, Planeta Femea, was the largest venue at the conference and attracted 1,500 people. Women’s activists linked women’s rights to environmental preservation and sustainability. Activists employed new tactics to advocate for the inclusion of issues targeting women in the initially genderless final document of the conference, Agenda 21. The Women’s Environment and Development Organization (WEDO), started by Bella Abzug, a United States activist and politician, sponsored the World Women’s Congress for a Healthy Planet. When faced with a lack of inclusion, women’s groups “creat[ed] their own opportunities for mobilization around the more general opportunity of the conference [and] organized the largest-ever NGO preparatory conference for a UN meeting, with 1,500 participants.”¹⁰⁵ Women utilized the format of a “tribunal to offer public testimony about women’s connection to environmental issues”¹⁰⁶ for the first time. Friedman notes that WEDO developed the ‘insider/outsider’ strategy of advocacy, which became standard throughout the 1990s. This approach “simultaneously mobiliz[ed] advocacy networks to bring pressure from outside

¹⁰⁴ United Nations, “The United Nations Work on Violence Against Women.”

¹⁰⁵ Friedman, “Gendering the Agenda,” 320.

¹⁰⁶ Ibid. 320.

governmental arenas and coordinat[ed] lobbying inside them.”¹⁰⁷ The establishment of the Women’s Caucus, a group that lobbied for gender issues throughout the conference, was one of the most important contributions to the transnational women’s network. To be clear, the Women’s Caucus referred to here was not the same Women’s Caucus for Gender Justice that developed in Rome, but the concept of a Women’s Caucus itself was a pivotal development. Friedman identifies ‘precedent setting’ as a key strategy of the Caucus.¹⁰⁸ When lobbying delegates to include women’s rights in Agenda 21, members of the Caucus assembled ‘precedent setting’ information from previous UN resolutions and documents that supported the Caucus’ positions, thus conveying that their positions were “built on accepted norms within the UN, not new rights.”¹⁰⁹ This tactic, according to Friedman, “was a clear effort to mainstream the women’s rights message while countering objections to it.”¹¹⁰ WEDO and the Women’s Caucus’ efforts were evidentially a success: the draft Agenda 21 contained two references to women, but by the conclusion of Rio an entire chapter, “Global Action for Women Towards Sustainable and Equitable Development,” was added with 172 references to women. VAW was not a subject of focus at Rio, but the tactics developed by activists there permeated conferences in which VAW became a central issue and depicts the affect that the transnational women’s network can have on conference delegates.

¹⁰⁷ Ibid. 320.

¹⁰⁸ Ibid. 320.

¹⁰⁹ Ibid. 320.

¹¹⁰ Ibid. 320.

The World Conference on Human Rights: Vienna (1993)

The next year, the World Conference on Human Rights was held in Vienna, and women made up half of the 3,000 NGO participants.¹¹¹ Women's groups prepared meticulously for Vienna using national data generation, media contacts, and governmental lobbying through the coordination of northern NGOs, including the Center for Women's Global Leadership (CWGL), International Women's Tribune Center (IWTC), and International Women's Rights Action Watch (IWRAP). Keck and Sikkink accurately convey the strong role women's groups played at Vienna, citing them 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."¹¹² Friedman argues that despite northern NGOs taking the lead on organizing, "leaders worked closely with international advocates to insure the representativeness of the movement and its message."¹¹³ Charlotte Bunch, the founder of the CWGL, emerged as a leading advocate for the inclusion of VAW in the conference. Similar to the Women's Caucus of Rio, the Global Campaign for Women's Human Rights was created to unite 90 NGOs in making the international community focus on VAW in Vienna.¹¹⁴ In addition to the CWGL, the Women's Caucus from Rio reemerged as a key organizer at Vienna.

Leading up to Vienna, the CWGL worked with organizations to globally launch the previously discussed '16 Days of Activism against Gender Violence' campaign in 1991. The CWGL spearheaded an effective petitioning campaign calling for women's rights to be recognized as human rights. The petition was sponsored by 800 groups and garnered 300,000

¹¹¹ Keck and Sikkink, "Transnational Networks on Violence against Women," 187.

¹¹² Ibid. 186.

¹¹³ Friedman, "Gendering the Agenda," 321.

¹¹⁴ Ibid. 321.

signatures from 123 countries by the beginning of the conference.¹¹⁵ At the same time, the UN chose to officially recognize ‘satellite meetings’ “by holding several international gatherings that issued statements and reports included in the official documentation of the conference.”¹¹⁶ In addition to attending satellite meetings, the CWGL directly engaged with governments in the preparatory process in order to guarantee the inclusion of ‘women’s human rights’ language in Vienna. The extraordinary engagement efforts undertaken by the CWGL — both at the UN and with governments directly — allowed them to have a direct impact on the language of the final document in Vienna. The Women’s Caucus coordinated lobbying efforts, uniting upwards of 200 participants, and made six plenary presentations at the governmental conference to present the demands of women’s human rights advocates.¹¹⁷

The CWGL found an ally within the UN Development Fund for Women (UNIFEM) via Roxanna Carillo, former CWGL staff member and the then head of UNIFEM’s women’s rights program, using the insider/outsider tactic of Rio. Carillo and the CWGL regularly met throughout Vienna, ensuring contact between NGOs and delegates.¹¹⁸ Again reflecting Rio, the CWGL made use of the Women’s Congress for a Healthy Planet’s tribunal strategy. The CWGL designed the Tribunal on Violations of Women’s Human Rights, which featured testimonies of women from all regions of the world, to showcase the daily, widespread abuse of women’s rights.¹¹⁹ 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.

¹¹⁵ Ibid. 321.

¹¹⁶ Ibid. 321.

¹¹⁷ Ibid. 321.

¹¹⁸ Ibid. 321.

¹¹⁹ Ibid. 321.

Hundreds of spectators observed the day-long Tribunal and its conclusions were presented as part of the official record of the governmental conferences.”¹²⁰

Despite the effort of the Tribunal to represent women globally, the diverse group of women also displayed numerous tensions apparent in trying to unify the abuses experienced by women in one coherent ‘frame’. 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.”¹²¹ Within the NGO workshops themselves, fierce debates broke out over the role that legal recourse as a whole should play in the women’s rights movement, and if the State should even play a role in the protection of women.¹²² Vienna exposed the weaknesses of the women’s rights network; however, organizers still exercised considerable influence over the negotiations.

The work of the CWGL and the Women’s Caucus succeeded in mainstreaming women’s human rights into the Vienna Conference. Mentions of women’s human rights cropped up all over the Vienna Declaration and Programme of Action as a result of a concentrated effort with organizing from both inside and outside government. The language of Section 1, Paragraph 18 recalls the ‘women’s rights are human rights’ mantra of the conference, while explicitly discussing gender-based sexual 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 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

¹²⁰ Ibid. 321.

¹²¹ Ibid. 321.

¹²² Ibid. 321.

fields as economic and social development, education, safe maternity and health care, and social support.¹²³

Section 1, Paragraph 28 addresses the World Conference's dismay at massive human rights violations, including the "systematic rape of women in war situations," and links systematic rape directly to refugees and displacement.¹²⁴ Similarly, Paragraph 29 of the same section expresses the Conference's concern over "violations of human rights during armed conflicts, affecting the civilian population, especially women."¹²⁵ The third section of this document addresses "the equal status and human rights of women" in nine thorough paragraphs. This section focuses on discrimination issues, but condemns SGBV: "All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response."¹²⁶ The gender-related progress made in Rio the year prior are affirmed and the need for women's human rights are emphasized as a central focus of Beijing in 1995. Gender mainstreaming at Vienna would not have been possible without the strong network of women's advocates at UN conferences that had been in development since Mexico City.

The International Conference on Population and Development: Cairo (1994)

Women's rights advocates convened the following year at the International Conference on Population and Development. Similar to their involvement in Rio and Vienna, activists were able to exert influence on the conference in a way that framed the agenda to include issues central to women. This time, advocates successfully linked controlling population growth to reproductive health access. Friedman argues that these activists "were responsible for the switch

¹²³ United Nations, World Conference on Human Rights in Vienna, *Vienna Declaration and Programme of Action*, 25 June 1993, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

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."¹²⁷ Like in Rio and Vienna, women's NGOs quickly formed a Women's Caucus prior to government preparatory processes to get women's rights issues on the conference's agenda.¹²⁸ In 1992, advocates formed the Women's Voices '94 Alliance and produced "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 spanning 100 countries.¹²⁹ The IWHC also held the "Declaration of the Reproductive Health" conference in January of 1994, nine months before Cairo, attracting 215 women from 79 countries for an NGO version of the governmental preparatory committee.¹³⁰

At Cairo itself, the level of involvement that the Secretary General allowed NGOs to have grew substantially. 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."¹³¹ In addition to attending the conference separately, NGOs were often a component of governmental delegations. Half of the United States' delegates were leaders on women's health issues, for example.¹³² The Women's Caucus formed at Cairo was the largest yet, with an estimated 400 to 500 women attending their meetings (compared to the 'Pro-Life' Caucus, which attracted fifteen

¹²⁷ Friedman, "Gendering the Agenda," 322.

¹²⁸ Ibid. 322.

¹²⁹ Ibid. 322. See: Women's Feature Service, 1994; Women's Voices '94, 1993.

¹³⁰ Ibid. 322. See: International Women's Health Coalition, 1994.

¹³¹ Friedman, "Gendering the Agenda," 322.

¹³² Amy J. Higer, "International women's activism and the 1994 population conference," in M.K. Meyer and E. Prugl (editors), *Gender politics in global governance*, (New York: Rowman & Littlefield, 1999), 137.

members).¹³³ The result of the transnational women's network's work was the emergence of language in the final document addressing women in relation to population growth. The fourth of fifteen principles outlining 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, and are cornerstones of population and development related programs."¹³⁴ The fourth chapter of the report is dedicated to the "Gender Equality, Equity, and Empowerment of Women," where VAW is explicitly discussed eight times. During conference 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."¹³⁵ Like its predecessors at Rio and Vienna, 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.

The Fourth World Conference on Women: Beijing (1995)

In September of 1995, the United Nations convened the Fourth World Conference on Women, attracting an unprecedented 17,000 participants and 30,000 activists.¹³⁶ Marking twenty years since Mexico City, Beijing highlighted the rapid growth experienced by the international women's rights movement. Where domestic violence was still too new to breach Mexico City's agenda, delegates found themselves in intense debate over a wide range of

¹³³ Friedman, "Gendering the Agenda," 323.

¹³⁴ United Nations, *Report of the International Conference on Population and Development*, A/CONF.171/13 (5-13 September 1994), <http://www.un.org/popin/icpd/conference/offeng/poa.html>.

¹³⁵ Higer, "International women's activism and the 1994 population conference," 137-138.

¹³⁶ "The Beijing Platform for Action: inspiration then and now," United Nations Women, accessed 20 April 2017, <http://beijing20.unwomen.org/en/about>.

subjects, including VAW. Hilary Charlesworth argues that the continued attempts of ‘gendering the agenda’ at United Nations conferences 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.”¹³⁷ Despite the perceived mainstreaming of gender at Beijing, the conference itself also experienced an unprecedented amount of 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, notes that “on the eve of the Fourth World Conference ... there were signs of a well-organised and well-financed backlash”¹³⁸ against the promises made at Rio, Vienna, and Cairo. Chen traces these challenges back to the PrepComs held prior to Beijing. NGOs faced increased accessibility restrictions, and on the inside, the drafting process was cumbersome and inefficient. After the final PrepCom, 35% of the Draft Platform of Action contained square brackets, each marking a point that at least one government was unwilling to accept and indicated that further negotiations and amendments would occur in Beijing.¹³⁹ Furthermore, the Draft Platform was introduced late into the final PrepCom and left little time for delegations to develop positions on the language of the text. “The preparatory process itself [was] sufficiently participatory that minority voices [could] slow down, derail, or obstruct the process.”¹⁴⁰ In an interview, Dorothy Thomas expressed “that such disagreement illustrated how

¹³⁷ Hilary Charlesworth, “Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations,” *Harvard Human Rights Journal* 18 (2005), 18.

¹³⁸ Martha Alter Chen, “Engendering World Conferences: The International Women’s Movement and the United Nations,” *Third World Quarterly* 16 (1995), 490.

¹³⁹ Ibid. 490.

¹⁴⁰ Ibid. 490.

fragile the global consensus around women's human rights was going into the Beijing meeting."¹⁴¹

Although Beijing was ramping up to be the most contentious women's conference, the transnational women's movement had also developed effective lobbying strategies and organized far beyond what it was in Mexico City. Women's NGOs carefully monitored bracketed issues and recommended language to governmental delegations. At times, "government delegations incorporated language suggested by NGOs directly; [at other times] governments consulted with NGOs to shape their positions on issues."¹⁴² Elisabeth Friedman rightly asserts that the ultimate goal of the transnational women's movement at Beijing was not primarily one of mainstreaming gender, but one of "protect[ing] the gains made against the newly powerful countermovement [against their agenda], while trying to ensure some implementation for the new frames of the 1990s."¹⁴³ This countermovement identified by Friedman has been described as the 'Unholy Alliance,' a coalition of countries with strong Catholic and Islamic leadership. This voting bloc emerged after the increased visibility of women's groups at Vienna and came out in full force at Cairo over issues of abortion. At Beijing, WEDO coordinated a "Linkage Caucus" in an attempt to preserve the progress made by women's groups. 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."¹⁴⁴ Due to the limited access that NGOs had to governmental working groups negotiating the bracketed language, the lobbying of governmental representatives occurred rather

¹⁴¹ Keck and Sikkink, "Transnational Networks on Violence against Women," 188.

¹⁴² Ibid. 188.

¹⁴³ Friedman, "Gendering the Agenda," 324.

¹⁴⁴ Ibid. 324.

informally at coffee breaks and in hallways.¹⁴⁵ Established relationships between advocates and delegates is key to maintaining lines of communication, especially when access to the governmental conference is limited. Without NGO collaboration with certain governments, it likely would have been difficult for activists to preserve the gains made in earlier conferences.

The Platform for Action at Beijing, despite previous advances, was the most contested text of all statements from international conferences.¹⁴⁶ Similar to Rome, the two key issues that were heavily disputed at Beijing 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."¹⁴⁷ The progressive use of gender, according to many delegations from predominantly Catholic countries, opened the floodgates to alternate definitions of gender identity that operate outside of the man/woman dichotomy. Twenty countries held reservations on paragraphs of the Platform for Action that were deemed to be incompatible with Islamic law, including issues of "reproductive rights/abortion, homosexuality, and inheritance."¹⁴⁸ Six Catholic Latin American countries and Malta expressed similar reservations on components of the Platform that challenged the 'traditional' nuclear family, heterosexuality, and abortion bans.¹⁴⁹ Like at Cairo, Catholic and Islamic countries formed blocs on these issues that would persist after the conclusion of Beijing at the Rome Conference.

¹⁴⁵ Ibid. 325.

¹⁴⁶ Sally Baden and 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*, ed. Kathleen Staudt, (Philadelphia: Temple University Press, 1997), 44.

¹⁴⁷ Friedman, "Gendering the Agenda," 325.

¹⁴⁸ Ibid. 326.

¹⁴⁹ Ibid. 326.

Most feminist issues were preserved, and some even experienced advancement, despite the threat presented by numerous states to the advances made by the women's network in prior conferences. In regards to the usage of the term '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."¹⁵⁰ This vague statement on gender seems to replace the disputed definition in the draft Platform, but allows for some level of interpretation. The final Platform for Action 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. Paragraph 96 of the Platform includes "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.¹⁵¹ Paragraph 106(k) addresses reproductive rights and urges governments to "consider reviewing laws containing punitive measures against women who have undergone illegal abortions."¹⁵² Section E, "Women in Armed Conflict," 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,"¹⁵³ while 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

¹⁵⁰ United Nations, *Report of the World Conference on Women*, A/CONF.177/20/Add. 1 (4-15 September 1995), <http://www.un.org/esa/gopher-data/conf/fwcw/off/a-20a1.en>.

¹⁵¹ United Nations, *Beijing Platform for Action* (4-15 September 1995), <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.

¹⁵² Ibid. 106(k).

¹⁵³ Ibid. Paragraph 132.

as a result of policies of ethnic cleansing and other new and emerging forms of violence.¹⁵⁴

Likewise, Paragraph 132 deems rape, which includes systematic rape in war, a “massive violations of human rights ... are abhorrent practices that are strongly condemned and must be stopped immediately, while perpetrators of such crimes must be punished.”¹⁵⁵ 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 decision-making levels”¹⁵⁶ as a means to alleviating this phenomenon. WEDO claims that in sum, 67% of recommendations made by NGOs on the bracketed text were incorporated into the final Platform for Action.¹⁵⁷

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. Beginning in the late 1970s, the Mexico City Conference and CEDAW made no reference to Violence against Women but by Beijing in 1995, VAW rose to become a centerpiece of the final document. Mainstreaming VAW to be a key component of the policy agendas of international organizations would have simply been impossible without the transnational women’s network between 1975 and 1995. The success of the women’s network in ‘gendering the agenda’ at non-women centric conferences¹⁵⁸ was due to their tactical frontline. By Beijing, the use of these strategies — specialized women’s networks, extensive preparatory work, precedent setting, the Tribunal model, and the insider/outsider strategy — were solidified in the women’s network’s

¹⁵⁴ Ibid. Paragraph 135.

¹⁵⁵ Ibid. Paragraph 131.

¹⁵⁶ Ibid. Strategic Objective E.1.

¹⁵⁷ Friedman, “Gendering the Agenda,” 325.

¹⁵⁸ Rio, Vienna, and Cairo.

repertoire. As Friedman notes, the advancement of mainstreaming tactics also emboldened their opposition to respond similarly, entering into a framing contest. At the same time as the conferences of the early 1990s, the International Criminal Tribunals for the former Yugoslavia and Rwanda were established and shaped by the outcome of these conferences. Tracking the development of women's networks and strategies at UN conferences is vital to understanding the role of the WCGJ at the Rome Conference in 1998, which I argue is a direct outgrowth of the transnational women's networks of the UN.

Chapter 2: Sexual and Gender Based Violence Under International Humanitarian Law

"Rape was considered a kind of collateral damage. It was seen as part of the unpreventable, fundamental culture of war."
-Rhonda Copelon¹⁵⁹

This chapter will delve into a thick description of the development of the justice cascade that flourished in the early 1990s with the *ad hoc* tribunals. The culmination of this chapter will be an analysis of landmark *ad hoc* cases that deeply impacted the ways in which the International Criminal Court has prosecuted SGBV crimes. The formation of the *ad hoc* tribunals, riding the human rights wave of the 1990s, was one of the key contributing factors to the successful construction of the ICC. The deep 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 International Criminal Court itself. The rapid development of international criminal tribunals in the 1990s — both the *ad hoc* courts and the ICC — is exemplary of Kathryn Sikkink's justice cascade and Stefan-Ludwig Hoffmann's temporal postulation of the rise of human rights idealism, both of which I argue were key to the Women's Caucus for Gender Justice's existence.

Rape and the Laws of War: From Richard II to Abraham Lincoln

As early as 500 BC, informal laws of war existed to regulate wartime behavior;¹⁶⁰ however, rape and sexual violence against women and girls were long considered to be property

¹⁵⁹ Peter Landesman, "A Woman's Work," *New York Times*, 15 September 2002, accessed 20 April 2017, <http://www.nytimes.com/2002/09/15/magazine/a-woman-s-work.html>.

¹⁶⁰ Kelly Askin, "Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward," in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, ed. Anne-Marie de Brouwer

crimes against the man that owned her. Oftentimes in conflict, rape was legitimate within the laws of war.¹⁶¹ The Middle Ages saw a continuation of the normative belief in the admissibility of rape as a spoil of war, but both Richard II¹⁶² and Henry V¹⁶³ introduced bans on wartime rape in 1385 and 1419, respectively. Beginning in at the end of the Middle Ages, the legitimacy of the wartime practice of rape began to be rethought by jurists and philosophers. Lucas de Penna, a Neapolitan jurist and judge writing in the fourteenth century, advocated for the protection of noncombatants from crimes, including rape.¹⁶⁴ Alberico Gentili, another noteworthy Italian jurist, echoed de Penna's views in the fifteenth century.¹⁶⁵ Gerrard Winstanley, a fifteenth century English political philosopher and founder of the Diggers,¹⁶⁶ advocated for rapists to face capital punishment.¹⁶⁷ Winstanley locates the equality of men and women in the ability of all genders to reason,¹⁶⁸ a radically progressive belief for his time.¹⁶⁹ Hugo Grotius' *The Law of*

et al, (Cambridge: Intersentia, 2013), 22. See: Cicero, *Marcus Tullius, Cicero's Three Books of Offices, or Moral Duties* (reprinted in 1897), 21-25.

¹⁶¹ Susan Brownmiller, *Against Our Will, Men, Women and Rape*, (New York: Fawcett Books, 1975), 33.

¹⁶² Richard II's ban took form as a proclamation prohibiting both rape and pillaging. See: Tuba Inal, *Development of Global Prohibition Regimes: Pillage and Rape in War*, (Ph.D. Diss., University of Minnesota, 2008).

¹⁶³ Violators were "subjected to capital punishment under national military codes." See: Theodor Meron, "Rape as a Crime Under International Humanitarian Law," *The American Journal of International Law* 87, no. 3 (07 1993): 425.

¹⁶⁴ "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 severely punished as if the crimes had been committed in peacetime." [emphasis added] in Richard Shelly Hartigan, *The Forgotten Victim: A History of the Civilian*, (Chicago: Precedent Publishing, 1982), 50. See: Kelly Askin, "Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward," in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, ed. Anne-Marie de Brouwer et al, (Cambridge: Intersentia, 2013), 22.

¹⁶⁵ "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]." Alberico Gentili, *De Iure Belli Libri Tres* (trans. John Rolfe, Vol II, 1995) (1612), 258-59. See: Askin, "Treatment of Sexual Violence in Armed Conflicts," 22.

¹⁶⁶ The Diggers were a radical Protestant group in England, credited by some as a precursor to modern anarchism.

¹⁶⁷ "If a man lie with a woman forcibly, and she cry out, and give no consent; if this be proved by two Witnesses, or mans confession, he shall be put to death and the woman let go free; it is robbery of a womans bodily Freedom." Gerrard Winstanley, *The Works of Gerrard Winstanley*, ed. George W. Sabine, (Ithaca: Cornell University Press, 1949), 599.

¹⁶⁸ "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

War and Peace, the first comprehensive systemization of the international laws of war in the seventeenth century, eschewed the practice of rape in war.¹⁷⁰ Obviously, the opposition of wartime rape by a handful of philosophers and rulers did very little to prevent wartime rape, and impunity for such crimes has prevailed for the majority of human history.

The eighteenth and nineteenth centuries began to include vague, though vital, provisions addressing wartime sexual violence against women and girls. The Lieber Codes (1863) was the first attempt to codify international customary laws of land warfare by Columbia College Professor Francis Lieber during the American Civil War. These codes, signed into law by President Lincoln, were specific instructions to regulate the conduct of Union soldiers made explicit reference to sexual violence in Article 44, which “prohibited rape as a capital crime.”¹⁷¹ The Code stated, “All wanton violence committed against persons in the invaded country ... all rape ... [is] prohibited under the penalty of death, or other such severe punishment as may seem adequate for the gravity of the offense.”¹⁷² Aspects of the Lieber Code became the basis for The Law and Customs of War On Land (Hague Convention IV).

The Hague Convention’s adaptation of Article 44 underwent serious changes, dropping the explicit reference to rape. Instead, Article 46 of the Hague Convention reads: “Family honour and rights, the lives of all persons, and private property, as well as religious convictions

the Globe, dwells 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.” Gerrard Winstanley, *The Works of Gerrard Winstanley*, 251.

¹⁶⁹ The author is grateful for Connor McDermott’s aid in finding Gerrard Winstanley’s writing.

¹⁷⁰ Grotius claims that acts of rape are not acts of civilized nations, and are of “no help toward establishing security or determining punishment ... and consequently [rape] should not go unpunished in war any more than in peace.” Hugo Grotius, *The Law of War and Peace* (1646). See: Askin, “Treatment of Sexual Violence in Armed Conflicts,” 23.

¹⁷¹ Meron, “Rape as a Crime,” 425.

¹⁷² Adjutant General’s Office, General Orders No. 100, “Instructions for the Government Armies of the United States in the Field,” (Washington, D.C., 1863), http://avalon.law.yale.edu/19th_century/lieber.asp, Article 44.

and practice, must be respected.”¹⁷³ Article 46 may be interpreted to include rape under the provision of family honor and rights, however “in practice it has seldom been so interpreted.”¹⁷⁴ It is important to note the absorption of sexual and gender based violence as subsidiary under the category of family and honor rights, as the reliance on language that emphasizes ‘purity’ and ‘morality’ over the gravity of SGBV itself became pervasive later legislation, including the Geneva Conventions. Moving into the twentieth century, Article 46 of the Hague Conventions laid a rocky foundation for prosecuting sexual and gender based violence and allowed for impunity to persist throughout much of the century.

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

The atrocities of the First and Second World Wars ushered in the prosecution human rights abuses through international tribunals. In response to the atrocities of the Second World War, the Allied Powers began to explore the possibility of prosecuting the Axis Powers in October of 1941.¹⁷⁵ Nearly two years later, on October 20, 1943, the United Nations War Crimes Commission (UNWCC) was formed in London. Ten days later, the Allied Powers issued the Moscow Declaration stating that the Allied Powers’ “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.”¹⁷⁶ The Allied Powers created the International Military Tribunal (IMT), commonly known as the Nuremberg Trials, on August 8, 1945 to prosecute

¹⁷³ Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague: 1907, Article 4.

¹⁷⁴ Meron, “Rape as a Crime,” 425.

¹⁷⁵ “From Nuremberg to The Hague: Teaching from the Past — Challenges for the Future,” *International Nuremberg Principles Academy*, accessed 12 December 2016, http://www.nurembergacademy.org/fileadmin/media/pdf/From_Nuremberg_to_The_Hague.pdf, 2.

¹⁷⁶ The Moscow Conference, *Joint Four-Nation Declaration*, October 1943, Available at Yale Law School’s Avalon Project: <http://avalon.law.yale.edu/wwii/moscow.asp>, Point 1.

prominent members of Nazi Germany. Four signatories — the United States, the United Kingdom and Northern Ireland, the Provisional French Government, and the Soviet Union — established the IMT, with four members, one representing each signatory.¹⁷⁷

The IMT's jurisdiction extended to three principal 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.”¹⁷⁸ 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 actions that are considered war crimes:

Murder, 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.¹⁷⁹

Crimes relating to sexual and gender based violence are absent, despite their prevalence throughout the Second World War. Similarly, the Charter defines crimes against humanity as a number of acts committed against a civilian population, without the condition of ongoing war:

Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population ... or persecutions on political, racial or

¹⁷⁷ Nuremberg Trial Proceedings, Volume 1, *Charter of the International Military Tribunal*, <http://avalon.law.yale.edu/imt/imtconst.asp>, Article 2.

¹⁷⁸ Ibid. Article 6a.

¹⁷⁹ Ibid. Article 6b.

religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.¹⁸⁰

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 that preceded the IMT by over eighty years, the Charter did very little at all to incorporate SGBV crimes. Due to the Hague Conventions’ influence upon the Charter’s definition of war crimes, it is unsurprising that SGBV was overlooked at this point in history.

Prosecutions began in Berlin on October 18, 1945 against twenty-four high-ranking officials of the Nazi regime and seven organizations. The IMT itself was groundbreaking: it was the first tribunal of its kind to prosecute serious crimes under international law. This was the first time that high ranking representatives of states were prosecuted, which “made it impossible to pass responsibility along to the ‘state’; immunity in one’s capacity as an officer of the state was no longer a reason for exemption from punishment.”¹⁸¹ The ultimate goal of the IMT was to prosecute crimes using international law in an international tribunal in order to “expand law into an effective, reliable legal system functioning on the basis of proceedings under the rule of law.”¹⁸² At the trial’s conclusion, all but three men were found guilty and twelve of these twenty-one were sentenced to death. Not one of these convictions charged SGBV as a war crime under customary international law.

The International Military Tribunal did not make mention to sexual and gender based violence in either its Charter or the charges brought to the perpetrators, but room for prosecuting the Third Reich for SGBV crimes was created in Control Council Law No. 10

¹⁸⁰ Ibid. Article 6c.

¹⁸¹ “From Nuremberg to The Hague,” 4.

¹⁸² Ibid. 4.

(1945). Control Council Law No. 10 (CCL No. 10) can reasonably be likened to the IMT Charter, but for Germany's national courts for crimes under international law. On December 20, 1945, Control Council Law No. 10 was issued and extended the work of the IMT. Article 2(1)(d), CCL No. 10 criminalized "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal"¹⁸³ and incorporated the prohibition of allowing immunity for heads of state from prosecution in Article 7 of the IMT. CCL No. 10 continued to prosecute crimes against peace, war crimes and crimes against humanity. While the definitions of crimes against peace and war crimes remained mostly unchanged, CCL No. 10's definition of crimes against humanity evolved substantially: it included rape. Aside from this, the explicit list of actions considered to be a crime against humanity remained virtually the same:

Murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, and 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.¹⁸⁴

This listing of rape set a definite milestone for re-introducing SGBV as an explicit crime against humanity under IHL/ICL. Few perpetrators, if any at all, of the 15,000 proceedings conducted before national courts under CCL No. 10 were charged with rape as a crime against humanity.

The International Military Tribunal for the Far East (IMTFE), the IMT's Pacific Theater counterpart, was founded by the Allied Powers in a special proclamation on January 19, 1946. The IMTFE was established by a special proclamation from General Douglas MacArthur, the Supreme Commander for the Allied Powers in the Pacific, who retained a significant amount of power over the court's proceedings. Differing from the IMT, the judges of the

¹⁸³ Nuremberg Trials Final Report Appendix D, Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, <http://avalon.law.yale.edu/imt/imt10.asp>, Article 2(1)(d).

¹⁸⁴ Ibid. Article 2 (1)(c), emphasis added.

IMTFE were a mix of judges from the Allied and Pacific Theater nations. General MacArthur appointed twelve judges, nine of which were from countries that signed the Japanese Instrument of Surrender.¹⁸⁵ Some doubts were expressed as to the partiality of MacArthur's appointees: the Philippine judge had survived a massacre by Imperial Japan and the Australian President of the tribunal previously prepared a report for his government on Japanese war crimes.¹⁸⁶ Sparing the Indian judge, none of the appointees were experienced in international law, and the Soviet and French judges did not speak either English or Japanese and required a translator.¹⁸⁷

Like the International Military Tribunal in Nuremberg, the IMTFE prosecuted three crimes: crimes against peace, conventional war crimes, and crimes against humanity. The IMTFE's definitions of crimes against peace and crimes against humanity are very similar to the original IMT definitions — not the CCL No. 10's with the inclusion of rape. Where the IMT's definition for conventional war crimes spanned numerous specific acts, the IMTFE's definition simply reads, “namely, the violations of the laws or customs of war.”¹⁸⁸ Perpetrators were charged with SGBV under this category of crimes. The IMTFE found “some Japanese military and civilian officials guilty of war crimes, including rape, because they failed to carry out their duty to ensure their subordinates complied with international law.”¹⁸⁹ Admiral Toyoda of the Imperial Japanese Navy was charged with violating the laws and customs of war by tolerating abuses made by his subordinates, including rape.¹⁹⁰ The IMTFE did not call any of the women who were

¹⁸⁵ Judges from: United States, United Kingdom, France, Soviet Union, Canada, China, Australia, New Zealand, India, Philippines, India, and The Netherlands.

¹⁸⁶ “From Nuremberg to The Hague,” 6.

¹⁸⁷ Ibid. 6.

¹⁸⁸ Library of Congress, *Special Proclamation: Establishment of an International Military Tribunal for the Far East*, January 19, 1946, <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0020.pdf>, Article 5(b).

¹⁸⁹ Meron, “Rape as a Crime,” 426.

¹⁹⁰ William H. Parks, “Responsibility for War Crimes,” *Military Law Review* 62 (1973), 69.

raped to testify.¹⁹¹ Toyoda was acquitted of all charges. The IMTFE only dedicated a mere paragraph in a judgment to the SGBV crimes that occurred during the Nanking Massacre¹⁹² Equally troubling, the widespread “notorious forcing of thousands of ‘comfort women’ into prostitution in Japanese military brothels was ... ignored by the IMTFE.”¹⁹³ The IMTFE did make notable progress from its counterpart in Nuremberg by explicitly listing rape as a crime against humanity and prosecuting it as such, but the IMTFE fell short in its approach towards prosecuting SGBV. Despite these shortcomings, the explicit presence of SGBV in the charges of war crimes sowed a seed for future normative development.

The Geneva Conventions and Additional Protocols were adopted in the wake of the Second World War in an attempt to further limit war crimes in future conflicts. The four Geneva Conventions, all adopted in 1949, cover four distinct groups of people. The first three concern themselves with soldiers: wounded and sick soldiers on land, wounded and sick soldiers at sea, and prisoners of war. The Fourth Geneva Convention discusses the protection of civilians, including those in occupied territories. All four Geneva Conventions share amongst themselves a Common Article Three, which importantly includes non-international armed conflict situations in its jurisdiction.

The Fourth Geneva Convention and Common Article Three make progress in international law addressing sexual and gender based violence. Article 27 of the Fourth Geneva Convention directly forbids SGBV: “Women shall be especially protected against any attack on

¹⁹¹ Richard Goldstone and Estelle Dehon, “Engendering Accountability: Gender Crimes Under International Criminal Law,” *New England Journal of Public Policy* 19 (2003), 123.

¹⁹² Ibid. 123.

¹⁹³ Ibid. 123.

their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”¹⁹⁴ The First and Second Additional Protocols dedicate room to SGBV in international and non-international armed conflicts. Protocol I includes an entire article on the treatment of women, regarding women as “the object of special respect,”¹⁹⁵ with subclauses two and three making reference to pregnant women or women with young children. These two subclauses give priority to pregnant women and mothers with dependent infants on detainment case processing and urges member states to avoid enforcing capital punishment on such women. Article 76 of Protocol I reiterates Article 27 of the Fourth Geneva Convention outlawing SGBV. Protocol II lists “outrages against personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, or any other form of indecent assault,”¹⁹⁶ as “prohibited in any time or place whatsoever.”¹⁹⁷ Despite the inclusion of rape and other forms of SGBV throughout the Geneva Conventions and Additional Protocols, SGBV crimes are not listed amongst the grave breaches subject to universal jurisdiction.

It is important to note the language that encompasses the provisions in the Geneva Conventions relating to women and its reliance on notions of honor and outrages upon personal dignity. The linkage of sexual and gender based violence to a woman’s honor is very problematic for the activists at both the *ad hoc* tribunals and the Rome Conference. The crimes enumerated in the Geneva Conventions established a hierarchy of crimes, with grave breaches at the top benefiting from universal jurisdiction and all other crimes following, including every SGBV

¹⁹⁴ Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949. Article 27.

¹⁹⁵ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, Article 76(1).

¹⁹⁶ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, Article 4(2)(e).

¹⁹⁷ Ibid. Article 4(2).

crime. The lack of incorporation of sexual and gender based violence as a grave breach and the focus on honor provisions in one of the most influential IHL documents proved to be a burden for women's activists working on the *ad hoc* tribunals and the Rome Statute. At Rome, feminist activists were in complete agreement over opposing the use of 'honor' in the Rome Statute.¹⁹⁸ Linking honor to SGBV crimes unnecessarily places an undue focus on the degradation of honor and distances the violent crime from the perpetrator.

The Second Wind: The *Ad Hoc* Tribunals

The stretch of decades following the post-war period, which produced the International Military Tribunal, the International Military Tribunal for the Far East, and the Geneva Conventions in the span of four years, remained silent on the front of international tribunals until the 1990s. For the majority of the twentieth century, the laws of war overlooked sexual and gender based violence. Richard Goldstone and Estelle Dehon write in their "Engendering Accountability: Gender Crimes Under International Law" on the nature of this phenomenon:

It is not really surprising, given that these laws were written by men drawing heavily on the male chivalristic 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.¹⁹⁹

The International Criminal Tribunals for the former Yugoslavia and Rwanda represent a shift away from this line of thought. The *ad hoc* tribunals have been characterized as having a

¹⁹⁸ Halley, "Rape at Rome," 57.

¹⁹⁹ Goldstone and Dehon, "Engendering Accountability," 123.

“specific intent to prosecute perpetrators of sexual assaults.”²⁰⁰ These tribunals differ greatly from the military tribunals of the 1940s that for the most part overlooked the clear existence of sexual and gender based violence.

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 as a response to the conflicts in the Balkans resulting from the breakup of Yugoslavia. On May 25, 1993, the Security Council passed Resolution 827 and formally created the ICTY. Resolution 827 invoked the Security Council’s Chapter VII powers in order to create a tribunal to prosecute violators of international humanitarian law in the former Yugoslavia. The ICTY is located in The Hague, Netherlands, as opposed to the site of conflict.²⁰¹ This was the first international criminal tribunal constructed by the United Nations and the first international criminal tribunal since the IMT and the IMTFE in the mid-1940s. This court is made up of three bodies: the chambers, the office of the prosecutor, and the registry. The chambers is led by the President, and contains three trial chambers and an appeals chamber, with three judges each trial chambers and five judges in the appeals chamber. The Office of the Prosecutor (OTP) is also divided into subsections: the Prosecution Division, Immediate Office, and Appeals Division. The Prosecution Division is responsible for the preparation and presentation of materials for the prosecution side of the trial. The Intermediate Office handles the functional side of the OTP — budgeting, formulating policy, transferring cases, et cetera. Finally, the Appeals Division handles all aspects of cases in the appeals process. The Registry maintains the practical functioning of the court — administrative duties, overall policy, and legal support are among its duties. The ICTY

²⁰⁰ Patricia Viseur Sellers and Kaoru Okuizumi, “Symposium: Prosecuting International Crimes: An Inside View: Intentional Prosecution of Sexual Assaults,” *Transnational Law & Contemporary Problems* 7 (1997): 45, 46-47.

²⁰¹ States that emerged out of the breakup of Yugoslavia: Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia, and Kosovo.

has pressed charges against 161 people and carried out 126 cases with the apprehension of Goran Hadžić, the last fugitive to the Court, on July 22, 2011.

At its inception, the ICTY indicated its concern to ensure that sexual and gender based violence crimes would be prosecuted. This intention is evidently clear when reading early Security Council Resolutions regarding Bosnia and Herzegovina prior to the formation of the ICTY. Security Council Resolution 798 (1992) is exemplary of this and is the first resolution to denounce rape in war, announcing that the Security Council was “appalled by reports of the massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina.”²⁰² Secretary General Boutros Boutros-Ghali highlighted the “widespread and systematic rape and other forms of sexual assault, including enforced prostitution.”²⁰³ The Secretary General made history when the proposed statute for the ICTY enumerated rape as a crime against humanity.²⁰⁴ When discussing the protection of victims in Article 23(c), the Secretary General noted the importance of providing sufficient protection to witnesses and victims, especially in cases of rape and sexual assault. The Secretary General took into account “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”²⁰⁵ when staffing the OTP. These suggestions made by the Secretary General were readily accepted and worked into the Statutes of both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. In the

²⁰² United Nations Security Council, *Bosnia and Herzegovina*, S/RES/798, (18 December 1992), [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/798\(1992\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/798(1992)).

²⁰³ United Nations Security Council, *Report of The Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, S/25704 (3 May 1993), http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf.

²⁰⁴ Ibid. Article 5(g)

²⁰⁵ Ibid. Article 15(b)(88).

Statute of the ICTY, the incorporation of sexual and gender based violence as a crime against humanity can clearly be seen in Article 5(g), which gave the ICTY jurisdiction over persons committing rape in armed conflict against civilians. The Statute addressed the widespread use of SGBV during the Yugoslav Wars, “expressing once again 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.”²⁰⁶ The Statute itself represents progress from the first international tribunal, where SGBV was ignored.

The International Criminal Tribunal for Rwanda, the ICTY’s later counterpart, continued to bolster the progress on prosecuting sexual and gender based violence made in the early 1990s. After taking very little action during the Rwandan genocide,²⁰⁷ the Security Council adopted Resolution 995 establishing the legal basis for the ICTR. Resolution 995 invoked its Chapter VII powers to establish another *ad hoc* court, the ICTR. The ICTR is very similar in structure to the ICTY, even sharing the Appeals Chamber with the ICTY in The Hague. The tribunal itself was situated in Arusha, Tanzania. The ICTR has indicted 93 individuals and of these cases, 62 were charged, fourteen were acquitted, ten were referred back to national courts, three fugitives were referred to the MICT,²⁰⁸ two were deceased before trials began, and two indictments were withdrawn prior to trial.²⁰⁹

The ICTR goes beyond its counterpart when prosecuting sexual and gender based violence. Where the Statute of the ICTY only explicitly listed rape as a crime against humanity,

²⁰⁶ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Updated Statute for the International Criminal Tribunal for the former Yugoslavia*, September 2009, 17.

²⁰⁷ An estimated 800,000 people were killed between April and July of 1994.

²⁰⁸ The United Nations Mechanism for International Criminal Tribunals.

²⁰⁹ “The ICTR in Brief,” United Nations Mechanism for the International Criminal Tribunals, accessed 12 December 2016, <http://unictr.unmict.org/en/tribunal>.

the ICTR includes SGBV within its definition of both war crimes and crimes against humanity.²¹⁰ In Article 4, in which the ICTR accounts for a nonexhaustive list of qualifying war crimes, “rape, enforced prostitution and any form of indecent assault”²¹¹ is listed as an outrage upon personal dignity. Substantial progress was made in the Statutes of the ICTY and ICTR themselves, further expansion of the scope in which sexual and gender based violence is prosecuted can be attributed to cases heard before the *ad hoc* tribunals.

Feminist Victories and Defeats on the ICTY and ICTR Statutes

Throughout the actual drafting process, feminists experienced a mixed bag of victories — mostly incremental and related to definitions within the statutes. Janet Halley argues that the largest feminist victory at the statute drafting process of the *ad hoc* tribunals related to the definition of rape as a crime against humanity. At the ICTY, rape as a crime against humanity is limited to taking place during an armed conflict. The ICTR Statute offers a more narrow definition of what qualifies as an armed conflict: the potential crime against humanity must be “committed as a part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”²¹² The strict definitions of armed conflict at the *ad hoc* tribunals is unfavorable in broadening the ability of SGBV to be prosecuted, and this expansion became a goal of feminist activists at Rome. Despite this, SGBV entered the pantheon of punishable IHL crimes with the caveat that it must fit the narrow crimes against humanity definitions, and this should be considered an ultimate victory for the *ad hoc* tribunals.

²¹⁰ United Nations Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, Article 3(g).

²¹¹ Ibid. Article 4(e).

²¹² Ibid. Article 3.

Ad Hoc Case Law as a Framework for the International Criminal Court

Both *ad hoc* tribunals tried groundbreaking cases regarding sexual and gender based violence. These cases were involved in not only the tribunals' existing definitions of crimes against humanity, but included landmark cases defining relationships between SGBV and genocide, war crimes, and torture, among others. This section analyzes a number of key cases that contributed to evolving definitions of rape and other forms of SGBV. The case law that emerged from both *ad hoc* tribunals greatly impacted the Rome Statute's approach to sexual and gender based violence.

Goldstone and Dehon note that the initial prosecution of SGBV were slowed by the initial cases chosen by the ICTY — in a rush to “issue its first indictment in order to obtain crucial funding from the General Assembly of the United Nations ... the decision was made to indict Dragan Nikolić.”²¹³ Nikolić was the Commander of the Sušica detention camp in Vlasenica; however, due to the funding-related time constraints the OTP decided to forego charging Nikolić with gender-related crimes. The decision not to investigate SGBV crimes did not last long. As the trial began, “evidence began to emerge that many of the women detained in the camp were subjected to sexual assaults, including rape.”²¹⁴ This led Judge Odio-Benito, one of two women judges at the time, to publicly call on the Office of the Prosecutor to include SGBV charges in the indictments. Citing witness testimony, the three Trial Chamber judges commented:

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

²¹³ Goldstone and Dehon, “Engendering Accountability,” 123.

²¹⁴ Ibid. 123.

with rape and other forms of sexual assault, either as a crime against humanity or as grave breaches [of the Geneva Conventions] or as war crimes.²¹⁵

Not only is this statement by the trial judges commendable in its efforts to include SGBV crimes in its first indictment, the language of the statement is not only limited to the possibility of prosecuting SGBV as a crime against humanity. Prosecuting SGBV as a war crime or a grave breach of the Geneva Conventions had the potential to be jurisprudentially groundbreaking for the future of SGBV prosecution throughout the ICTY. In 2003, the Appeals Chamber sentenced Nikolić to twenty years in prison for charges of crimes against humanity, with charges of sexual violence and rape.

Prosecutor v. Anto Furundžija (1998) was the third judgment to be rendered by the ICTY and again contributed significantly to SGBV prosecution. Furundžija, the local Commander of the Croatian Defense Council (HVO), stood trial for charges of war crimes for his involvement in the torture, rape, and sexual assault of a woman under interrogation by the HVO. The OTP based the charge of rape as a war crime on Article 4(2)(e) of Additional Protocol II of the Geneva Conventions, which explicitly (and problematically) includes rape as an outrage of personal dignity. The Tribunal readily agreed with the OTP and stated that “rape in the time of war is prohibited both by treaty law and, most significantly, as a matter of customary international law.”²¹⁶ The Tribunal charged Furundžija with aiding and abetting the rape of the victim and rape as an outrage upon personal dignity.²¹⁷ In response, Furundžija’s

²¹⁵ Judge Jorda, Judge Odio Benito, and Judge Riad, In re Dragan Nikolic: Decision of Trial Chamber I, Review of Indictment Pursuant to Rule 61 (The Prosecutor v Dragan Nikolic) IT-94-2-R61, (20 October 1995), paragraph 33.

²¹⁶ Goldstone and Dehon, “Engendering Accountability,” 126.

²¹⁷ “Furundzija Case: The Judgment of the Trial Chamber Anto Furundzija found guilty on both charges and sentenced to 10 years in prison,” last modified 10 December 1998, <http://www.icty.org/en/press/furundzija-case-judgement-trial-chamber-anto-furundzija-found-guilty-both-charges-and>.

defense accused Judge Florence Mumba, one of three judges assigned to his case, of bias due to her past involvement in the United Nations Commission on the Status of Women and their campaign to reaffirm rape as a war crime.²¹⁸ The case went on to the Appeals Chamber, where the following statement was released:

With regard to the affirmation 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 *Čelebići* 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.²¹⁹

The Appeals Chamber released this judgment in 2000, well after the Rome Statute had been adopted, but not yet entered into force. The ICTY's reference to the Rome Statute in this case is telling: Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) are two pieces of law that establish SGBV as self-standing war crimes, not a subset of outrages upon personal dignity. Thus, the Appeals Chamber suggests that rape in this case is also a self-standing war crime.²²⁰

This view of sexual and gender based violence has been reaffirmed by the ICTY in a second case, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković* (1996). The OTP initially charged the defendants with sixteen counts of rape as crimes against humanity; however, in July of 1998, the charges were amended to “charge six counts of rape as ‘a violation of the laws or customs of war, punishable under Article 3 of the statute of the tribunal and recognised by Additional Protocol II Article 4 (rape) of the Geneva Conventions,’ separate from

²¹⁸ *Prosecutor v Anto Furundzija* IT-95-17/1-A (21 July 2000), paragraphs 164-70.

²¹⁹ *Ibid.* Paragraphs 208 and 210.

²²⁰ Goldstone and Dehon, “Engendering Accountability,” 127.

the two remaining charges of outrages against personal dignity.”²²¹ The next year, the amended version of the charges against Kunarac et al encompassed three of seven counts of rape as a war crime with simplified language: “Rape, a violation of the laws or customs of war, punishable under Article 3 of the Statute of the Tribunal.”²²² In their judgment, the Trial Chambers found that “common Article 3 alone is sufficient in principle to form the basis of these charges under Article 3.”²²³ The decisions in both *Furundžija* and *Kunarac* worked towards establishing rape not only as a distinct crime against humanity, but also as a war crime separate from outrages against personal dignity. The Appeals Chamber wrote that “even if the perpetrator is motivated by the desire for sexual gratification, this does not rule out proof of intent for torture.”²²⁴ In addition to *Kunarac*’s contribution to defining rape as a distinct war crime, the case also made history for including sexual slavery as crime against humanity.²²⁵

Prosecutor v. Zejnil Delalić et al, also known as the *Čelebići* case²²⁶ broke ground in charging rape as a form of torture. In response to the Appeals Chamber’s statement in the previous paragraph, the OTP “began to take imaginative steps to prosecute gender crimes as war crimes and grave breaches of the Geneva Conventions.”²²⁷ One such tactic employed by the OTP has been to use rape and sexual assault as *actus reus*, “guilty deed in law Latin, of other war crimes or grave breaches enumerated in the Statutes of the Tribunals.”²²⁸ SGBV is used as a

²²¹ Ibid. 127

²²² Ibid. 127.

²²³ Ibid. 127. See Judgment, paragraphs 406-8.

²²⁴ Michelle Jarvis and Elena Martin Salgado, “Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice,” *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia, 2013), 104.

²²⁵ Ibid. 127. See Judgment, paragraphs 539-543.

²²⁶ Referring to the prison camp in which the aforementioned crimes took place.

²²⁷ Goldstone and Dehon, “Engendering Accountability,” 125.

²²⁸ Ibid. 125.

constituent element of another grave breach, i.e. torture, to charge the accused with a grave breach while incorporating sexual violence crimes. This method was used in the *Delalić* case, where prisoners of the Čelebići camp reported repeated incidents of rape. The ICTY conducted a thorough examination of the elements of torture and decided that rape constituted a constituent element: “The Trial Chamber considers rape of any persons to be a despicable act which strikes the very core of human dignity and physical integrity.”²²⁹ Goldstone and Dehon aptly express the importance of the conflation of 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.²³⁰

The recognition of rape as a form of torture makes clear the possibility that rape as torture may be prosecuted as a grave breach of the Geneva Conventions.²³¹ This case, in combination with the jurisprudence of the tribunal and a statement released by the International Committee for the Red Cross (ICRC) in 1991 affirmed the possible use of SGBV as torture to be a grave breach of the Geneva Conventions. This was a breakthrough in IHL, as grave breaches are subject to universal jurisdiction.

²²⁹ Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo IT-96-21-T (16 November 1998), Paragraph 495.

²³⁰ Goldstone and Dehon “Engendering Accountability,” 126.

²³¹ See: Geneva Conventions Articles 50, 51, 130, 147.

Moving to the ICTR, *Prosecutor v. Jean-Paul Akayesu* affirmed that certain acts of SGBV may constitute genocide. Following the pattern of many of the previously discussed cases, *Akayesu* originally did not encompass SGBV charges; however, upon hearing witness testimonies that referenced the widespread presence of SGBV in the Taba commune, where Akayesu was the mayor and his implicitly supported the crimes. Judge Navanethem, one of the few women judges on the ICTR, observed the presence of sexual violence. Her observation, in combination with a *amicus curiae* brief filed by the Coalition for Women's Human Rights in Conflict Situations requesting the addition of SGBV charges to the indictment, led the ICTR to prosecute Akayesu for such crimes. The tribunal used the outrages upon personal dignity mode of thought when examining this case, and recognized that "rape committed with the aid of a public official [Mayor Akayesu] is torture."²³² The ICTR found Akayesu guilty of crimes against humanity and "genocide for aiding, abetting, ordering, or encouraging, and sometimes witnessing, more than two dozen rapes and other sexual assaults at the bureau communal where, by dint of his authority, he could have prevented them."²³³ The judgment of *Akayesu* allowed for the possibility of sexual and gender based violence to be charged as a crime of genocide.²³⁴

Conclusion

There are significant parallels and overlap between the *ad hoc* cases and the ICC in both legislation and adjudication. These parallels, as we shall see, did not go unnoticed by feminists at Rome. "The *ad hoc* tribunals by trying and convicting perpetrators [of sex-based crimes]

²³² Diane Marie Amann, "Prosecutor v. Akayesu. Case ICTR-96-4-T," *The American Journal of International Law* 93 (1999), 197.

²³³ Ibid. 197.

²³⁴ This project does not focus on genocide and sexual and gender based violence, as this subject is very contentious within feminist activism, and it was not a centerpiece of the WCGJ's platform.

fomented a legal climate beyond its jurisdiction that made it conducive to draft several sex-based crimes into the Rome Statute of the ICC,”²³⁵ Patricia Viseur Sellers reflects. Due to the involvement WCGJ members in the *ad hoc* tribunals and vice versa, many of the arguments used at Rome are a reflection of the *ad hoc* drafting process outcomes. For example, feminists at Rome borrowed from lines of argument in the *Čelebići* case when advocating for the admission of rape in the Rome Statute’s list of grave breaches.²³⁶ It is of the utmost importance to consider the statutes and cases of the *ad hoc* tribunals when discussing the ICC due to the interconnected nature of the courts. The WCGJ’s ability to take hold of the anti-impunity momentum that spurred the move to tribunals was necessary to their overall success at the ICC, as well as the establishment of the Court itself. As this chapter has conveyed, the development of both international criminal tribunals and sexual violence crimes under international humanitarian law was sluggish until the 1990s, when anti-impunity swept the human rights movement. The timing of the justice cascade and the preeminence of the transnational women’s network by the UN conferences in the 1990s was no coincidence. Both events were the result of the “epochal ruptures of the late twentieth century”²³⁷ identified by Hoffmann from which human rights entered global politics as an irreplaceable concept. Without the two, it is unlikely that the International Criminal Court would have gained traction at the United Nations. Likewise, without the pre-established transnational women’s network at prior conferences, the WCGJ would not have been able to impact the Rome Statute on sexual and gender based violence.

²³⁵ Halley, “Rape at Rome,” 12. See also: Patricia Viseur Sellers, “Individual(s) Liability for Collective Sexual Violence,” *Gender and Human Rights* (2004), accessed 20 April 2017, doi: 10.1093/acprof:oso/9780199260911.001.0001, 10.

²³⁶ Ibid. 12. See page 67.

²³⁷ Hoffmann, “History and Human Rights,” 282.

Chapter Three: Feminist Activism and the Establishment of an International Criminal Court

“Women have a lot to say about how to advance women’s rights, and governments need to learn from that, listen to the movement and respond.”

- Charlotte Bunch²³⁸

This chapter is a critical examination of the Women’s Caucus for Gender Justice’s role in the foundation of the International Criminal Court. After experiencing the wide success of the transnational women’s network at UN conferences, the WCGJ was founded as a direct outgrowth of the transnational women’s network. The WCGJ benefitted from the extreme organization of the first modern network. I argue that this piece of the story to follow was the fortuitous confluence of the mainstreaming of VAW beginning two decades prior, the justice cascade that led to the rise of criminal tribunals, and the eventual founding of the ICC in the wake of the *ad hoc* tribunals. This project argues that these events were all brought about by the human rights wave of the twentieth century, as identified by Hoffmann.

Like the chapters 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 ICC by way of thick description. As previously discussed in the Introduction, this project is not a total endorsement of the WCGJ and is critical of the structuralist-feminist ideology that prevailed in the Caucus. The issues that the WCGJ fought for at negotiations was wide-sweeping, and for the sake of length, this chapter will focus on a handful of key issues related to war crimes and crimes against humanity. These subsections are as follows: gender and gender violence definitions; delinking honor and dignity from SGBV; listing SGBV as a grave breach; (en)forced

²³⁸ “Women Gather in the Name of Female Equality,” Cable News Network, last modified 4 June 2000, <http://www.cnn.com/TRANSCRIPTS/0006/04/wv.06.html>.

pregnancy; sexual slavery; and structural and procedural reforms. This chapter will trace just how the WCGJ was able to mainstream gender, examine the influence of *ad hoc* case law, and convey the confluence of interconnected events that allowed the WCGJ to accomplish what they did at Rome.

Establishing an International Criminal Court: A Short History

After the globe was shook by the horrors of the World Wars and the fall of the Soviet Union, a renewed sense of urgency developed for the creation of a permanent international criminal court. In 1989, Trinidad and Tobago asked the United Nations General Assembly to request that the International Law Commission to resume its work on an international criminal court, initially for the purpose of establishing a venue to prosecute international drug trafficking cases. The concept of an international criminal court was far from new, with direct efforts spanning as far back as 1899 from the First Hague Convention for the Settlement of International Disputes, the first international effort to proscribe war crimes. In 1907, the Second Hague Convention dealt with the issue of obligatory arbitration with support from major world powers, including the United States, Great Britain, and Russia. The interwar period saw an effort by the newly formed League of Nations to create a court. The League called for a Permanent Court of International Justice in 1920 to settle disputes between states with proposals from Allied powers “containing various international rules of culpability for human rights abuses and aggression (for starting wars with no legitimate pretext).”²³⁹ The League of Nations

²³⁹ Steven Roach, *Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law* (Lanham: Rowman & Littlefield Publishers, 2006), 21.

produced the Convention for the Creation of an International Court in 1937, however by that time the League was losing its credibility and not enough members signed.

The post-war era ushered in a new period of tribunals that set new standards for international criminal law. The military tribunals, discussed in Chapter 1, have been considered to be widely successful, despite their specific gender-related shortcomings. The tribunals were imperfect: Nuremberg garnered more media attention, which “may have had to do with the Nuremberg Trial becoming a show trial, as it did the disorderly manner in which the IMTFE was conducted.”²⁴⁰ This was in part due to legitimacy of the new United Nations Charter that “established the conditions for the suspension of state consent or the norm of non-intervention, [and] provided an important link between the tribunal and universal jurisdiction”²⁴¹ under Chapter VII of the Charter. The pioneering success of the military tribunals influenced the creation of the Universal Declaration of Human Rights and the Convention on Genocide in defining many modern day war crimes.

Between the post-war trials and the end of the Cold War, there was not very much in the way of progress on international criminal courts until the establishment of *ad hoc* tribunals in the early 1990s. In the post-Cold War period, ICTY and ICTR were created by the Security Council’s invocation of its Chapter VII powers. The ICTY and ICTR were applauded for their ability to eliminate the politics of victor’s justice by allowing the trials to be run by the more impartial United Nations. While both *ad hoc* tribunals were regarded as a major advancement in international criminal law, they faced major limitations foreshadowing many of the International Criminal Court’s shortcomings. In a physical sense, the tribunals were lauded as costly and

²⁴⁰ Ibid. 24.

²⁴¹ Ibid. 25.

inefficient: whereas by 2005, the ICTY accumulated a budget of \$650 million and the ICTR lacked the resources to prosecute many of the widespread perpetrators of the genocide. Second, the *ad hoc* nature of the tribunals limited their scope to a certain defined territory or region. Lastly, the tribunals were plagued by the contradiction of state sovereignty: “the permanent members of the Security Council would never have consented to allow the investigation of their own generals”²⁴² and had the ability to veto any prosecution of their own military personnel stationed in the region. In return, “the International Criminal Court provides an arguably more autonomous, less entrenched legal institution, insofar as it is rooted in treaty law or state consent.”²⁴³ While the International Court of Justice at The Hague handles cases between states, at the time, no court existed to handle cases between individuals.

Almost a hundred years after the First Hague Convention, the International Law Commission produced a draft statute for the International Criminal Court at the behest of Trinidad and Tobago. Throughout 1995 and 1997, preparatory committees met six times to draft the statute for the International Criminal Court, and in June of 1998, 168 state delegations and several delegates from international organizations met to negotiate the Rome Statute. At the beginning of the conference, the draft statute produced by its formal preparatory committee was riddled with over 1,700 square brackets, each marking points of disagreement between states. The group of states that emerged to work on the draft statute, mostly European and several Latin American states, became known as the Like-Minded Group:

The Like-Minded Group 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

²⁴² Ibid. 32.

²⁴³ Ibid. 32.

themselves as more able to construct international architecture that would be perceived as fair and legitimate by the rest of the world ... powerful states with complex interests had limited ability to advance impartial international justice.²⁴⁴

The P5 remained wary of the statute and sought to preserve their Security Council privileges.

The P5 suggested that the Security Council, as to be expected, should control the new court; however, this was met with great resistance, especially by Germany. 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 small and weak countries, never to violators in powerful nations.”²⁴⁵ In the summer of 1997, Singaporean diplomats offered an important compromise between the Security Council and the LMG: the Council could possess limited powers over the Court, and if the Council agrees that a particular inquiry were to be counterproductive, they could halt the investigation for a certain period of time. The Security Council would have the ability to refer cases to the court, but the P5 members would not be able to block cases on their own. Several elections in the P5 countries conveniently strengthened the possibility for the ICC’s success: President Bill Clinton was reelected; in May of 1997, Britain’s left-leaning Labour Party came into power for the first time in almost two decades with Tony Blair as Prime Minister; and in France, the Pluralist Left²⁴⁶ won a majority in the National Assembly. Soon after, Britain joined the LMG and supported Singapore’s compromise and France decided that it “had to end up on the ‘right’ side of

²⁴⁴ David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press, 2014), 39.

²⁴⁵ Ibid. 41.

²⁴⁶ In France, a coalition of the Socialist Party, French Communist Party, Greens, Radical Left, and the Citizen’s Movement.

negotiations, but that the concerns of the military had to be addressed.”²⁴⁷ The Clinton administration remained ambivalent to the Court, still desiring P5 control. Prior to Britain joining the LMG, the P5 attempted to propose 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.”²⁴⁸ Despite the short burst of hope with the reelection of President Clinton, most advocates for the Court were aware that the United States and other major powers would not support it. Richard Dicker of Human Rights Watch recalled the desire to set in motion a longer process:

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.²⁴⁹

On July 17, 1998, the Rome Statute was adopted in a vote of 120-7 with 21 abstentions.²⁵⁰ The final version of the Rome Statute reflected the compromises made, “requiring the ICC to obtain Security Council permission to proceed and precluding the Security Council from any ability to stop investigations.”²⁵¹ The compromise allows the Security Council to perform its Charter VII duties while preventing the P5 from unilaterally abusing their veto power to halt investigations. Almost fifty years after the success of the Allied-led International Military Tribunals, “the most powerful states were losing their grip on the mechanisms of international justice.”²⁵² After nearly

²⁴⁷ Ibid. 43.

²⁴⁸ Ibid. 49-50.

²⁴⁹ Ibid. 49.

²⁵⁰ The United States, China, Israel, Syria, Iraq, Cuba, and Yemen opposed the statute.

²⁵¹ Christopher Joyner, *International Law in the 21st Century: Rules for Global Governance* (Lanham: Rowman & Littlefield Publishers, 2005), 157.

²⁵² Bosco, *Rough Justice*, 51.

a century of attempts to institutionalize international criminal accountability, the International Criminal Court was established.

The International Criminal Court is governed by complementarity, a principle that distinguishes it from the *ad hoc* tribunals. Complementarity limits the scope of the International Criminal Court's jurisdiction by recognizing the primacy of domestic jurisdiction and the right of the state to prosecute international crimes. The International Criminal Court "may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings."²⁵³ Complementarity intended to allow states *prima facie* to investigate and prosecute its own crimes. This increases efficiency, as "states will generally have the best access to evidence and witnesses and the resources to carry out proceedings."²⁵⁴ Complementarity is a reasonable compromise between state sovereignty and the jurisdiction of the Court. State sovereignty is respected until it is proven that the state is unwilling or unable to prosecute in a timely and effective manner. While complementarity is an important advancement in international law, it also complicates and slows the trial process by entangling it with state cooperation.

The Road to Rome: Feminists in the Negotiation Process

As seen in the various United Nations conferences discussed in Chapter 1, by the mid-1990s NGOs grew to be an integral component of negotiations. In 1996 during PrepComI process, William Pace formed the Coalition for the International Criminal Court (CICC) as a

²⁵³International Criminal Court. *Informal expert paper: The principle of complementarity in practice*. ICC-OTP, 2003, <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>.

²⁵⁴ Ibid.

means of coordinating pro-ICC NGOs.²⁵⁵ While the primary focus of the CICC was to promote the creation of the ICC, the CICC also became an advocate for the involvement of NGOs in PrepComs and the Conference itself. Throughout the PrepComs, the CICC unsurprisingly found allies in the Like-Minded Group. At the third meeting of PrepComI, NGOs were permitted to register for all informal and formal meetings.²⁵⁶ By the time of the Rome Diplomatic Conference, the United Nations released a resolution requesting to allow the participation of NGOs.²⁵⁷ NGO input grew to be valued more as expertise as opposed to lobbying, signaling a shift from Mexico City, where NGOs struggled to involve themselves. Zoe Pearson, a legal scholar at Keele University, interviewed delegates at Rome and wrote:

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 [S]tates to their positions and assisted the good working relationships that evolved between many NGOs and state delegations.²⁵⁸

Within the CICC, the 316 members split off into four working groups, including one on women — the Women’s Caucus for Gender Justice.²⁵⁹

The Women’s Caucus for Gender Justice was a direct outgrowth of the transnational women’s network that solidified at the UN conferences discussed in Chapter 1. As such, the WCGJ can be very clearly identified as a international and domestic nongovernmental research and advocacy organization²⁶⁰ network using Keck and Sikkink’s classifications. Within Keck and

²⁵⁵ Fanny Benedetti and John L. Washburn, “Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference,” *Global Governance* 5 (1999), 8-9.

²⁵⁶ Ibid. 23.

²⁵⁷ General Assembly resolution 52/160, *Establishment of an International Criminal Court*, A/RES/52/160 (Dec. 15, 1997), <http://www.un.org/ga/documents/gares52/res52160.htm>, paragraph 9.

²⁵⁸ Zoe Pearson, “Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law,” *Cornell International Law Journal* 39 (2006), 272.

²⁵⁹ Janet Halley, “Rape at Rome,” 21.

²⁶⁰ Keck and Sikkink, *Activists beyond Borders*, 9.

Sikkink's typology of networks, the WCGJ should be categorized as an *information politics* network.²⁶¹ At the PrepComs and Rome, the WCGJ was the only coalition that focused on gender issues and served as the primary source of information and guidance for this topic.²⁶² Keck and Sikkink's definition of an information politics network does not completely fit the WCGJ, however. Keck and Sikkink make a careful distinction of information politics networks providing something separate from what 'qualified' experts do. The WCGJ was inherently a group of legal experts, with many members who would likely argue that the WCGJ provided alternate, *expert*, sources of information. Due to the level of access that NGOs were afforded during Rome process, the WCGJ served as an information network from within. The Women's Caucus should be viewed as an extension of the transnational women's network against VAW. Given this, as well as the clear fit within Keck and Sikkink's definition of an activist network, the WCGJ should be classified as a transnational network.

The Women's Caucus for Gender Justice emerged as the leading feminist group widely credited for incorporating a "stronger gender perspective throughout ... [the Rome Statute's] text."²⁶³ The WCGJ was an officially recognized²⁶⁴ coalition of women's NGOs consisting of 200 affiliates by the beginning of the Conference. The WCGJ is comparable to the Women's Caucuses of Rio, Vienna, and Cairo in its mission: "it consolidated a coherent platform for

²⁶¹ Though the Women's Initiative for Gender Justice, the WCGJ's post-Rome form would likely be placed under *accountability politics*.

²⁶² "Nonstate actors gain influence by serving as alternate sources of information ... These aims require clear, powerful messages that appeal to shared principles, which often have more impact on state policy than advice of technical experts. An important part of the political struggle over information is precisely whether an issue is defined primarily as technical — and thus subject to consideration by "qualified" experts — or as something that concerns a broader global constituency." Keck and Sikkink, *Activists beyond Borders*, 19.

²⁶³ Leila Nadya Sadat and S. Richard Carden, "The New International Criminal Court: An Uneasy Revolution," *Georgetown Law Journal* 88 (2000), 396.

²⁶⁴ Nicole Eva Erb, "Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court," *Columbia Human Rights Law Review* 29 (1998), 425.

feminist reform and lobbied hard in the Rome Statute negotiations.”²⁶⁵ Many of the activists on the WCGJ were active contributors to law reviews, where they testified to their own successes.²⁶⁶ Barbara Bedont and Katherine Hall-Martinez credit the WCGJ’s success to their “persistent lobbying efforts.” Hilary Charlesworth concurs: “This recognition ... was the result of considerable work and lobbying by women’s organizations.”²⁶⁷ Bedont and Hall-Martinez argue that “women’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.”²⁶⁸ The WCGJ has been commended for its influence in the codification of SGBV crimes as crimes against humanity and war crimes; however, the scope of the Caucus was far more broad and included advocacy for the protection of victims and witnesses, fair representation and gender expertise on the Court, and work on specific definitions within the Rome Statute, such as *gender* and *gender violence*.

This Chapter will begin by exploring goals of the Women’s Caucus for Gender Justice before and throughout the Rome Conference and will conclude with an analysis of the respective success of their goals. Members of the WCGJ and judges at the ICC alike often wrote accounts of their work in law reviews and provided a unique window into the *modus operandi* of their movement. Janet Halley reflects that initially there appeared to be a substantial amount of consensus:

[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

²⁶⁵ Janet Halley, “Rape at Rome,” 23.

²⁶⁶ Ibid. 23.

²⁶⁷ Hilary Charlesworth, “Feminist Methods in International Law,” *American Journal of International Law* 93 (1999), 386.

²⁶⁸ Bedont and Hall-Martinez, “Ending Impunity,” 66.

hierarchy of IHL/ICL codification as they could get them, and in terms that derive from their shared feminist understanding of them.²⁶⁹ Thus, the feminist goals are twofold: push SGBV crimes up hierarchically and influence the legal language to reflect a shared value system. While there was a clear consensus on a majority of feminist goals, sharp disagreement emerged over two subjects: the role of SGBV in genocide, and sexual slavery, enforced prostitution, and sex trafficking.

Defining Gender & Gender Violence

The first major challenge faced by members of the WCGJ was over the inclusion of ‘crimes of gender violence’ into the final version of the Rome Statute. This ambition was new to the ICC, with references to ‘gender violence’ nowhere to be found in the *ad hoc* tribunals.²⁷⁰ Bedont and Hall-Martinez briefly explain the difference between ‘sexual violence’ and ‘gender violence’:

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.”²⁷¹

While the ‘gender violence’ is inclusive of ‘sexual violence,’ the reverse is untrue, as ‘sexual violence’ disregards the expansive forms of violence that people face based on their societally prescribed gender roles. 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

²⁶⁹ Halley, “Rape at Rome,” 49-50.

²⁷⁰ Ibid. 82.

²⁷¹ Bedont and Hall-Martinez, “Ending Impunity,” 68.

marriage).”²⁷² Not only would the proposed addition of gender violence cover more abuses faced by women, this new crime would incorporate practices that affect men and LGBTQ+ people. On occasion in the WCGJ’s Recommendations, they would offer salient examples of the ways in which gender violence affects men: “Gender based persecution ... is involved when young boys are either killed to prevent their becoming soldiers or coerced and humiliated into becoming killers.”²⁷³

This conflict is complicated by the seemingly odd definition of gender ultimately adopted in the Rome Statute. As seen with the previous conflicts between Women’s Caucuses and conservative state alliances at UN conferences, negotiations on material relating to a plethora of gender-based issues (e.g. sexuality or abortion) are tenuous at best and require an extreme amount of compromise. The definition of ‘gender’ in Article 7(3) of the Statute reads: “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. The term ‘gender’ does not indicate any meaning different from the above.”²⁷⁴ The conflation of sex and gender stands out: while it seems to erase the difference of the two terms, the definition provides for sex/gender to be understood within societal contexts. The United Nations has historically neglected to define gender in multilateral human rights documents due to a lack of consensus between states as to the actual meaning of gender.²⁷⁵ The final definition of gender within the Statute garnered criticism from those within

²⁷² Halley, “Rape at Rome,” 84.

²⁷³ Ibid. 84.

²⁷⁴ United Nations, *Rome Statute of the International Criminal Court*, A/CONF.183/9 (17 July 1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, Article 7(3).

²⁷⁵ Valerie Oosterveld, “Gender and the International Criminal Court,” *Harvard Human Rights Journal* 18 (2005), 66.

the WCGJ, including Charlesworth and Copelon, for its “peculiar and circular”²⁷⁶ language, the result of intense negotiation. Given the inclusion of “within the context of society” in the article, it is doubtful that the ICC will adopt a biologically determinist interpretation of ‘gender.’ Further, Valerie Oosterveld, legal theorist and member of the Canadian delegation to Rome, argues, “the criticisms of the Rome Statute’s definition of ‘gender’ highlight the fact that the term is undertheorized in international law.”²⁷⁷

Oosterveld’s suggestion — that gender is underdeveloped under international law — may account for the difficulties experienced by the WCGJ in establishing the concept of gender violence in the Rome Statute. The WCGJ likely faced a strong resistance from many states given their structuralist-feminist framing of gender violence. Janet Halley argues that the WCGJ often erased the trauma faced by men and boys in favor of a model that highlighted the subordination of women: “Trauma to boys is problematic because it produces an ideology of ‘masculinity,’ ratifying ‘patriarchal values,’ and thus discriminates against *women*.”²⁷⁸ Similarly, from a WCGJ Recommendation:

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, for example, 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.²⁷⁹

In a subsequent briefing paper, the WCGJ offers a distinctly structuralist interpretation of the *Tadić* case: “A man was tortured when another prisoner was forced to bite off his testicle. The

²⁷⁶ Rhonda Copelon, “Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law,” *McGill Law Journal* 46 (2000), 236.

²⁷⁷ Oosterveld, “Gender and the International Criminal Court,” 82.

²⁷⁸ Halley, “Rape at Rome,” 85.

²⁷⁹ *Ibid.* 85.

sexual organs of the man were targeted in order to take away his male identity and make him like a woman.”²⁸⁰ The WCGJ’s undue focus on male identity in this statement is rather problematic and ushered a resistance from at least sixteen states.²⁸¹ The majority of the states strongly opposing the WCGJ’s attempt to include gender violence in the Rome Statute mostly came from the ‘Unholy Alliance’ — Catholic and Islamic states heavily influenced by their religious roots. Gender violence was initially present at PrepComI, but it eventually became the subject of an intense battle. The WCGJ ultimately surrendered in order to preserve other victories. Bedont and Martinez-Hall reflect, “The dispute regarding terminology threatened the inclusion of certain gender crimes, of a non-discrimination clause, and of special protective measures under the procedural provisions.”²⁸² On the matter of gender violence, the WCGJ were sharply defeated.

Honor, Dignity, & The Geneva Conventions

Due to the tendency of major international humanitarian law documents to discard SGBV as a subsidiary crime — affecting the “honor” of a woman, yet not serious enough to be a grave breach — feminists sought to elevate SGBV to a grave breach of the Geneva Conventions at Rome. Jennifer Green, Rhonda Copelon, Patrick Cotter, and Beth Stephens published a lengthy document, nicknamed the CUNY Clinic Memorandum,²⁸³ essentially a feminist

²⁸⁰ Halley, “Rape at Rome,” 86.

²⁸¹ Ibid. 87. Opposing states: Qatar, Libya, Egypt, Venezuela, Guatemala, the United Arab Emirates, Saudi Arabia, Kuwait, Syria, Turkey, Sudan, Bahrain, Iran, Yemen, Brunei, and Oman. Canada, Australia, New Zealand, and Samoa consistently supported this.

²⁸² Bedont and Hall-Martinez, “Ending Impunity,” 68.

²⁸³ Jennifer Green, Rhonda Copelon, Patrick Cotter, and Beth Stephens, “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,” *Hastings Women’s Law Journal* 5 (1994). In short, the CUNY Clinic Memorandum.

blueprint for a new court. The CUNY Clinic Memorandum is a strong example of the use of law review articles to outline objectives far before the Rome Conference occurred. Green, Copelon, Cotter, and Stephens argue extensively for the inclusion of SGBV crimes (specifically rape, forced prostitution, and forced pregnancy) as a grave breach: “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 and the International Committee of the Red Cross.”²⁸⁴ This memorandum, written in 1994, relies on drawing the link between SGBV (not grave breaches) and torture (grave breach) in order to assert that SGBV crimes are, in fact, able to be categorized as such as opposed to honor crimes.²⁸⁵ It should be noted that the *Deliać* case from the ICTY uses this line of reasoning to charge rape as a constituent element of torture in 1996.²⁸⁶ Hilary Charlesworth and Christine Chinkin assert that another reason to view SGBV as a grave breach instead of a crime against humanity lies in the individualization of the crime. By charging a rape, for example, as a crime against humanity, this would reason that the rape caused an ultimate harm to humanity. If the rape were to be considered a grave breach, the crime may be addressed as an individualized wrong and offer the possibility for a focus on gender in the proceedings.²⁸⁷ The use of torture to constitute rape as a grave breach was less than ideal for many, as the ultimate goal of the WCGJ at Rome was to explicitly stipulate that rape itself was a grave breach. In order to move SGBV up the IHL

²⁸⁴ Ibid. 236.

²⁸⁵ “[Rape, enforced pregnancy, and forced prostitution] constitute forms of “willful torture and inhuman treatment” and they “willfully caus[e] great suffering or serious injury to body or health.” Ibid. 236.

²⁸⁶ See page 67.

²⁸⁷ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000), 315-21.

hierarchy, the WCGJ had to transgress the glaring obstacle of regarding SGBV as a violation of honor and dignity.

As recently as the ICTR Statute, language still tied SGBV to outrages upon personal dignity.²⁸⁸ Delinking SGBV crimes from honor became central to feminists working on the Rome Statute and was an area where most were in agreement. Valerie Oosterveld argues, “The 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.”²⁸⁹ The Geneva and Hague Conventions’ proscription of SGBV crimes as a morality issue diminishes its gravity and distances the perpetrator from the crime by focusing on the supposed ‘degradation’ of the woman. This sentiment is echoed by numerous feminist authors who urge the Rome Statute to forsake this antiquated ideology. Moreover, Hilary Charlesworth notes, “[Article 27 of the Geneva Conventions] assumes 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.”²⁹⁰ Delinking SGBV and honor was an attempt to send the feminist message that “rape is a crime of *sexual violence*,”²⁹¹ a fairly radical message for the 1990s and an immense achievement. Addressing sexual violence as sexual violence massively broadened the IHL lexicon: “[SGBV] is a sexual *assault*; it is *violent* and *physical*; it causes *physical and emotional (or physical and psychological) harm*; it is *painful*.”²⁹²

²⁸⁸ ICTR Statute, Article 4(e): “Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”

²⁸⁹ Valerie Oosterveld, “Sexual Slavery and the International Criminal Court,” *Michigan Journal of International Law* 25 (2004), 613.

²⁹⁰ Hilary Charlesworth, “Feminist Methods in International Law,” *American Journal of International Law* 93 (1999), 386.

²⁹¹ Halley, “Rape at Rome,” 58.

²⁹² *Ibid.* 59.

The WCGJ was partially successful in their attempts to reclassify SGBV. The WCGJ urged drafters at Rome to inscribe rape and other forms of SGBV as a grave breach of the Geneva Conventions, prosecutable as war crime, and classified this as “of fundamental importance;”²⁹³ however, SGBV continued to be left out in this respect. The Rome Statute continued to use the phrase ‘outrages upon personal dignity,’ while divorcing sexual violence from this article and removing the use of the word ‘honor.’ Article 8.2(b)(xxi) addresses personal dignity as a violation of the customs of war: “outrages upon personal dignity, in particular humiliating and degrading treatment.”²⁹⁴ This article differs starkly from the ICTR Statute in that it removes all references to SGBV as a form of an outrage upon personal dignity.²⁹⁵ The Rome Statute dedicates an article solely to SGBV crimes: “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”²⁹⁶ are all offenses prosecutable as a serious violation of the laws and customs of war. Language at the end of Article 8(2)(xxii) deems that ‘other forms’ of sexual violence may “constitute a grave breach of the Geneva Conventions.” Although the WCGJ was unable to codify SGBV crimes as grave breaches, this sentence allows for the possibility that sexual violence may be prosecuted in conjunction with grave breaches, as enumerated in Article 8(2)(a). This development was clearly not ideal for the WCGJ but, as Bedont and Hall-Martinez write, “this characterization of sexual violence crimes is ... important

²⁹³ Ibid. 76. See: Women’s Caucus for Gender Justice, “Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court,” United Nations Headquarters, August 4-15, 1997.

²⁹⁴ Rome Statute of the International Criminal Court, Article 8(2)(xxi).

²⁹⁵ See ICTR Statute, Article 4(e): “Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”

²⁹⁶ Rome Statute of the International Criminal Court, Article 8(2)(xxii).

to the ICC's capacity to indict sexual violence crimes in multiple ways."²⁹⁷ The Rome Statute, for the first time, delinked honor and dignity from sexual violence crimes.

(En)forced Pregnancy

Janet Halley traces notion of prosecuting enforced pregnancy back to a WCGJ Recommendation. This recommendation, like the definition of gender in the Statute, was the site of fierce debate between the WCGJ and the Holy See, who sought to delete the term. The provision including enforced pregnancy as a crime was viewed by the Holy See to endanger national laws criminalizing abortion. Similar to the final definition of gender in the Rome Statute, the definition of enforced pregnancy was the result of compromises on part of the WCGJ. Halley writes that this compromise may have occurred to "disable the religious conservative attack, to prevent disagreement from emerging within the WCGJ itself, or both."²⁹⁸ In order to quell disagreement, the WCGJ offered the use of 'forced pregnancy,' over 'enforced pregnancy,' to indicate that the crime "is a violent crime, committed with violent intent."²⁹⁹ Second, the scope of enforced pregnancy was narrowed to exclude national anti-abortion laws: "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."³⁰⁰ Less literature on the enforced versus forced pregnancy debate is available in comparison to other areas. Although the end definition of forced pregnancy was the result of

²⁹⁷ Bedont and Hall-Martinez, "Ending Impunity," 70.

²⁹⁸ Halley, "Rape at Rome," 89.

²⁹⁹ Ibid. 89.

³⁰⁰ Ibid. 89.

compromise, the criminalization of the practice should still be considered an overall victory for the WCGJ.

Enforced Prostitution, Trafficking, & Sexual Slavery

This set of reforms differed from the previously discussed ones in that the issue of sexual slavery illuminates a rift between feminists in terms of ideology. The rift that occurred between structuralist and liberal feminists on the WCGJ on this topic has been subject of much debate, and is still very controversial. Structuralist feminists,³⁰¹ as per Janet Halley, supported the view that all sex work regardless of consent constitutes sexual slavery. Feminists in this vein tended to conflate prostitution, trafficking, and sexual slavery.³⁰² On the opposite side, liberal feminists tended to differentiate between consensual sex work and ‘enforced prostitution.’ This battle over sexual slavery can be traced back to the moral campaigns of the nineteenth century that attempted to link trafficking to slavery.³⁰³

One may draw the conclusion that the inclusion of language regarding trafficking of women and children in the Rome Statute to be the result of WCGJ advocacy, the Recommendations may point to the exact opposite. The December 1997 Recommendations used language to describe, but skirt around, trafficking: “enslavement and slavery-like practices in all their forms, including by sale, deception, coercion, or threat.”³⁰⁴ At the March 1998 PrepCom the WCGJ actively opposed the use of the term trafficking, “because of the need for review of

³⁰¹ “By 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.” See: Halley, “Rape at Rome,” 91.

³⁰² Ibid. 92.

³⁰³ See: Teresa Billington-Greig, “The Truth About White Slavery,” *The English Review* (1913).

³⁰⁴ Halley, “Rape at Rome,” 93.

the international definition of trafficking, the Women's Caucus suggests instead that the crime be described as 'trade in and coercive or deceptive transport of persons.'³⁰⁵ The preceding quote outlines a trend in disagreement that would also appear over 'enforced prostitution': due to the lack of definitional consensus and disagreement over scope, the WCGJ was unable to endorse the inclusion of such terms. Halley argues that the WCGJ's objections were actually a poor tactic to mute the disagreement from within.³⁰⁶

The presence of both liberal and structural feminists in the WCGJ contributed in part to the perceived conflict. For example, the December 1997 Recommendations contained both structuralist and liberal ideologies in direct conflict:

[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 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.³⁰⁷

This statement incorporates both structuralist and liberal feminist points of view on sex work, in which they are diametrically opposed. The structuralist statement conflates enforced prostitution as sexual slavery and rape, and references the male domination of women. The liberal statement

³⁰⁵ Ibid. 93. See also: WCGJ, "Gender Justice and the ICC."

³⁰⁶ Ibid. 94.

³⁰⁷ Ibid. 95. See: WCGJ, 12/97 Recommendations. Emphasis added.

does not say that all enforced prostitution is sexual slavery, thereby leaving the possibility that not all enforced prostitutions are equivalent to sexual slavery.³⁰⁸ This passage may point to disagreement within the WCGJ, or it may be a result of their inability to control the final definition in the Rome Statute and a careful attempt to safeguard enforced prostitution from being diminished to a lesser crime.

In Oosterveld's "Sexual Slavery and the International Criminal Court: Advancing International Law," the same strange ideological disagreement is present. Halley argues that Oosterveld affirms the sexual autonomy of women as her highest-order issue, but she also adopts a position sympathetic to the structuralist inclusion of 'sexual slavery' as a crime.³⁰⁹ Sexual slavery for Oosterveld manifests itself in defenses of consent by perpetrators: even if the victim claims consent, this should not be a permitted defense by perpetrators. "The argument was that women who had sex with combatants from the other side of an armed conflict were operating in coercive circumstances, and any consent they gave was meaningless, not real consent at all."³¹⁰ For Halley, Oosterveld is a complex figure. She declares Oosterveld as "one of the Rome process's liberal feminists,"³¹¹ but points to her adoption of many structuralist arguments.³¹² Using Oosterveld as an example, Halley argues that the appearance of consensus amongst feminists at Rome may actually have been a performed solidarity with the prevailing structuralists.³¹³

The WCGJ ultimately experienced mostly defeats on the front of sexual slavery, enforced prostitution, and trafficking. In the final Statute, 'enslavement' was included as a branch of

³⁰⁸ Ibid. 95.

³⁰⁹ Ibid. 95

³¹⁰ Ibid. 99.

³¹¹ Ibid. 100.

³¹² "She supported structuralist reforms in structuralist terms. She argued for a shift to autonomy that would strengthen the liberal feminist variant." See: Halley, "Rape at Rome," 100.

³¹³ Ibid. 100.

crimes against humanity: “Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking persons, in particular women and children.”³¹⁴ The WCGJ never advocated for the use of the term ‘enslavement’ or ‘trafficking’ to describe sexual slavery. Subsequently, the inclusion of the phrase “in particular, women and children” is one that feminism consistently denounces.³¹⁵ The placement of ‘sexual slavery’ alongside rape in the lists of sexual offenses in the Rome Statute as a war crime (international and internal) and crime against humanity was an overall positive gain for the WCGJ.³¹⁶

Procedural and Structural Gender Mainstreaming

The International Criminal Court saw expansions in its procedural mechanisms relating to evidence and protections for witnesses and victims with regard to sexual and gender based violence. The ICC, influenced by *ad hoc* case law, adopted a number of provisions in the Rules and Procedures of Evidence of the ICC that codified “procedural advances in relation to gender crimes pioneered by the Tribunals.”³¹⁷ These progressions, especially in respect to structural aspects, are clear manifestations of gender mainstreaming at the International Criminal Court.

Rule 63 forbids the Court from imposing requirements that corroboration is established to prove crimes, and singles out “crimes of sexual violence.”³¹⁸ Rule 70 establishes that consent cannot be inferred when force is used, the victim is incapable of consenting, from silence or lack

³¹⁴ Rome Statute of the International Criminal Court, Article 7(1)(c).

³¹⁵ For example, refer to the previous discussion on the Hague and Geneva Conventions.

³¹⁶ Halley, “Rape at Rome,” 108.

³¹⁷ Goldstone and Dehon, “Engendering Accountability,” 136.

³¹⁸ Rules and Procedures of Evidence of the International Criminal Court (International Criminal Court: The Hague, 2013), Rule 63.

of resistance, or from any prior or subsequent sexual conduct of victims.³¹⁹ Rule 71 adds to Rule 70, declaring that sexual conduct of victims is inadmissible to the Court. Rules 87 and 88 grants protective measures to witnesses and victims, with Rule 88(5) making “special protective measures” for victims of sexual violence: “A Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to victims of crimes of sexual violence.”³²⁰ Lastly, Rules 16-19 established the ICC’s Victims and Witnesses Unit,³²¹ and held the Registrar responsible for “taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.”³²²

The Rome Statute orders the incorporation of women into the leadership structure of the Court. Article 36(8)(a) requires the “fair representation of female and male judges” to be considered in the selection process, “as well as fair representation of females and males in the selection of staff in the Office of the Prosecutor and in all other organs of the Court.”³²³ In 2003, the first election of the Court’s eighteen judges yielded seven women. Since the historic election, a total of fourteen women have served as judges at the ICC. In comparison, the International Court of Justices has had four women justices since its inception in 1946.

Outside of the ICC’s skeleton, the OTP is “required to appoint advisers with legal expertise on specific issues including sexual and gender violence [Article 42(9)].”³²⁴ Given the expansive influence feminists exerted at Rome as experts, both through NGOs and within

³¹⁹ Ibid. Rule 70.

³²⁰ Ibid. Rule 88(5).

³²¹ Goldstone and Dehon, “Engendering Accountability,” 137.

³²² Rules and Procedures of Evidence, Rule 16(1)(d).

³²³ Goldstone and Dehon, “Engendering Accountability,” 136.

³²⁴ Ibid. 136.

delegations themselves, it is unsurprising that the language of expertise was included in the final document. As previously discussed,³²⁵ a facet of Governance Feminism was the move to brand “feminism as expertise.”³²⁶ At Rome, the WCGJ sought to bring experts on SGBV to the ICC, both as judges and advisers. Bedont and Hall-Martinez write, in regards to ICC judges, “The ICTY and ICTR are case studies on why it is so crucial to include women as well as men with appropriate expertise in international bodies charged with investigating war and conflict situations.”³²⁷ Bedont and Hall-Martinez’s “call for *women* was a call for *feminists*.”³²⁸

Conclusion

The Women’s Caucus for Gender Justice is certainly a network by Keck and Sikkink’s standards. The WCGJ is an offshoot of the original transnational women’s network discussed in Chapter 1. In the PrepComs and at the Rome Conference, the WCGJ “[became] part of a larger policy [community] that group[ed] actors working on an issue”³²⁹ by attracting membership and support that included members of delegations and support from former *ad hoc* participants. The WCGJ sought to “promote norm implementation by pressuring target actors to adopt new policies, and by monitoring compliance with international standards.”³³⁰ In the case of the WCGJ, this pressure was mounted physically at Rome, and the WCGJ continues its monitoring today as the Women’s Initiative for Gender Justice.

³²⁵ See Introduction.

³²⁶ Halley, “Rape at Rome,” 34.

³²⁷ Bedont and Hall-Martinez, “Ending Impunity,” 75.

³²⁸ Halley, “Rape at Rome,” 36.

³²⁹ Keck and Sikkink, *Activists beyond Borders*, 3.

³³⁰ Keck and Sikkink, *Activists beyond Borders*, 3.

Although the WCGJ suffered resounding losses on some fronts, notably on the definitions of gender and gender violence, the Caucus experienced success and partial success in many areas. The structural feminism embraced by many members of the WCGJ fell short in its “indifference to the suffering and death of men.”³³¹ This is exemplified in the discussion of the *Tadić* case in which the WCGJ placed an undue focus on the negation of masculinity, as opposed to the physical harm caused by SGBV crimes that Muslim men faced at several concentration camps in Bosnia-Herzegovina.

Despite ideological criticisms of the WCGJ, or GFeminism, the Caucus made immense advancements the legal recognition of the distinct harm faced by those that suffer from SGBV crimes in armed conflict. This progress in international humanitarian law and international customary law should not be minimized. The phenomenon of the WCGJ at Rome is the direct result of the formation of transnational women’s networks, the justice cascade’s shift to anti-impunity by way of tribunals, and the opportunity to found the International Criminal Court itself. The confluence of these three events were temporally limited to the early 1990s due to the emergence of human rights idealism and the renewed enthusiasm for the international system as identified by Hoffmann.

³³¹ Halley, “Rape at Rome,” 123.

Chapter 4: Sexual Violence Prosecutions at the ICC

“We know that often holding those who have carried out mass atrocities accountable is at times
our best tool to prevent future atrocities.”

-Samantha Power³³²

In 2013, Luis Moreno-Ocampo, the then Chief Prosecutor at the International Criminal Court,³³³ wrote, “at the Office of the Prosecutor ... our vision, and actually our plan is to pursue the gender crimes the Rome Statute defines.”³³⁴ This chapter sets out to examine just that: has the OTP brought sexual violence crimes to the Court? Did Luis Moreno-Ocampo succeed in his vision? The aim of this chapter is to discuss the sexual violence cases that have come to the International Criminal Court to aid in understanding how the Court ought to move forward after its first fifteen years of operation. Maxine Marcus, a former prosecuting attorney at the ICTY, reflects: “crimes of sexual and gender-based violence are under-documented and under-included in cases which are brought before international jurisdictions.”³³⁵ Keeping in mind the great difficulty in bringing cases of sexual violence to trial, the relative youth of the Court, and the amount of time it takes for the Court to operate, I will briefly survey the ICC’s sexual violence cases to date.

³³² “President Obama Directs New Atrocity Prevention Methods,” The White House Blog, 6 August 2011, <https://obamawhitehouse.archives.gov/realitycheck/blog/2011/08/06/president-obama-directs-new-atrocity-prevention-measures>.

³³³ Luis Moreno-Ocampo has since been succeeded by Fatou Bensouda, of Gambia.

³³⁴ Luis Moreno-Ocampo, “The Place of Sexual Violence in the Strategy of the ICC Prosecutor,” in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, ed. Anne-Marie de Brouwer et al. (Cambridge: Intersentia, 2013), 156.

³³⁵ Maxine Marcus, “Investigation of Crimes of Sexual and Gender-Based Violence Under International Criminal Law,” in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, ed. Annie-Marie de Brouwer et al. (Cambridge: Intersentia, 2013), 211.

Cases: Past and Pending

The most notable and only case to be decided in the realm of sexual and gender based violence is that of Jean Pierre Gombo Bemba. Bemba was the third person to be convicted by the ICC and the first to be convicted of SGBV crimes after fourteen years of operation. Bemba stood trial for the crimes committed by soldiers in the *Mouvement de libération du Congo*³³⁶ in the Central African Republic between 2002 and 2003 while he was Vice President. Bemba was convicted of rape and murder as war crimes and crimes against humanity.³³⁷ He was sentenced to eighteen years for rape and sixteen years for murder and pillaging, which are being served concurrently. Bemba's sentencing was the longest to date. Dienneke de Vos writes:

The highest sentence at the ICC to date has been issued for *sexual violence* is (at a minimum) symbolically significant ... With the particular focus on sexual violence in this case, and the attention paid to the complexity of these crimes in the trial judgment and sentencing decision, the reparations order will surely represent yet another important milestone for gender justice in international criminal law.³³⁸

Bemba's case is so powerful due to the place of sexual and gender based violence at the forefront of the case, and not a subsidiary crime (as is the historic trend with SGBV). As of the time of writing, is still the only conviction in which SGBV is charged.

Thomas Lubanga Dyilo's case posed the possibility of prosecuting SGBV crimes perpetrated against child soldiers recruited by the *Force Patriotique pour la Libération du Congo* (FPLC)³³⁹ where Lubanga was President and Commander-in-Chief. Moreno-Ocampo argues that there was evidence present that "showed how Mr. Lubanga instrumentalized sexual violations to subject child

³³⁶ English: Movement for the Liberation of the Congo.

³³⁷ "Bemba et al Case," *International Criminal Court*, accessed 20 April 2017, <https://www.icc-cpi.int/car/Bemba-et-al/#14>.

³³⁸ Dienneke de Vos, "Bemba: First Sentence for SGBV and Turning Point for ICC," Justice Hub, last modified 22 June 2016, accessed 10 April 2017, <https://justicehub.org/article/bemba-first-sentence-sgbv-and-turning-point-icc>.

³³⁹ English: Patriotic Forces for the Liberation of the Congo.

soldiers of both sexes to his will, and made them tools to further his own violent goals.”³⁴⁰ Young girl soldiers “were used as cooks and fighters, cleaners and spies, scouts and sexual slaves.”³⁴¹ Moreno-

Ocampo reflects on the duty of the OTP to prosecute:

It is our responsibility to present the gender crimes suffered by the most vulnerable. During the course of the trial, Prosecution has made its mission to ensure that Mr. Lubanga be held criminally responsible for the atrocities committed against little girl soldiers. In the ICC, girls will not be invisible. The Lubanga ruling could change the life of these girls; never again should they be left out of assistance provided by demobilization programmes.³⁴²

Ultimately, Lubanga was still convicted for the conscription of child soldiers under the age of fifteen; however, the Court failed to prosecute Lubanga for the sexual abuses faced by children under his reign.³⁴³

Germain Katanga and Mathieu Ngudjolo Chui, respectively the leader and senior commander of the *Force de Résistance Patriotique d'Ituri* (FRPI)³⁴⁴ were prosecuted by the ICC for their involvement in the attack on the village of Bogoro in the Democratic Republic of the Congo.³⁴⁵ Among their charges were “gender crimes of sexual slavery and rape, as crimes against humanity and war crimes.”³⁴⁶ Trial Chamber II found Katanga guilty of one count of crimes against humanity and four counts of war crimes,³⁴⁷ and acquitted Chui of his crimes on the grounds that the prosecution failed to prove his involvement beyond a reasonable doubt.³⁴⁸ The

³⁴⁰ Moreno-Ocampo, “The Place of Sexual Violence in the Strategy of the ICC Prosecutor,” 154.

³⁴¹ Ibid. 154.

³⁴² Ibid. 154.

³⁴³ “Lubanga Case,” International Criminal Court, accessed 20 April 2017, <https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf>

³⁴⁴ English: Patriotic Resistance Forces in Ituri.

³⁴⁵ “Case Information Sheet: Katanga,” International Criminal Court.

³⁴⁶ Moreno-Ocampo, “The Place of Sexual Violence in the Strategy of the ICC Prosecutor,” 154.

³⁴⁷ Crimes against humanity (murder) and war crimes (murder, attacking a civilian population, destruction of property, and pillaging). See: “Case Information Sheet: Katanga,” International Criminal Court.

³⁴⁸ Ibid.

charges of sexual slavery and rape melted away when the Trial Chambers acquitted both Katanga and Chui in this respect.³⁴⁹

Persecution on basis of gender, a newly codified form of persecution under the Rome Statute, stood a chance to be prosecuted for the first time in 2011. Callixte Mbarushimana, a senior *Forces Démocratiques de Libération du Rwanda* (FDLR)³⁵⁰ leader, was accused of commissioning the FDLR to commit crimes against humanity of persecution. The charge of persecution on the basis of gender arose from instances of rape in villages in North and South Kivu.³⁵¹ The Pre-Trial Chambers refused to confirm the thirteen charges of crimes against humanity and war crimes against Mbarushimana and declined the prosecution's appeal, citing a lack of sufficient evidence.³⁵² The International Criminal Court has yet to prosecute any gender-based persecution crimes.

Two cases are currently on trial that include charges of SGBV. Bosco Ntaganda, the Commander of Operations for the FPLC — the organization to which Lubanga belonged —

³⁴⁹ “The Trial Chamber acquitted Germain Katanga of rape and sexual slavery as a crime against humanity and the war crimes of using children under the age of fifteen years to participate actively in hostilities, sexual slavery, and rape. The Chamber found that there was evidence beyond reasonable doubt that the crimes of rape and sexual slavery were committed. Regarding the crime of using child soldiers, it found that there were children within the Ngiti militia and among the combatants who were in Bogoro on the day of the attack. However, the Chamber concluded that the evidence presented in support of the accused's guilt did not satisfy it beyond reasonable doubt of the accused's responsibility for these crimes.” See: “Case Information Sheet: The Prosecutor v. Germain Katanga,” <https://www.icc-cpi.int/drc/katanga/Documents/KatangaEng.pdf>.

³⁵⁰ English: Democratic Forces for the Liberation of Rwanda.

³⁵¹ Valerie Oosterveld, “Prosecuting Gender-Based Persecution as an International Crime,” in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, ed. Anne-Marie De Brouwer et al. (Cambridge: Intersentia, 2013), 59.

³⁵² “Although the Chamber found substantial grounds to believe that acts amounting to war crimes were perpetrated in five out of the twenty-five occasions identified by the Prosecutor, the Majority found that the evidence submitted was insufficient to be convinced of the existence of substantial grounds to believe that such acts were part of a course of conduct amounting to “an attack directed against the civilian population” pursuant to or in furtherance of an organisational policy to commit such attack, within the meaning of article 7 of the Rome Statute which defines crimes against humanity. Accordingly, the Majority found that there were not substantial grounds to believe that crimes against humanity were committed by the FDLR troops.” See: “Case Information Sheet: The Prosecutor v. Callixte Mbarushimana,” International Criminal Court, 15 June 2012, <https://www.icc-cpi.int/drc/mbarushimana/Documents/MbarushimanaEng.pdf>.

faces charges of thirteen counts of war crimes and five counts of crimes against humanity for crimes committed between 2002-2003. Among these war crimes are rape, sexual slavery of civilians, and the rape and sexual slavery of child soldiers.³⁵³ Rape and sexual slavery are additionally charged as crimes against humanity by the prosecution.³⁵⁴ The trial opened on September 2, 2015 and is ongoing.

The second case, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, charges the former President of the Côte d'Ivoire and the Minister for Sports and Youth, respectively, with four crimes against humanity. Rape is included as one of the crimes against humanity charges, and one of the events in which Gbagbo and Goudé allegedly had involvement was at a women's march in Abobo on March 3, 2011.³⁵⁵ The two cases were merged on March 11, 2015 and trial began on January 28, 2016.³⁵⁶

A number of perpetrators have been charged with SGBV crimes by the OTP but remain at large. The majority of these cases come from the conflict in Sudan: Omar Al-Bashir;³⁵⁷ Ali Kushayb³⁵⁸ and Ahmad Harun;³⁵⁹ Abdel Raheem Muhammad Hussein.³⁶⁰ Sylvestre Mudacumura, a Rwandan national, has been charged by the OTP with nine counts of war crimes for his alleged involvement in the conflict in Kivus, Democratic Republic of the

³⁵³ See: "The Prosecutor v. Bosco Ntaganda: Alleged Crimes," International Criminal Court, accessed 22 April 2017, <https://www.icc-cpi.int/drc/ntaganda/pages/alleged-crimes.aspx>.

³⁵⁴ Ibid.

³⁵⁵ See: "The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé: Alleged Crimes," International Criminal Court, accessed 22 April 2017, <https://www.icc-cpi.int/cdi/gbagbo-goude/pages/alleged-crimes.aspx>.

³⁵⁶ Ibid.

³⁵⁷ SGBV charges: rape as a crime against humanity. See: "Al Bashir Case," *International Criminal Court*, accessed 22 April 2017, <https://www.icc-cpi.int/darfur/albashir>.

³⁵⁸ SGBV charges: rape as a war crime. See: "Harun and Kushayb Case," *International Criminal Court*, accessed 22 April 2017, <https://www.icc-cpi.int/darfur/harunkushayb>.

³⁵⁹ SGBV charges: rape as a war crime and crime against humanity. Ibid.

³⁶⁰ SGBV charges: rape as a war crime and crime against humanity, outrages upon personal dignity as a war crime. See: "Hussein Case," *International Criminal Court*, accessed 22 April 2017, <https://www.icc-cpi.int/darfur/hussein>.

Congo.³⁶¹ Simone Gbagbo, former President Laurent Gbagbo's wife, faces four counts of war crimes including rape and other forms of sexual violence.³⁶² The ICC has issued a warrant for her arrest, but she is not in custody. In Sierra Leone, Joseph Kony and Vincent Otti face charges at the ICC. Joseph Kony, the Commander-in-Chief of the Lord's Resistance Army (LRA) faces twelve counts of crimes against humanity, including sexual enslavement and rape, and twenty-one war crimes charges, with rape among the crimes.³⁶³ Vincent Otti, the Vice-Chairman and Second-In-Command of the LRA faces eleven charges of crimes against humanity and twenty-one war crimes, including sexual enslavement as a crime against humanity and rape as a war crime.³⁶⁴ Kony and Otti are charged in the same case, which originally included Raska Lukwiya and Okot Odhiambo. With their deaths, Lukwiya and Odhiambo were removed from the case. As the ICC is unable to try perpetrators unless they are present for the proceedings, all of the aforementioned cases are unable to continue until the perpetrators are apprehended.

Conclusion

In many cases, the International Criminal Court's prosecution of SGBV crimes has been slow. It is important to make note of how long cases often take to go to trial: for example, Jean Pierre Bemba was the third case to be tried by the Court, and a verdict was only reached in 2016. Although only Bemba's case has successfully prosecuted SGBV crimes as both war crimes and crimes against humanity, it is likely that Ntaganda or Gbagbo and Goudé may face charges of

³⁶¹ SGBV charges: rape as a war crime. See: "Mudacumura Case," *International Criminal Court*, accessed 22 April 2017, <https://www.icc-cpi.int/drc/mudacumura>.

³⁶² "Simone Gbagbo Case," *International Criminal Court*, accessed 22 April 2017, <https://www.icc-cpi.int/cdi/simone-gbagbo>.

³⁶³ "Kony et al. Case," *International Criminal Court*, accessed 22 April 2017, <https://www.icc-cpi.int/uganda/kony>.

³⁶⁴ Ibid.

SGBV crimes in the near future by the Trial Chamber. The temporal jurisdiction of the ICC contributes to the relatively low number of SGBV cases, and cases in general. The ICC is non-retroactive, and their jurisdiction is two-fold: the Court may prosecute cases occurring either after July 1, 2002,³⁶⁵ or sixty days after the Rome Statute enters into force³⁶⁶ if ratification occurs after July 1, 2002.³⁶⁷ In the latter case, for *new* states that become party to the Rome Statute, the treaty enters into force on the first day of the month sixty days after ratification, accession, approval, or acceptance. Therefore, the number of cases falling under the ICC's jurisdiction are limited to the past fifteen years. The principle of complementarity also curbs the number of cases tried by the ICC: by working in tandem with national courts, the Court only seeks to prosecute cases in which the national government is unwilling or unable to prosecute. Regardless of the number of SGBV cases before the Court, the WCGJ not only fundamentally impacted the ICC itself, but also international humanitarian and customary law. As seen with the influence of the Lieber Codes on The Hague Conventions, or the IMT and IMTFE on the *ad hoc* tribunals, incremental changes in international law tend to become incorporated and are often expanded upon in following bodies of law.

³⁶⁵ Rome Statute of the International Criminal Court, Article 11.

³⁶⁶ Through ratification, acceptance, approval, or accession.

³⁶⁷ Rome Statute of the International Criminal Court, Article 126(2).

Conclusion

This project analyzes the Women's Caucus for Gender Justice at the Rome Conference, and places this Caucus within the larger human rights wave of the 1990s. In order to understand the WCGJ, the specifics of three crucial events must be parsed through in a critical jurisprudential genealogy. These three events — the transnational women's network at the United Nations, the rise of international criminal tribunals, and the establishment of the International Criminal Court — are deeply interconnected. In conjunction, the normative shifts towards human rights idealism and the justice cascade made it possible for the Women's Caucus for Gender Justice to flourish. Can other networks to use the progression of the Women's Caucus for Gender Justice and the larger transnational women's network as a model, or was the key to the WCGJ's success their ability to ride the human rights wave of the post-Cold War era?

The Women's Caucus for Gender Justice experienced overall mixed results in their aim for SGBV inclusion and gender mainstreaming. This project focused on six goals (of many): the definition of gender and gender violence; delinking honor and dignity; expanding 'grave breaches'; (en)forced pregnancy; sexual slavery; and structural and procedural gender mainstreaming. The expansion of gender and gender violence definitions was an overall loss. Gender definitions have always been highly contested, exemplified at the Fourth World Conference in Beijing with the debate between the transnational women's network and the 'Unholy Alliance'. The definition of gender in the Rome Statute does include the possibility for 'gender' to be viewed within the context of society, salvaging the definition from strictly biologically determinist interpretation. As for adding gender violence to the Statute, the WCGJ experienced a total loss. The prevailing structuralist-feminist language used in the WCGJ

Recommendations on this issue was too extreme for many state delegations to be convinced in favor of its inclusion. The WCGJ's attempt to delink honor and dignity from SGBV crimes was successful, evidenced in the separation of articles discussing honor crimes and SGBV. The WCGJ was unable to go so far in its delinking process to be able to add SGBV crimes as a grave breach of the Geneva Conventions, and suffered a loss on this issue. Despite this, it is still possible to charge SGBV crimes as a constituent crime to a grave breach, as seen with *Tadić* at the ICTY. (En)forced pregnancy experienced mixed success, as it was the result of a compromise between the 'Unholy Alliance' and more limited in scope. Nonetheless, the WCGJ still witnessed a net gain by codifying forced pregnancy. The issue of sexual slavery was mostly a loss — the Statute enumerates trafficking and enslavement as crimes, which the WCGJ advocated against, but also added sexual slavery as an SGBV crime. As for structural and procedural gender mainstreaming, the outcome was quite positive. The Rome Statute contained provisions for including women and SGBV specialists as judges, prosecutors, and experts. Although the WCGJ experienced mixed results in their goals, it would be unreasonable to expect the Caucus to perfectly achieve all the goals they set out to accomplish, especially initiatives with strong structuralist language, like gender violence. The WCGJ was reasonably successful in incorporating SGBV language into the Rome Statute, despite the obstacles they faced.

The epochal ruptures of the late twentieth century — the dissolution of the Soviet Union and of multi-ethnic states — identified by Hoffmann led to the emergence of human rights as a solidified structure, an “explanatory framework for understanding what just happened.”³⁶⁸ The development of the human rights framework shifted the ways in which humanitarian

³⁶⁸ Hoffmann, “Human Rights and History,” 282.

interventions as well as international humanitarian law were, and are, justified. Habermas and Havel characterize this era as ushering in the value of human rights over the sovereignty of states, a fundamental tenet of international law, after the experience of the international community's failure to prevent the genocides in the former Yugoslavia and Rwanda. Just as humanitarian intervention became normatively justified, legal intervention became justified.

The experiment of the *ad hoc* tribunals, a product of the human rights wave, influenced and affirmed the path of anti-impunity through the tribunal model. Critics of this move, such as Karen Engle, argue that human rights activists took too quickly to incorporating anti-impunity prosecution into their repertoire. Instead, I argue that this necessary turn happened due to the collapse of the bipolar system. In the rush to salvage the international community's failures, the prosecution of past wrongs was ingrained as a model, first at the *ad hoc* tribunals and then at the ICC. The violence of Srebrenica and Rwanda harkened back to the Holocaust, and the subsequent resurgence of Holocaust remembrance connected genocide to human rights. A new thirst for prosecution materialized, and the Women's Caucus for Gender Justice was extremely fortuitous in throwing itself into the fray.

The human rights wave was the product of both the overall emergence of human rights idealism identified by Hoffmann and Sikkink's 'justice cascade.' The combination of these two interrelated phenomena led to the formation of the *ad hoc* tribunals, the first international criminal tribunals since the IMT and IMTFE. Within the framework of legal human rights activism, the 1990s drew a unique enthusiasm for increased international intervention. The WCGJ found itself able to grow out of and build upon the work done by the transnational women's networks at UN conferences, and took advantage of the increasing involvement of

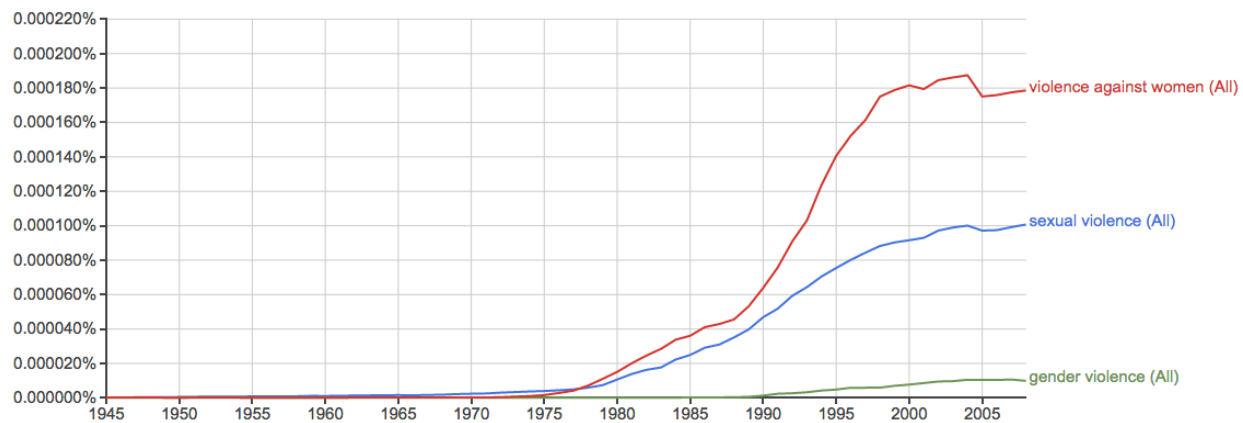
NGOs in treaty making to exert influence at Rome. Given the developments in the early to mid 1990s that allowed for the rapid development of legal institutions, it would be naïve to suggest that the model of the WCGJ can be exactly followed. The three events covered in this project — VAW at the UN, the *ad hoc* tribunals, and the ICC — did not occur consecutively; they overlapped and drew direct influence from each other, with main actors often keeping their feet in multiple areas. Without the development of gender mainstreaming throughout the twenty years prior to Rome, the transnational women's network would have likely been relegated to the peripheral backwaters of the United Nations, limited to 'women's only platforms'. Instead, the transnational women's network became a robust nexus for women's organizing that directly led to the inception of the WCGJ at PrepComI. Likewise, the justice cascade of the 1990s that gave way to the *ad hoc* tribunals solidified the foundation of the International Criminal Court. Both events drew on a new sense of enthusiasm for human rights — the human rights wave — that was a consequence of the epochal ruptures of the late twentieth century. The confluence of these three events allowed for the Women's Caucus for Gender Justice to ride the human rights wave on tour de force.

It is of great importance to return to such a normalized phenomenon in human rights history. 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 law and governance provided the WCGJ with a fortuitous opportunity to institutionalize gender into the International Criminal Court with a surprising level of success. The WCGJ benefited overall from the paradigmatic furor of human rights as a whole and gender mainstreaming at the United Nations. Networks looking to the WCGJ cannot draw on the same excitement over anti-

impunity or operate within the same post-Soviet and post-Yugoslav political climate. Where groups may be able to find inspiration, however, is from the tactical side of the WCGJ. Gender mainstreaming has since become omnipresent at the United Nations, and activist networks may be able to utilize this experience. Extensive preparatory work, precedent setting, and the Tribunal model at conferences, are all accessible to appropriation by other activist networks. The insider/outsider tactic pioneered by WEDO at Rio — organizing from outside governmental arenas and lobbying from inside — may certainly be subject to reuse, especially by groups with access to preparatory committees and conferences themselves. While other networks may not be able to benefit from the political environment that the WCGJ operated within, observant networks may be able to pull from the WCGJ's experience by carefully following its history, beginning with Violence against Women at the United Nations.

Appendix

Figure 1



This n-gram³⁶⁹ 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 UN 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. Sexual and gender based violence all together was so unused that it could not be graphed.

³⁶⁹ Both figures were created with Google Books Ngram Viewer: <http://books.google.com/ngrams>.

Figure 2

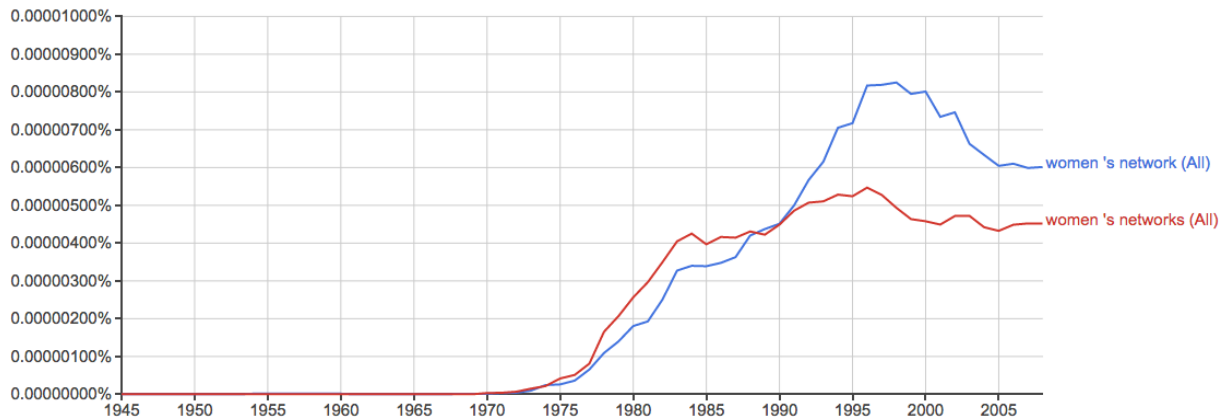


Figure 2* is conveys the steady rise in the term 'women's network(s).' The two are graphed separately in order to allow for variation between the singular and plural. In the early 1970s, the term enters use and experiences a sharp incline after 1975, the year of Mexico City. 'Women's network' (singular) 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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