(RE)CONSTRUCTING AN INTERNATIONAL CRIME: INTERPRETING SEXUAL VICTIMHOOD IN THE ROHINGYA GENOCIDE AND BEYOND

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ABSTRACT

This Article argues that legal actors use narratives of gendered violence to generate intelligible victimhood categories when investigating and prosecuting sexual harm. Building upon several critical legal traditions, I argue that lawyers working on issues of sexual violence are constantly engaged in a dual process of interpretation wherein they attempt to confirm (1) if a sexual crime has occurred, and (2) whether the crime is severe enough to deserve inclusion in justice efforts. Instead of understanding this process as a simple "investigation" into a pre-existing reality, I argue that legal actors constitute both the crime and the identities of the legal subjects through their work, (re)producing a particular narrative order wherein only intelligible forms of sexual victimhood can be adjudicated by legal actors.

To demonstrate this, I focus on international criminal law, examining the interpretations which influence the categorization of sexual violence as an act of genocide. Using the ongoing justice efforts for the Rohingya genocide as a case study, I show how legal actors working with multiple international mechanisms (i.e., the U.N. Fact-Finding Mission, the International Court of Justice, the International Criminal Court, and universal jurisdiction courts)

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engage in this dual process of interpretation, building upon hegemonic beliefs about gender and sexuality to interpret the reality and severity of the crimes presented to them. Notably, I show that many lawyers involved in these justice efforts understand genocidal sexual violence as a crime committed solely against cisgender women, despite ample evidence which points to how such acts can also be committed against men, transgender women, and individuals outside the gender binary. Building upon this case study, I discuss how different understandings of harm can result in the dismissal of certain acts according to gender, questioning the utility of an identity-based concept of "gender" as a tool for interpreting criminal actions. Only by understanding gender as an always-incomplete system of power relations (rather than a concrete value that a person embodies or possesses) can justice systems like international criminal law move beyond the narrow system of interpretation which currently hierarchizes the investigation of sexual violence.

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INTRODUCTION

In 2019, a team of lawyers from the American law firm Foley Hoag LLP submitted a filing to the International Court of Justice ("ICJ") on behalf of their client The Gambia.[1] In this document, the lawyers alleged that Myanmar had violated the Genocide Convention by committing various systematic acts of violence against the Rohingya,[2] a Muslim-majority ethnic group that has lived in parts of Myanmar for centuries.[3] While the Rohingya have been targeted by discriminatory laws and physical violence for decades,[4] with significant crackdowns in 2012,[5] the worst of these crimes allegedly took place in 2016 and 2017 during bloody "clearance operations" conducted by Myanmar's military.[6] These clearance operations, the lawyers argued, were motivated by genocidal intent, with the Myanmar military targeting the Rohingya for extermination due to their ethnic, racial, and religious identity.[7] The lawyers for The Gambia then listed a number of acts which Myanmar allegedly committed in violation of international law, including killing (of men, women, and children), torture (of men, women, and children), and sexual violence (against women and girls only).[8]

This last claim—that Myanmar only used genocidal sexual violence against women and girls—has been repeatedly articulated by individuals working on international cases about the Rohingya genocide. For example, a brief filed at the International Criminal Court ("ICC") argued that "whilst the [Rohingya] men and boys were separated for execution, women and girls were systematically

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1 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Application, 2019 I.C.J. (Nov. 11) [hereinafter ICJ Application].

2 *Id.* ¶ 116.

3 *See History of the Rohingya*, ROHINGYA CULTURE CTR., rccchicago.org/history-of-the-rohingya/ [https://perma.cc/MXB7-5SSC] (last visited Oct. 19, 2023).

4 ROHINGYA LANGUAGE PRESERVATION PROJECT, FIRST THEY TARGETED OUR CULTURE AND LANGUAGE: THREATS TO ROHINGYA LANGUAGE, CULTURE, AND IDENTITY IN MYANMAR AND BANGLADESH 5 (2022).

5 *Burma: End "Ethnic Cleansing" of Rohingya Muslims*, HUM. RTS. WATCH (Apr. 22, 2013), https://www.hrw.org/news/2013/04/22/burma-end-ethnic-cleansing-rohingya-muslims [https://perma.cc/4T4Z-TC6V].

6 ICJ Application, *supra* note 1, ¶ 6.

7 *Id.* ¶ 116.

8 *Id.*

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raped, as well as being tortured and killed."[9] Advocates bringing an international case in Argentina under the principle of universal jurisdiction similarly chose to include testimony about genocidal sexual violence from six Rohingya victims—all cisgender women.[10] In fact, the dominant narrative about sexual crimes in the Rohingya genocide, one that has been repeated in dozens of legal briefs, public statements, and webinars, is that the Myanmar military committed genocide by ordering the execution of "thousands of Rohingya men, women and children and . . . the rape of thousands of Rohingya women."[11]

At the same time, however, evidence from investigators on the ground increasingly points to a much larger occurrence of sexual violence against the Rohingya. Most notably, the U.N. Fact-Finding Mission for Myanmar ("FFM") found that Myanmar's military committed sexual violence against cisgender women,[12] cisgender men, and "transgender women."[13] As I discuss below, this last category likely refers to individuals who often identify as *hijra* or *hizara*, a distinct third-gender identity that has long historical roots in Southeast Asia.[14] Other organizations have reported similar findings, asserting that the Myanmar military committed sexual violence against Rohingya of all genders, not just cisgender women and girls.[15] One survey of around 500 Rohingya households found that "34.3 percent of men reported experiencing sexual abuse, sexual humiliation, or sexual exploitation in Myanmar, compared with 31.1

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[9] Situation in Bangladesh/Myanmar, ICC-RoC46(3)-01/18, Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute, ¶¶ 20-22 (May 30, 2018).

[10] *BROUK President Highlights Tatmadaw Crimes as Genocide Trial Opens*, BURMESE ROHINGYA ORG. U.K. (BROUK), (Dec. 16, 2021), https://www.brouk.org.uk/brouk-president-highlights-tatmadaw-crimes-as-genocide-trial-opens/ [https://perma.cc/79UU-AAHZ].

[11] Human Rights Watch, Event on the Rohingya Genocide (Feb. 2022), (on file with author).

[12] *See* B Aultman, *Cisgender*, 1 TRANSGENDER STUD. Q. 61, 61-62 (2014).

[13] Indep. Int'l Fact-Finding Mission on Myanmar, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, ¶¶ 1-7, U.N. Doc. A/HRC/42/CRP.4, (2019) [hereinafter FFM 2019 Report].

[14] SILVIA GUGLIELMI ET AL., GENDER-BASED VIOLENCE : WHAT IS WORKING IN PREVENTION, RESPONSE AND MITIGATION ACROSS ROHINGYA REFUGEE CAMPS, COX'S BAZAR, BANGLADESH 9 (2022); *See also* Sandra Duffy, *Contested Subjects of Human Rights: Trans and Gender-Variant Subjects of International Human Rights Law*, 84 MODERN L. REV. 1041, 1064 (2021).

[15] Lindsey Green et al., *"Most of the Cases Are Very Similar": Documenting and Corroborating Conflict-Related Sexual Violence Affecting Rohingya Refugees*, 22 BMC PUB. HEALTH 1, 9 (2022).

percent of women."[16] Another organization reported similar numbers for male respondents who claim to have experienced either rape or other direct forms of sexual violence.[17] While some reports claim that rates of sexual violence against cisgender women may have been even higher (one survey reported that 52% of female respondents experienced sexual violence),[18] the dominant legal framing of genocidal sexual violence as a crime that *only* affected Rohingya women and girls fails to account for potentially tens of thousands of instances of sexual violence against men and queer individuals.[19]

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What can we learn from such a situation, where international lawyers have excluded so many acts of violence from the processes that are meant to address these kinds of mass atrocities? On one level, my goal in this paper is to present a very specific case study into how international lawyers articulated a narrative about the Rohingya genocide in which only women and girls experienced the crime of "genocidal sexual violence."[20] Instead of pointing to specific decisions or mistakes which may have contributed to the under-

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[16] FORTIFY RIGHTS, "THE TORTURE IN MY MIND": THE RIGHT TO MENTAL HEALTH FOR ROHINGYA SURVIVORS OF GENOCIDE IN MYANMAR AND BANGLADESH 15 (2020).

[17] SARAH CHYNOWETH, "IT'S HAPPENING TO OUR MEN AS WELL": SEXUAL VIOLENCE AGAINST ROHINGYA MEN AND BOYS 8 (2018).

[18] U.N. High Commissioner on Hum. Rts., *Flash Report: Interviews with Rohingyas Fleeing from Myanmar Since 9 October 2016*, at 10 (Feb. 3, 2017); *See also* Amelia Hoover Green, *Statistical Evidence of Sexual Violence in International Court Settings*, *in* UNDERSTANDING & PROVING INTERNATIONAL SEX CRIMES 295, 296-97 (Morten Bergsmo et al. eds., 2012). *See also* Chris Dolan, *Has Patriarchy Been Stealing the Feminists' Clothes? Conflict-Related Sexual Violence and UN Security Council Resolutions*, 45 IDS BULLETIN 80, 81 (2014) (pointing out the paradox between the reliance on statistics about conflict-related sexual violence and the belief that conflict-related sexual violence is always under-reported).

[19] *See* Jamie J. Hagen, *Queering Women, Peace and Security*, 92 INT'L AFF. 313, 313-15 (2016).

[20] I do not mean here that international lawyers *originated* a discourse about sexual violence; instead, poststructural approaches like mine understand discourse as a continuous system of derivative citation and (re)production. *See* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX 13 (1993); *see also* Martha Minow, *Identities*, 3 YALE J. L. & HUMAN. 97, 127 (1991) ("Contemporary lawyers and judges did not invent the terms society uses to address legal debates over identity, but by using these terms, today's legal actors give them new and renewed definition.").

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investigation of sexual violence against men and queer people (for example, the lack of funding or misguided investigatory techniques),[21] my argument is much broader, instead asserting that the discursive category of "genocidal sexual violence victim" itself has been repeatedly articulated in line with a particular political agenda that makes these experiences illegible to international law practitioners. As such, this paper concludes by articulating an alternative understanding of "genocidal sexual violence" which explicitly includes victims of all genders.

On another level, however, this paper also demonstrates the complex and often exclusionary role of interpretation that occurs when legal actors adjudicate claims of gendered harm in any legal system. This process of interpretation occurs along two axes: (1) did the act in question actually occur, and (2) is the act in question serious enough to merit inclusion as a harm? Legal precedent is of course influential in making such interpretations, but as I demonstrate below, the *legibility* of a sexual harm is dependent upon a gendered system of narrative meaning-making that circumscribes what legal actors believe and do.[22] As such, I build upon and extend the assertion made by various critical traditions that legal interpretation is an inescapably political process,[23] arguing that legal actors in fact *generate* the identities and crimes that they seek to adjudicate.[24] In other words, justice systems like the ones I describe in this Article are not neutral arbiters of a pre-existing world, but are

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[21] *See*, *e.g.*, Victoria Hospodaryk, *Male and Gender-Diverse Victims of Sexual Violence in the Rohingya Genocide: The Selective Narrative of International Courts*, INT'L J. TRANSITIONAL JUST. 1, 13-15 (2023) (citing international lawyers who have critiqued the ICC for their approach to Rohingya victim representation); *see also* Valerie Oosterveld, *Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal*, 107 J. INT'L L. & INT'L REL. 107, 115-26 (2014) (identifying a number of factors which may result in the under-recognition of conflict-related sexual violence against men); *see* Roxanne Lynn Doty, *Foreign Policy as Social Construction: A Post-Positivist Analysis of U.S. Counterinsurgency Policy in the Philippines*, 37 INT'L STUD. Q. 297, 299 (1993).

[22] *See* ANNICK T. R. WIBBEN, FEMINIST SECURITY STUDIES: A NARRATIVE APPROACH 27-28 (2011).

[23] *See*, *e.g.*, Katheryn K. Russell, *A Critical View from the Inside: An Application of Critical Legal Studies to Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 222, 223-26 (1994); I Bennett Capers, *Critical Race Theory and Criminal Justice*, 12 OHIO ST. J. CRIM. L. 1, 2-4 (2014); ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY 315-16 (2021); Doris Buss, *Performing Legal Order: Some Feminist Thoughts on International Criminal Law*, 11 INT'L CRIM. L. REV. 409, 410-11 (2011).

[24] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 5 (1990) ("Juridical power inevitably 'produces' what it claims merely to represent.").

instead central to (re)producing intelligible categories of identity such as "woman" or "sexual violence victim."[25] As such, I argue here that juridical ideas about gender are inescapably linked to expectations about sexual victimhood, with gender labels and criminal categories mutually constituting each other.[26] Moreover, as these discursive classifications become enmeshed in a system of repeated interpretation at multiple stages of the justice system, this matrix of connected meanings can lead to exclusionary or overly-restrictive categorizations which *limit* attempts to obtain justice.[27]

In this Article, I adopt a discursive approach to gender, drawing upon critical feminist, decolonial, and queer understandings of the socially constructed reality of identity.[28] In other words, I assert that commonplace understandings of what constitutes identity categories (*e.g.*, "man" or "victim") are not universal or natural, but rather informed by the repetition of legal and extra-legal interpretations.[29] Such a perspective puts into question seemingly-stable categories of gender and crime, instead asserting that legal actors constitute gendered identities by "carv[ing] up human differences into hierarchies capricious enough to accommodate subordination."[30] Victimhood, and especially sexual victimhood, is closely associated with this (re)production of hierarchized gendered identities, since "victims" and "women" are expected to be weak, vulnerable, and passive, while "men" are rarely connected to such ideas and are thus less likely to be understood as victims of

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[25] *See* LAURA J. SHEPHERD, GENDER, VIOLENCE AND SECURITY: DISCOURSE AS PRACTICE 22 (2008).

[26] *See* Nicola Henry, *The Fixation on Wartime Rape: Feminist Critique and International Criminal Law*, 23 SOC. & LEGAL STUD. 93, 98 (2014).

[27] *See* BUTLER, *supra* note 24, at 24.

[28] *See* KIT HEYAM, BEFORE WE WERE TRANS: A NEW HISTORY OF GENDER 5-8 (2022). *See also* Lena Holzer et al., *An Introduction to International Law Dis/Oriented: Sparking Queer Futures in International Law*, 49 AUS. FEMINIST L. J. 1, 6 (2023) (discussing how queer research approaches epistemological and ontological questions in international law).

[29] *See* Audrey Alejandro, *Reflexive Discourse Analysis: A Methodology for the Practice of Reflexivity*, 27 EUR. J. INT'L REL. 150, 152-53 (2020) ("As discursive agents, we unconsciously inherit and sociali[z]e others into these implicit elements of discourses, which are both a necessary condition for communication (such as the shared knowledge that lies within the consensual definitions of the words we use) and a key mechanism of the invisible reproduction of the socio-political order (as assumptions and biases are naturali[z]ed within this taken-for-granted shared knowledge.").

[30] COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS 40 (2011).

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gendered crime.[31] While these kinds of identity narratives can be (re)produced anywhere, legal fora like courts are particularly productive sites where "stereotype's power to reconstitute identity" comes into effect.[32]

While this process of interpretation constructs the identities of victims, it also constitutes and delimits the scope of the crime itself. I thus assert that while the practice of law frames crime as self-evident or easily-recognized, what is "criminal" actually results from a "series of historical articulations . . . built through practices of speech, writing, and thinking that change over time."[33] In other words, it is the repeated citation to law itself (in this case, the law criminalizing genocide) that produces interpretations which delineate the form of the crime.[34] In this Article, I trace how different discursive constructions of victimhood generate the crimes of "genocide" and "not genocide," but I could similarly examine how common understandings of what qualifies as "rape," "domestic violence," or "sexual harassment" generate components which either qualify or fail to qualify as legible versions of the crime.[35] Instead of conceiving of law as a formalist system of rules, therefore, I instead assert that legal claims must be understood as a process of linguistic speech acts in which various actors imperfectly attempt to articulate and contest the construction of our social world.[36]

This is especially relevant for understanding how legal actors prosecute sexual violence, which in jurisdictions around the world is consistently inconsistent, influenced by a wide range of beliefs

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[31] Alex Vandermaas-Peeler et al., *Constructing Victims: Suffering and Status in Modern World Order*, REV. INT. STUD. 1, 4-5 (2022).

[32] Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 966 (2006).

[33] BENJAMIN MEICHES, THE POLITICS OF ANNIHILATION: A GENEALOGY OF GENOCIDE 12 (2019).

[34] *See* BUTLER, *supra* note 20, at 225.

[35] *See* ESTELLE B. FREEDMAN, REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION 1-11 (2013) (examining how the American legal category of "rape" was intertwined with political agendas, highlighting certain harms like the rape of white women by Black men, while obscuring other forms of penetrative sexual violence); *see also* LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM 9 (2023) (describing how many victims of domestic and interpersonal violence are "imperfect victims" who are illegible to the U.S. criminal justice system because they are not stereotypically passive and weak).

[36] *See* MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS 10-13 (2014).

about sexuality and gender.[37] For example, in the United States, only a fraction of sexual assault allegations turn into criminal charges, with police and prosecutors frequently and improperly dismissing claims brought by women of color,[38] men,[39] and queer individuals.[40] Even claims which do go to trial are subjected to multiple layers of interpretation wherein legal actors like prosecutors and juries draw upon pre-existing assumptions about sexual violence to understand (1) whether an act has occurred and (2) whether that act qualifies as a harm[41] This pattern of interpretation has been observed in many domestic contexts: in the United Kingdom, for example, the legal system does not categorize men who are forced to sexually penetrate female partners as "rape victims" because their experiences do not fit within legible understandings of what "rape" is.[42] In France, the police officers accused of sodomizing a young black man in the widely-condemned "Affaire Théo" were acquitted of "rape" but convicted of the non-sexual crime of "willing violence."[43] In Australia, a recent study found that judges were less likely to believe rape allegations where the victim did not immediately report the assault to the police.[44] And in India, rape is often considered to be more serious (thus resulting in longer prison sentences) for

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37 *See* VERONIQUE LE GOAZIOU, VIOL: QUE FAIT LA JUSTICE? 23-26 (2019).

38 Michal Buchhandler-Raphael, *Underprosecution Too*, 56 RICH. U. L. REV. 409, 411-13 (2022).

39 Scott M. Walfield, Philip D. McCormack & Kaitlyn Clarke, *Understanding Case Outcomes for Male Victims of Forcible Sexual Assaults*, 37 J. INTERPERSONAL VIOLENCE 1, 22-23 (2022).

40 *See Understanding Intimate Partner Violence in the LGBTQ+ Community*, HUM. RTS. CAMPAIGN (NOV. 4, 2022), https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community, [https://perma.cc/29SF-FXZ6]; *see also About Sexual Assault*, RAPE, ABUSE & INCEST NAT'L NETWORK (RAINN), https://www.rainn.org/about-sexual-assault [https://perma.cc/R42P-C5EE] (last visited Jan. 2, 2024) (providing further statistics about sexual violence and the criminal justice system).

41 *See* Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 842-46 (2002).

42 Siobhan Weare, *"Oh You're a Guy, How Could You Be Raped by a Woman, That Makes No Sense": Towards a Case for Legally Recognising and Labelling "Forced-to-Penetrate" Cases as Rape*, 14 INT'L J. L. IN CONTEXT 110, 110-11 (2018).

43 *Affaire Théo: Le Parquet Requiert le Renvoi de Trois Policiers Devant les Assises*, LIBERATION (Oct. 7, 2020), https ://www.liberation.fr/france/2020/10/07/affaire-theo-le-parquet-requiert-le-renvoi-de-trois-policiers-devant-les-assises_1801659/ [https ://perma.cc/KXD5-E6YR].

44 *See* Julia Quilter et al., *The Most Persistent Rape Myth? A Qualitative Study of "Delay" in Complaint in Victorian Rape Trials*, 35 CURRENT ISSUES IN CRIM. JUST. 4-5 (2023).

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defendants accused of assaulting female victims who are virgins and unmarried.[45]

Similar questions about legibility are central to debates about sexual violence in international law.[46] At the ICC, for example, a panel of judges dismissed evidence of penile amputation and forced circumcision in Kenya because, to them, it was not "sexual" in nature.[47] The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") similarly held that while men and women were required to consummate forced marriages during the Khmer Rouge regime, only the women in these inhumane relationships were counted as victims of "rape."[48] And at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), crimes such as rape and genital mutilation were almost entirely adjudicated as "torture" for male victims and "sexual violence" for female victims, even though the acts were in many instances very similar.[49] Moreover, these acts of "torture" are now categorized on the ICTY's website as "sexual violence," further obfuscating what qualifies as a legitimate form of "sexual" violence.[50]

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[45] *See* MRINAL SATISH, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA 73-74 (2016).

[46] And not just sexual violence. *See*, *e.g.*, Anjali Dayal & Kate Cronin-Furman, *Russia's Invasion Has Created Victims the World Recognizes*, FOREIGN POL'Y (Apr. 5, 2022, 3:39 PM), https://foreignpolicy.com/2022/04/05/russia-invasion-victims-bucha-ukraine [https://perma.cc/X63M-FCY4] (discussing why Ukrainian victims are "more legible" than victims from other situations of armed conflict because the narrative framing of Ukrainian victimhood fits within the role against which "international institutions and international law are built to protect").

[47] ROSEMARY GREY, PROSECUTING SEXUAL AND GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL COURT: PRACTICE, PROGRESS AND POTENTIAL 210-12 (2019).

[48] Melanie O'Brien, *Symposium on the ECCC: Forced Marriage in the ECCC*, OPINIOJURIS BLOG (NOV. 2, 2022), http://opiniojuris.org/2022/11/02/symposium-on-the-eccc-forced-marriage-in-the-eccc/ [https://perma.cc/648U-SVGV].

[49] Patricia Viseur Sellers & Leo C. Nwoye, *Conflict-Related Male Sexual Violence and the International Criminal Jurisprudence*, *in* SEXUAL VIOLENCE AGAINST MEN IN GLOBAL POLITICS 211, 214-24 (Marysia Zalewski et al. eds., 2018); Caitlin Biddolph, *Queering Crimes of Torture: A (Re)Imagining of Torture in International Criminal Tribunal for the Former Yugoslavia Jurisprudence*, 27 AUSTL. J. HUM. RTS. 382, 385-87 (2021).

[50] *Landmark Cases*, International Tribunal for the Former Yugoslavia, www.icty.org/en/features/crimes-sexual-violence/landmark-cases [https://perma.cc/5F3L-ADAF] (last accessed Jan. 2, 2024). To paraphrase Harriet Gray, the meanings we attached to certain acts or body parts—*e.g.*, whether a violent act involving genitalia is always "sexual" or "non-sexual"—tell us more about the interpretations we are making than the actual reality of the acts themselves. Harriet Gray, *Reflections on the Slippery Politics of Framing*, *in* SEXUAL

My focus here on the construction of "genocidal" sexual violence (as opposed to sexual acts which are not "genocidal") is also useful for understanding how legal actors hierarchize different categories of victimization and harm. In international criminal law, acts of sexual violence can be divided into three categories: genocide, crimes against humanity, and war crimes.[51] While there is no formal distinction among these three categories, genocide is often understood as "the crime of crimes," establishing it as the most severe in the unofficial hierarchy of international crimes.[52] Moreover, "genocide" is the name given to acts which target a group, whereas war crimes and crimes against humanity can be experienced by a single individual; because of this, "genocidal sexual violence" is differentiated as a type of harm that is experienced by an entire community, even if only one person was in fact sexually assaulted.[53] In other words, there are varying levels of sexual harm that can be interpreted into a specific situation of armed conflict: sexual violence against a group which qualifies as genocide, sexual violence against an individual which only qualifies as a crime against humanity or war crime, and sexual violence which merely qualifies as a human rights violation or a violation of domestic law. As I demonstrate below, while sexual violence against cisgender women is sometimes interpreted as genocidal (that is, the "crime of crimes" affecting an entire community), identical acts against individuals of other genders are almost never interpreted as genocidal, constructing them as less serious in comparison.[54]

This paper proceeds in three parts. First, I examine the doctrinal history of genocide and sexual violence, highlighting how international law practitioners drew from politicized narratives

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VIOLENCE AGAINST MEN IN GLOBAL POLITICS 243, 244 (Marysia Zalewski et al. eds., 2018).

51 There is a fourth international crime—aggression—which is much more contentious and for which the connection to sexual violence is ill-defined. *See How the Court Works*, International Criminal Court, www.icc-cpi.int/about/how-the-court-works, [https://perma.cc/Y3CG-7CKT] (last accessed Jan. 2, 2024); *see also* Patryk I. Labuda, *Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law's Selectivity in the Wake of the 2022 Ukraine Invasion*, LEIDEN J. INT'L L. 1, 14-15 (2023) (discussing the politically contentious discourse around the crime of aggression in Ukraine).

52 MEICHES, *supra* note 33, at 14.

53 ANNE-MARIE DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 44-45 (2005); LAURA SJOBERG, WOMEN AS WARTIME RAPISTS: BEYOND SENSATION AND STEREOTYPING 70 (2017).

54 *See infra* notes 217 to 218 and accompanying text.

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about gendered violence to generate a juridical category—genocidal sexual violence—that has only ever been articulated as a crime committed against cisgender women. Next, I turn to the Rohingya genocide, examining how this dominant narrative about genocide influenced the interpretations of legal actors, generating identities and criminal categories which were intelligible to international legal actors. Finally, I conclude with a broad discussion about the inescapable role of interpretation in criminal justice, drawing from several critical legal traditions to articulate a never-complete understanding of gender as a political framework for adjudicating harm.

To accomplish this goal, I draw from unique empirical work conducted over the course of four years, bringing together document analysis, site observation, and interviews to produce a detailed picture of the legal articulations which have structured how international lawyers discuss the events of the Rohingya genocide.[55] Because of the Covid-19 pandemic, much of this fieldwork has been conducted online, which has demanded a careful and methodical approach to analyzing the statements made during various online

[55] Methodologically, I sought to be as reflexive as possible when examining documents and conducting fieldwork, drawing from feminist and other critical interpretive approaches to knowledge production. This reflexivity was particularly important when conducting interviews, which I analyzed with a particular focus on the productive power of our dialogue. I understand narratives to be both central to the process of interpretation and yet always partial: because a narrative must implicitly exclude certain perspectives and events in order to prioritize a coherent form of communication, a narrative cannot represent a story in its totality. At the same time, however, the process of (re)producing narrative socially constructs the world as we know it, providing us with the words and stories necessary to create meaningful understandings of social facts. As such, identifying the shape and form of a narrative allows the researcher to also identify what has been excluded, de-emphasized, and misrepresented. Because much of language is divided into binary pairs (for example, genocidal/not genocidal, men/women, victim/perpetrator), deconstructing narratives allows for a greater perspective onto what is rendered unintelligible by linguistic processes of interpretation. *See*, *e.g.*, Lene Hansen, *Performing Practices: A Poststructuralist Analysis of the Muhammad Cartoon Crisis*, *in* INTERNATIONAL PRACTICES 280, 293 (Emanuel Adler & Vincent Pouliot eds., 2011); Tami Jacoby, *From the Trenches: Dilemmas of Feminist IR Fieldwork*, *in* FEMINIST METHODOLOGIES FOR INTERNATIONAL RELATIONS 153, 161-62 (Brooke A. Ackerly et al. eds., 2006); Carol Bacchi & Jennifer Bonham, *Poststructural Interview Analysis: Politicizing "Personhood," in* POSTSTRUCTURAL POLICY ANALYSIS 113, 113-17 (Carol Bacchi & Susan Goodwin eds., 2016); CHARLOTTE EPSTEIN, THE POWER OF WORDS IN INTERNATIONAL RELATIONS: BIRTH OF AN ANTI-WHALING DISCOURSE 95 (2008); LAURA J. SHEPHERD, NARRATING THE WOMEN, PEACE AND SECURITY AGENDA: LOGICS OF GLOBAL GOVERNANCE 9-11 (2021).

events about the Rohingya genocide.[56] I also was able to attend the 2022 ICC Assembly of States Parties in person, and analysis from that week has been included here.[57]

Before beginning, it is important to clarify that I do not want this article to be read as an unequivocal endorsement of criminal trials as a solution or ideal remedy to incidents of mass violence. As I have written previously, international justice actors draw from an idealist rhetoric that is often incompatible with formalized criminal proceedings and the right of the accused to be innocent before proven guilty.[58] I am also keenly inspired here by the work of many critical colleagues who have challenged domestic and international criminal law systems as cruel, ineffective, and anti-feminist, despite the fact that many legal reformers have historically embraced criminal law as a solution to gender-based violence.[59] Similarly, I am certainly not calling for the simple "representation" of under-represented minority groups in criminal prosecutions, especially since participation in a criminal trial can be traumatic or dangerous to a victim without providing much substantive benefit.[60]

However, my interest in criminal justice, and international criminal justice specifically, derives from the important and often-

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[56] *See* Marnie Howlett, *Looking at the "Field" Through a Zoom Lens: Methodological Reflections on Conducting Online Research During a Global Pandemic*, 22 QUALITATIVE RES. 387, 389-99 (2022).

[57] *See* Alison Rooke, *Queer in the Field: On Emotions, Temporality, and Performativity in Ethnography*, *in* QUEER METHODS AND METHODOLOGIES 25-27 (Kath Browne & Catherine J. Nash eds., 2010).

[58] *See* David Eichert, *Hashtagging Justice: Digital Diplomacy and the International Criminal Court on Twitter*, 16 HAGUE J. DIPL. 391, 405-09 (2021).

[59] There are many important critiques of domestic criminal responses to gendered violence, many more than I can cite here. *See*, *e.g.*, ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 627-60 (2009); Beth E. Richie, *Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice (Transcript)*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 257, 271-73 (2015); Kate Zen, *In Defense of Sex Worker Rights*, MEDIUM (Aug. 14, 2020), https://www.medium.com/@katezenjoy/dear-esperanza-5aa7db4d501a [https://perma.cc/H8Z9-TCRL]. Regarding international law, *see*, *e.g.*, Mattia Pinto, *Historical Trends of Human Rights Gone Criminal*, 42 HUM. RTS. Q. 729, 759-61 (2020); Rachel López, *Black Guilt, White Guilt at the International Criminal Court*, *in* RACE AND NATIONAL SECURITY 1, 13-14 (Matiangai Sirleaf ed., forthcoming 2023).

[60] *See* Rachel López, *The (Re)Collection of Memory After Mass Atrocity and the Dilemma for Transitional Justice*, 47 INT'L L. & POL. 799, 851-53 (2014); *see also* Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood*, 76 L. & CONTEMP. PROBS. 235, 241, 259-62 (2014) (complicating narratives of victimhood at the ICC).

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invisible role of law in generating stories about situations of violence.[61] These narratives—of a society, a war, or a genocide—can help vindicate or validate the suffering of victims, creating an official historical narrative against which individuals can base their claims for justice or reparation.[62] This is especially important in situations of mass atrocity, since international criminal law can do little to address the individual wrongs experienced by thousands of people who live far from The Hague and often in situations of extreme deprivation.[63] Instead, criminal law is central for allocating guilt and victimhood, which can be an important resource to help victims come to terms with their experiences.[64] Moreover, access to monetary reparations, as well as medical and social support, can sometimes rely upon recognition by legal authorities, which makes the exclusion of certain victims all the more problematic.[65] If men and queer victims of genocidal sexual violence are excluded from official narratives about mass violence, such exclusion could very well carry forward to their future exclusion from post-rape medical care, educational opportunities, and financial support allocated to victims of sexual violence.[66] Of course, a better system would simply provide those resources to victims without a prior determination of criminal responsibility, but I reluctantly recognize the need to work within an international system that continues to assign tremendous importance to judicial proceedings.[67]

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[61] *See* Frédéric Mégret, *What Sort of Global Justice Is "International Criminal Justice"?*, 13 J. INT'L CRIM. JUSTICE 77, 91 (2015); *see also* Barrie Sander, *The Method Is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts*, 19 MELB. J. INT'L L. 299, 301-02 (2018).

[62] Vandermaas-Peeler et al., *supra* note 31, at 5.

[63] Recent developments, including the ability for parties at the ICC to admit witness statements instead of live testimony, further complicate efforts to understand the benefits of international justice mechanisms for victims. *See* Megan A. Fairlie, *The Abiding Problem of Witness Statements in International Criminal Trials*, 50 N.Y.U. J. INT'L L. & POL. 75, 77–78 (2017).

[64] *See* CONSTABLE, *supra* note 36, at 127; *see also* Mégret, *supra* note 61, at 96.

[65] *See generally* PHILIPP SCHULZ, MALE SURVIVORS OF WARTIME SEXUAL VIOLENCE: PERSPECTIVES FROM NORTHERN UGANDA (2020) (assessing how some male survivors in Uganda view reparations and recognition).

[66] *See also* Dara Kay Cohen & Amelia Hoover Green, *Dueling Incentives: Sexual Violence in Liberia and the Politics of Human rights Advocacy*, 49 J. PEACE RES. 445, 451-52 (2012) (discussing how commonly-accepted truths about sexual violence may be factually contested and yet drive humanitarian aid allocation).

[67] *See* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 10 (2003). This focus on criminal justice is certainly not universal, but rather coming from a certain perspective (largely Global North institutions and governments) and with a certain

I. GENOCIDE AND SEXUAL VIOLENCE — A CONSTRUCTED RELATIONSHIP

In its simplest form, the doctrinal history connecting sexual violence to genocide is fairly short. The Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") lists two main elements which comprise the crime of genocide.[68] First, there is a *mens rea* element which requires that violence is committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[69] The Genocide Convention then identifies five broad *actus rei* which can qualify as genocidal:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group; [and]

(e) Forcibly transferring children of the group to another group.[70]

The Genocide Convention was a direct response to the horrors of the Holocaust and the systematic policy of extermination centered around death camps and killing fields.[71] This focus on murder, however, meant that there was initially little discussion of the role of sexual violence in genocide,[72] and no charges were filed before post-war criminal tribunals regarding the genocidal use of sexual violence against Jews and other minority groups.[73] Moreover, while

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political philosophy (one which prioritizes a certain branch of political rights over material, economic, and social needs). *See also* Amrita Basu, *Globalization of the Local/Localization of the Global Mapping Transnational Women's Movements*, 1 MERIDIANS 68, 70-71 (2000).

[68] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[69] *Id*. art. II.

[70] *Id.*

[71] *See* A. DIRK MOSES, RAPHAEL LEMKIN, CULTURE, AND THE CONCEPT OF GENOCIDE 36-37 (Donald Bloxham & A. Dirk Moses eds., 2010).

[72] In fact, a small number of international law scholars argued that sexual violence could not amount to genocide. DE BROUWER, *supra* note 53, at 44.

[73] CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 177 (2006).

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the post-war Geneva Conventions outlawed the non-genocidal use of sexual violence against women during conflict,[74] many other Cold War-era treaties (including the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")) were silent about the legal status of sexual violence.[75]

In the 1990s, however, the international community regained interest in using international law as a response to mass violence.[76] Two tribunals—the ICTY and the International Criminal Tribunal for Rwanda ("ICTR")—were created with the goal of bringing some sense of justice to atrocity.[77] The Rome Statute was signed in 1998, creating the permanent ICC,[78] while the early 2000s saw the establishment of smaller tribunals in places like Sierra Leone, Cambodia, and East Timor.[79] Feminist activists, who had previously focused the vast majority of their attention on domestic law in the 1970s and 1980s, also turned to international law during this period, dramatically reshaping the discipline throughout the decade.[80]

The first case about genocide from this period, *Akayesu*, was prosecuted at the ICTR.[81] In addition to finding the defendant responsible for multiple genocidal murders, the judges in *Akayesu* ruled that acts of sexual violence could constitute genocide if they were committed with the specific intent to "destroy, in whole or in

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[74] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. For a greater discussion of whether sexual violence against men violates the Geneva Conventions and their Optional Protocols, see David Eichert, *Expanding the Gender of Genocidal Sexual Violence: Towards the Inclusion of Men, Transgender Women, and People Outside the Binary*, 25 U.C.L.A. J. INT'L L. FOR. AFF. 157, 165 (2021); *see also* Boyd van Dijk, *Gendering the Geneva Conventions*, 44 HUM. RTS. Q. 286, 309 (2022) (arguing that the inclusion of women in the Geneva Conventions was part of a project to maintain sex differences and hierarchies in the post-WWII world order).

[75] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. For discussion about this omission, *see* Neil A Englehart, *CEDAW and Gender Violence: An Empirical Assessment*, MICH. ST. L. REV. 265, 266-68 (2014).

[76] *See* PHIL CLARK & NICOLA PALMER, CHALLENGING TRANSITIONAL JUSTICE 1 (Nicola Palmer et al. eds., 2012).

[77] *Id.*

[78] Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[79] *See generally* CESARE P. R. ROMANO ET AL., INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA (2004) (discussing the politics behind several international tribunals).

[80] KAREN ENGLE, THE GRIP OF SEXUAL VIOLENCE IN CONFLICT: FEMINIST INTERVENTIONS IN INTERNATIONAL LAW 1-3 (2020).

[81] *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sep. 2, 1998).

part" the targeted group.[82] Sexual violence, while not explicitly named in the Genocide Convention, could nevertheless qualify as an *actus reus* of genocide, both by "causing serious bodily or mental harm to members of the group" under Article II(b) and by "inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" under Article II(c).[83] The judgment also affirmed that sexual violence could be genocidal under Article II(d) by preventing births through sexual mutilation, forced impregnation, sterilization, or if a person was so traumatized that they chose not to procreate.[84] Finally, the judgment cited to witness testimony of brutal sexual violence being used as a means of killing, which could amount to a fourth *actus reus* of genocide under Article II(a).[85] This ruling led many feminist international lawyers to celebrate *Akayesu* as a groundbreaking case: not only was it the first genocide conviction since the post-WWII period, but the ruling also explicitly articulated a connection between sexual violence and genocide, which until then was not widely accepted.[86]

Following *Akayesu*, a number of other trials at the ICTR and ICTY reaffirmed the principle that sexual violence could constitute an *actus reus* of genocide.[87] Notably, several cases confirmed that sexual violence did not need to be fatal or result in permanent infertility for it to be genocidal in nature.[88] For example, building upon the precedent in *Akayesu*, the Trial Chamber in *Gacumbitsi* ruled that genocidal violence could include acts leading to the "impairment of mental faculties" or other serious harm that is later

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82 *Id.* ¶ 731.

83 *Id.*

84 *Id.* ¶¶ 507-08.

85 *Id.* ¶ 429.

86 *See* Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 318 (2003). Not all feminists were happy, however, interpreting the judgment as suggesting that women's rights were secondary to the harm experienced by the community. ENGLE, *supra* note 80, at 110-12. Other feminists questioned the reliance on the role of women in biological reproduction as opposed to autonomous rights-having individuals. *See also* CHISECHE SALOME MIBENGE, SEX AND INTERNATIONAL TRIBUNALS: THE ERASURE OF GENDER FROM THE WAR NARRATIVE 70-73 (2013).

87 *See* Eichert, *Expanding the Gender of Genocidal Sexual Violence*, *supra* note 74, at 169-70, 173. *But see* ENGLE, *supra* note 80, at 103 (discussing complaints about the low conviction rate at the ICTR for genocidal sexual violence).

88 Eichert, *Expanding the Gender of Genocidal Sexual Violence*, *supra* note 74, at 170.

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remediable.[89] *Akayesu* has similarly influenced how other courts like the Iraqi High Tribunal and the Guatemalan Court for High-Risk Crimes have interpreted genocidal sexual violence,[90] as well as the content of several U.N. Security Council resolutions articulating a connection between sexual violence and genocide.[91]

One key detail, however, is that in *Akayesu* and subsequent cases, genocidal sexual violence is *only* conceived as a crime committed against cisgender women. In *Akayesu*, for example, the ICTR only heard evidence of sexual violence against female victims, concluding that "[s]exual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[92] Later ICTR cases repeated this exclusive narrative about genocidal sexual violence against cisgender women, such as in *Karemera.* where the Trial Chamber asserted that "Tutsi women and girls were raped and sexually assaulted systematically" and that those acts "were acts of genocide."[93] While I obviously do not dispute these interpretations (many cisgender women *did* experience horrific and systematic sexual violence during the Rwandan genocide and in later conflicts), the doctrinal framing of these crimes constructs the crime of "genocidal sexual violence" as something that cannot happen to transgender or cisgender men, transgender women, or other queer individuals.[94] In fact, as I discuss in Part II regarding the Rohingya

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[89] Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶¶ 291 (Sep. 2, 1998).

[90] Eichert, *Expanding the Gender of Genocidal Sexual Violence*, *supra* note 74, at 177-78.

[91] S.C. Res. 1820, ¶ 4 (June 19, 2008); S.C. Res. 2106, ¶¶ 1-2 (June 24, 2013); S.C. Res. 2467, ¶ 32 (Apr. 23, 2019).

[92] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sep. 2, 1998). However, the judges in *Akayesu* did leave open the possibility for other victims of genocidal sexual violence, stating that sexual violence is "one of the worst ways of inflict[ing] harm on the victim as *he or she* suffers both bodily and mental harm." *Id.* (emphasis added).

[93] Prosecutor v. Karemera, Case No. ICTR-98-44-T, Judgment and Sentence, ¶¶ 1665, 1668 (Feb. 2, 2012).

[94] *See* SHEPHERD, *supra* note 25, at 39 ("While the violences reported by those [women] who have experienced them are in no way 'untrue' and it is vital to raise awareness of these issues, it is also important to problematize the politics of constructing these accounts and the ways in which processes of interpretation and representation are implicated in the 'reclamation' of knowledge that is perceived as unproblematic within this conceptualization."); *see also* Brooke A. Ackerly & Jacqui True, *Reflexivity in Practice: Power and Ethics in Feminist Research on International*

genocide, the narrow framing in *Akayesu* has restricted how legal actors understand genocidal sexual violence, despite the fact that there is nothing in the Genocide Convention or subsequent texts which limits the crime to acts against cisgender women.[95]

It is important to note here that cisgender women were not the sole victims of sexual violence during the Rwandan genocide.[96] The Prosecution at the ICTR included evidence of sexual harm against cisgender men in a small number of cases without charging it as genocide; this evidence was mostly used to demonstrate the general chaos and depravity of the genocide without explicitly articulating a criminal charge.[97] A number of male survivors of sexual violence have also come forward outside of the formal ICTR process to testify about their experiences during the Rwandan genocide. Take, for example, this testimony from Faustin Kayihura:

> The woman locked me in her house. I was only thirteen, and the horrors I experienced in her house were more than I could endure. She forced me to have sex with her. She raped me three times a day for three days. She made me lie on the floor . . . . She would stroke my penis up and down with her hands first . . . and then she would force my penis into her vagina. Sometimes she forced me to go on top of her, and sometimes she went on top of me. She was much stronger than I was, and since I was afraid, I did everything she told me to do . . . . After the genocide, I tried to continue my

Relations, 10 INT'L STUD. REV. 693, 698 (2008) (discussing the importance of reflexivity for researchers studying very sensitive subjects like sexual violence).

[95] *See infra* notes 181 to 188 and accompanying text.

[96] *See generally* ANNE-MARIE DE BROUWER & SANDRA KA HON CHU, THE MEN WHO KILLED ME: RWANDAN SURVIVORS OF SEXUAL VIOLENCE (2009) (including testimony of sexual violence against men in an anthology of survivor stories from Rwanda).

[97] *See* Eichert, *Expanding the Gender of Genocidal Sexual Violence*, *supra* note 74, at 171 ("[I]n *Muhimana*, the Trial Chamber's final judgment did not address allegations that the accused had cut off one man's penis and testicles and displayed them on a pole. Similarly, in *Bagosora*, the Trial Chamber heard evidence that genocidaires used machetes to cut men's scrotums and that the mutilated genitals of men were seen at roadblocks, but this was only considered as background information and the accused were not charged for such actions."). Similarly, in *Niyitegeka*, the accused was convicted of the crime against humanity of "inhumane acts" for killing, decapitating, and castrating a male victim, and for perpetrating "sexual violence" on the body of a dead female victim. The fact that the violence against the male victim was not also characterized as "sexual" is not accidental, since the crime of "sexual violence" at this time was often synonymous with "rape" and rarely articulated as something that could happen to a man. *See* Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, ¶ 467 (May 16, 2003).

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> secondary school education. It was very difficult because I constantly saw visions of the woman who had raped me . . . . I hated myself for a long time. I hated my life and wanted it to end. I am so thankful that I have now found people who care for me . . . . I also met women who showed an interest in me, who listened to me and wanted to know me. For some time, I hated all women and did not want to see them, but I am now healing.[98]

For me, this story presents a clear instance of genocidal sexual violence. The repeated sexual assault and the trauma of sexual slavery caused Kayihura serious mental harm in violation of Article II(b) of the Genocide Convention, to the point that the traumatic memory of the experience haunted him for a long time and had a serious deleterious effect on his wellbeing. Similarly, Kayihura's experience could be read as a violation of Article II(d) (preventing births), since his experiences made him suicidal and distrusting of women, and thus less likely to have children. Finally, this testimony could also be interpreted as a violation of Article II(c) (inflicting conditions of life calculated to bring about the group's physical destruction) because Kayihura's experience led to his increased isolation from his community, which could have resulted in him leaving his community permanently.

However, testimonies like this one were not included in rulings about genocidal sexual violence at the ICTR.[99] This is in part due to a smaller body of evidence around such acts: male and queer survivors of sexual violence are sometimes less likely to report on their experiences,[100] and there is little evidence that the Prosecution sought out these survivors or prompted witnesses to discuss sexual violence against men.[101] Additionally, the ICTR sometimes

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98 DE BROUWER & KA HON CHU, *supra* note 96, at 93-94, 97.

99 Eichert, *Expanding the Gender of Genocidal Sexual Violence*, *supra* note 74, at 171.

100 Oosterveld, *supra* note 21, at 119. However, this explanation can often excuse improper investigations—notably, the Prosecutor at the ICTR also blamed Rwandan women for not disclosing their experiences as a way of deflecting criticism. *See* MIBENGE, *supra* note 86, at 67; *see also* Emeka Thaddues Njoku & Isaac Dery, *Gendering Counter-Terrorism:* Kunya *and the Silencing of Male Victims of CRSV in Northeastern Nigeria*, AFR. STUD. REV. 1, 15 (2023) (discussing how male victims may fear disclosing their victim status and/or choose silence as a form of asserting agency in a difficult situation).

101 Viseur Sellers & Nwoye, *supra* note 49, at 225 ("The [Office of the Prosecutor] focused purely on [conflict-related sexual violence against women]. No line of questioning surfaced [conflict-related sexual violence against men.]").

articulated sexual violence in an exclusionary manner: most notably, in some cases the crime of "rape" was solely limited to acts which included penetration "by the penis of the perpetrator," a requirement which would not fit with evidence like Kayihura's testimony.[102]

This strange situation suggests that the traditional doctrinal story about sexual violence and genocide is much more complicated than a simple retelling of caselaw would suggest. Instead, it is essential to consider the political narratives about gender and harm which were used to construct these commonplace understandings of genocidal sexual violence.[103] It is not accidental that the ICTR used a restricted definition of rape, or that the Prosecution did not seek out other survivors of sexual violence. To the contrary, for centuries the crime of sexual violence has been purposefully and explicitly articulated in international law as a crime committed by men against women, a narrative expectation which was being actively (re)produced by lawyers working and lobbying at the ICTR.[104]

a. (Re)Constructing Binary Gender

As I have written elsewhere, the earliest international law texts articulated a Christian Eurocentric logic whereby gender and sexual victimhood were defined as binary (men and women) and hierarchical (men as more powerful and violent than women).[105] These early jurists constructed the crime of wartime rape as an act committed by cisgender men against cisgender women, with no room for victims and perpetrators who fell outside that framing.[106] Later international lawyers would (re)produce this discursive framing in their work, (re)constructing the legal identity of

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[102] *See*, *e.g.*, Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-T, Judgement and Sentence, ¶ 6075 (Jun. 24, 2011); *see also* Mark A Drumbl, "*She Makes Me Ashamed to Be a Woman": The Genocide Conviction of Pauline Nyiramasuhuko, 2011*, 34 MICH. J. INT'L L. 559, 577-78 (2013) (discussing the ICTR's ruling about genocidal rape in *Nyiramasuhuko*).

[103] *See* AUDREY ALEJANDRO, WESTERN DOMINANCE IN INTERNATIONAL RELATIONS?: THE INTERNATIONALISATION OF IR IN BRAZIL AND INDIA 138 (2019) ("Discourses do not exist in a vacuum. They need to be studied in relation to the social context in which they emerge as well as to other related discourses.").

[104] David Eichert, *Decolonizing the Corpus: A Queer Decolonial Re-Examination of Gender in International Law's Origins*, 43 MICH. J. INT'L L. 557, 559 (2022).

[105] *Id.* at 566-76.

[106] *Id.* at 567.

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"woman" as the gender which experienced rape and thus needed the protection of men and the law.[107] Such a framing, of course, ignored the vast array of gendered expressions and identities which existed around the world, with many non-binary or third-gender identities being discursively erased by the colonizing power of law.[108] Instead, European international lawyers articulated a strict binary understanding of "men" and "women" which were linked to the concepts of "perpetrator" and "victim" respectively:

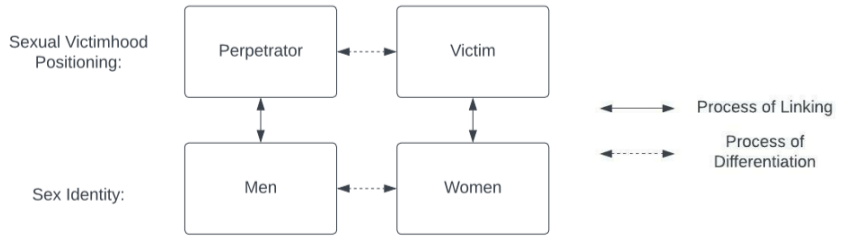

Figure One: The Binary Framing of Early International Law

Importantly, this "Euro-modern" framing worked alongside other provisions in early international law which focused on categorizing, hierarchizing, and governing human life.[109] For example, many early international law texts also codified what women could not do (*e.g.*, own property, work in certain professions), further (re)producing the dependent legal category of "woman."[110] As successive generations of international lawyers repeated the categories of "women" and "men," they became naturalized and commonsensical, making alternative interpretations about gender seem impossible.[111]

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[107] Dianne Otto, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, *in* INTERNATIONAL LAW AND ITS OTHERS 318, 322-25 (Anne Orford ed., 2006).

[108] Eichert, *Decolonizing the Corpus*, *supra* note 104, at 579-86.

[109] FOLÚKẸ́ ADÉBÍSÍ, DECOLONISATION AND LEGAL KNOWLEDGE: REFLECTIONS ON POWER AND POSSIBILITY 67 (2023).

[110] *See* NATALIE KAUFMAN HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN 4-9 (1983).

[111] EPSTEIN, *supra* note 55, at 10; *see also* PAISLEY CURRAH, SEX IS AS SEX DOES: GOVERNING TRANSGENDER IDENTITY 21-23 (2022) (discussing how legal articulations of biological sex in U.S. domestic law were meant to classify who had fewer rights than others). Of course, it is vital to recognize that while these texts constructed gender categories as universal (women/men), they also (re)produced a racial and colonial order in which non-white women and men faced systemic discrimination and violence. For example, some have correctly pointed out that enslaved Black women could not be victims of "rape" in the United States; that was an experience reserved for white women. *See* Angela P. Harris, *Race and Essentialism in Feminist*

This legal narrative remained dominant until the "renaissance" of international law in the 1990s, which coincided with the rapid incorporation of certain stands of feminist thought into international law and politics.[112] During this period, a number of prominent structural feminists turned their attention away from the domestic legal debates of the 1970s and 1980s to focus instead on international law, articulating binary constructions of gender and harm which understood women (as a unitary group) to be oppressed by men (another unitary group).[113] For example, (in)famous feminist law scholar Catharine MacKinnon wrote:

> [I]nternational law still fails to grasp the reality that members of one half of society are dominating members of the other half in often violent ways all of the time, in a constant civil war within each civil society on a global scale—a real world war going on for millennia . . . . Nothing imagines a conflagration with one side armed and trained, the other side taught to lie down and enjoy it, cry, and not wield kitchen knives.[114]

These feminists notably articulated "sexual violence" as the quintessential form of violence committed against women, a type of gender oppression that was universal both in its ubiquity and lack of attention from international law.[115] In the words of Australian feminist scholar Judith Gardam:

> Sexual violence in warfare is the most obvious distinctive experience of women in armed conflict; it is not something that they experience to any degree in common with [male] civilians generally, it results in immense suffering and

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Legal Theory, 42 STAN. L. REV. 581, 599 (1990). This pattern can similarly be seen in a number of early international law provisions which criminalized the "white slave trade" but did nothing to stop the horrors of colonialism. *See* Jean Allain, *White Slave Traffic in International Law*, 1 J. TRAFFICKING & HUM. EXPLOITATION 1, 1-3 (2017).

112 *See* Dianne Otto, *Queering Gender [Identity] in International Law*, 33 NORDIC J. HUM. RTS. 299, 302-09 (2015).

113 RANA M. JALEEL, THE WORK OF RAPE 65-70 (2021); Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 121-22 (2008).

114 MACKINNON, *supra* note 73, at 266.

115 Feminist activism at this time also succeeded in broadening criminal prohibitions on "rape" (which had been discussed for centuries by international lawyers) to "sexual violence," a category which includes non-penetrative acts as well. *See* ENGLE, *supra* note 80, at 48; Eichert, *Decolonizing the Corpus*, *supra* note 104, at 569-72.

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> trauma, unrelated to any arguments as to military necessity, and is almost universal in all types of warfare. The law, however, does not reflect that reality.[116]

Alongside these structural feminists working on the laws of armed conflict, other feminists were articulating a new discursive category of crime—"violence against women"—that could advance the cause of women in the post-Cold War period.[117] Whereas earlier human rights agreements said nothing about "violence against women," suddenly a whole host of international documents began to advocate for its abolition.[118] Throughout the 1990s, legal actors thus articulated this category of "violence against women" through authoritative repetition in international legal recommendations,[119] political speeches,[120] and non-binding declarations.[121] These texts also theorized how violence against women operates during genocide: for example, the section about "Violence Against Women" in the 1995 Beijing Platform for Action stated:

> Massive violations of human rights, especially in the form of genocide, ethnic cleansing as a strategy of war and its consequences, and rape, including systemic rape of women in war situations . . . must be punished . . . . While entire

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116 Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, 46 INT'L & COMPAR. L. Q. 55, 73 (1997).

117 MIBENGE, *supra* note 86, at 49-54. This very brief discussion of "feminists" deserves further attention in a future publication, both for identifying who is doing the speaking and for how the discourse about "violence against women" simultaneously produced the category of "feminist international law expert" as a legible actor in international affairs. *See* EPSTEIN, *supra* note 55, at 93-94 (discussing how discourse produces subject-positions for actors to resolve the problems they articulate); Johann Koehler & Tony Cheng, *Settling Institutional Uncertainty: Policing Chicago and New York, 1877–1923*, 61 CRIMINOLOGY 518, 528 (2023) (showing how criminal law efforts are constructed through the identification of problems and subsequent authorization of legal systems to address those problems).

118 MIBENGE, *supra* note 86, at 49-54; Karen Engle, *Looking Back to Think Forward: What We Might Learn from Cold War Feminist Movements*, 116 AJIL UNBOUND 264, 268-69 (2022).

119 *See*, *e.g.*, Rep. of the Comm. on the Elimination of Discrimination Against Women, 11th Sess., Jan. 20-30, 1992, ¶¶ 4-6, U.N. Doc. A/47/38; GAOR, 47th Sess., Supp. No. 38 (1993) (interpreting CEDAW's prohibition on discrimination to include a prohibition on sexual violence while using the new framing of "violence against women").

120 *See*, *e.g.*, U.N. GAOR, 48th Sess., 35th mtg., U.N. Doc. A/C.3/48/SR.35 (Nov. 16, 1993) (featuring statements from a number of diplomats in 1993 about violence against women).

121 *See*, *e.g.*, G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993).

> communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex. Parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism.[122]

This overall framing of sexual violence as a "distinctive experience of women in armed conflict" which "particularly affect[s]" women *in addition* to the generalized violence that affects everyone in a community presents a very narrow narrative about sexual victimhood in genocide, one which is informed by a staunchly binary strand of feminist politics.[123] Importantly, this framing actually (re)produces identity categories like "women" which have existed in international law for centuries by discursively linking "women" to specific political phenomena like "systematic rape."[124] In other words, while feminist international lawyers in the 1990s did reject certain international law articulations about women (*e.g.*, by asserting that women could work in the same jobs as men),[125] they did not dispute the centuries-old binary construction of gender and victimhood which understood "women" as being always sexually victimized by "men."[126]

Instead, prominent feminist international lawyers in the 1990s were more focused on articulating a moral obligation to focus on "violence against women."[127] The articulation of "sexual violence" as an international crime was central to this normative push, with feminists constituting the criminal category of "sexual violence" by describing it as something disproportionately used against women

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122 Rep. of the Fourth World Conference on Women, U.N. GAOR, 50th Sess., Agenda Item 165, ¶¶ 131, 135, U.N. Doc. A/CONF.177/20 (Sep. 15, 1995).

123 *See* Halley, *supra* note 113, at 2; *see also* Gardam, *supra* note 116, at 73; Rep. of the Fourth World Conference on Women, *supra* note 122, ¶¶ 131, 135.

124 SHEPHERD, *supra* note 25, at 52-53.

125 *See*, *e.g.*, Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 631-33 (1991).

126 *See* Eichert, *Decolonizing the Corpus*, *supra* note 104, at 576-77; *see also* LENE HANSEN, SECURITY AS PRACTICE: DISCOURSE ANALYSIS AND THE BOSNIAN WAR 16-17 (2006) (discussing how feminists at different times have disputed the discursive connections associated with the word "woman").

127 KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 253 (1997) (articulating a historical narrative in which women had been forgotten by international law, and the solutions to that forgottenness).

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and yet forgotten by international law.[128] These discursive elements were linked to the concepts of "men" and "women" to produce a new narrative about sexual violence in armed conflict, one in which international tribunals had a responsibility and priority to focus on invisible sexual crimes against cisgender women:

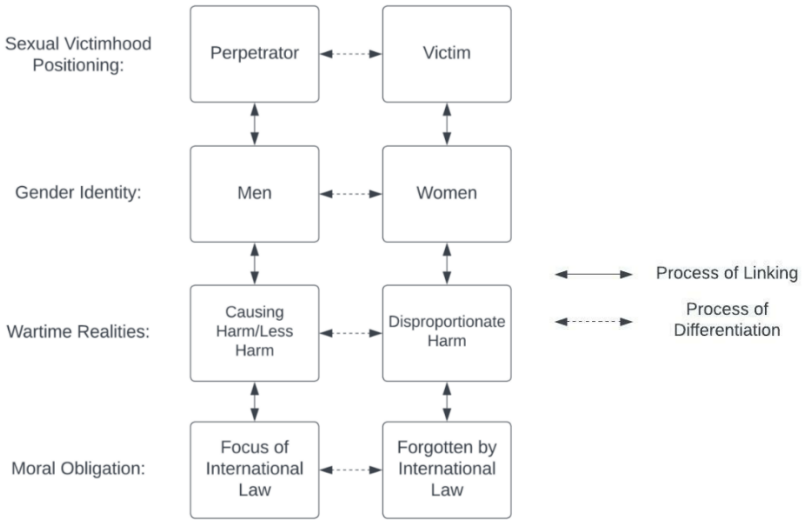

Figure Two: The Feminist (Re)Articulation of the Gender Binary

This is not to say that prominent feminist international lawyers purposefully ignored evidence of sexual violence against men; in a future project I examine how these advocates later made such

[128] Heidi Matthews, *Redeeming Rape: Berlin 1945 and the Making of Modern International Criminal Law*, *in* THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS 90, 99-100 (Immi Tallgren & Thomas Skouteris eds., 2019).

evidence legible within their binary feminist narrative. My point here is instead that the crime of "sexual violence" was *made intelligible* through the continued repetition of "truths" about it: sexual violence is something that happens solely or predominately to cisgender women; sexual violence is an umbrella category which includes rape and other crimes; sexual violence had been forgotten by international law until the 1990s. At the same time, this advocacy around sexual violence also (re)produced identity categories like "woman" and "man" by telling "truths" about armed conflict: women are disproportionately affected by sexual violence; men commit sexual violence against women; women have been forgotten by male lawyers.

b. Constructing "Genocidal Sexual Violence"

This binary narrativization of sexual violence was dominant during the early years of the ICTR and ICTY, informing how legal actors in both contexts practiced international law.[129] For example, one of the most notable accounts of sexual violence in Rwanda came from a report produced by Binaifer Nowrojee at Human Rights Watch's Women's Rights Project.[130] This report, entitled "Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath," recounted the tremendous violence faced by cisgender women in the conflict:

> During the Rwandan genocide, rape and other forms of violence were directed primarily against Tutsi women because of both their gender and their ethnicity . . . . Some Hutu women were also targeted with rape because they were affiliated with the political opposition, because they were married to Tutsi men or because they protected Tutsi. A number of women, Tutsi and Hutu, were targeted regardless of ethnicity or political affiliation.[131]

Importantly, like many feminist international law actors in the 1990s, Nowrojee connected the crimes described in her report to the violence experienced by a universal category of "women":

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[129] *See* SJOBERG, *supra* note 53, at 70-73.

[130] HUM. RTS. WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996).

[131] *Id.* at 3.

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> Throughout the world, sexual violence is routinely directed against females during situations of armed conflict. This violence may take gender-specific forms, like sexual mutilation, forced pregnancy, rape or sexual slavery. Being female is a risk factor; women and girls are often targeted for sexual abuse on the basis of their gender, irrespective of their age, ethnicity or political affiliation. Rape in conflict is also used as a weapon to terrorize and degrade a particular community and to achieve a specific political end.[132]

This report was key to directing the focus of other feminist international lawyers towards the use of sexual violence during genocide.[133] As such, the opening of the *Akayesu* trial at the ICTR was met with initial interest from feminist activists: notably, the Prosecutor's opening statement mentioned "sexual assault and mutilations"[134] and several witness statements testified to a systematic campaign of sexual violence against women.[135] However, these feminists quickly became frustrated that neither Akayesu nor defendants in other cases were in fact being formally charged for these sexual crimes.[136]

A coalition of feminist observers began to lobby the ICTR, submitting an amicus brief which asserted that Akayesu should be charged with committing genocide for acts of sexual violence against cisgender women that resulted in (1) serious bodily or mental harm; (2) conditions of life calculated to bring about the physical destruction of the group; and (3) the prevention of births.[137] At the same time, Judge Navanethem Pillay (one of three judges on the case and the only woman on the bench) began to question why witness allegations of sexual violence were not being investigated.[138]

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132 *Id.* at 2.

133 *See* Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L. J. 217, 224 (2000) ("Rape was essentially invisible until nine months later . . . . Nor was it, thereafter, officially documented. That was left to the initiatives of two NGOs, African Rights and the Women's Project of Human Rights Watch.").

134 *See* Prosecutor v. Akayesu, Case No. ICTR-96-4, Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the Competence of the Tribunal, ¶ 24 (June 17, 1997) [hereinafter Akayesu Amicus Brief].

135 *See* Copelon, *supra* note 133, at 224-25.

136 *See* Akayesu Amicus Brief, *supra* note 134, ¶¶ 35-36.

137 *Id.* ¶ 43.

138 *See* ENGLE, *supra* note 80, at 106. Judge Pillay had close connections to the international feminist movement and even attended the 1993 World Conference on

Judge Pillay, influenced by this feminist lobbying, ultimately suspended the case, ordering the prosecutor to conduct further investigation into such crimes.[139] A short time later, the Prosecution amended the indictment, adding two new charges about sexual violence against women.[140] Additionally, throughout the trial process, women's rights groups assisted the Prosecution by working to identify female victims of sexual violence who could testify before the ICTR.[141]

Viewed from this angle, the result of the *Akayesu* case is not accidental but rather the victory of a certain politicized push to articulate "violence against women" in genocide.[142] Investigations about sexual violence (like the one carried out by Binaifer Nowrojee from the Women's Rights Project) and legal articulations of genocidal sexual violence (like the ones made in the amicus brief) were structured around the assumption that victims would be female. As a result, the *Akayesu* case contributed to the dominance of a now-authoritative narrative about what genocidal sexual violence looks like, the people it affects, and the motivations behind it—in essence, articulating a crime where previously there was ambiguity.[143] Narratives about "what happens" during armed conflict—namely, the expectation that "men" commit sexual violence against "women"—became naturalized and self-evident

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Human Rights in Vienna, later stating "Women were able to convince the governments of the world that violence against women for instance was as much a public issue, a concern for the world community, as political torture." Barbara Frey, *A Fair Representation: Advocating for Women's Rights in the International Criminal Court*, CTR. ON WOMEN & PUB. POL'Y CASE STUDY PROGRAM 6 (2004).

139 ENGLE, *supra* note 80, at 106; *see also* Akshan de Alwis, *Interview with Navi Pillay: Former UN High Commissioner for Human Rights*, DIPL. COURIER (Oct 6, 2016), https://www.diplomaticourier.com/posts/interview-navi-pillay-former-un-high-commissioner-human-rights ("A[n] NGO asked us why out of 21 indictments issued to date, is there no charge of rape? That prompted me to ask for evidence of sexual violence or rape on the bodies of victims. When witnesses gave evidence of sexual violence, in the Akayesu case, I and my fellow judges called for more information.").

140 Kelly Dawn Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 105-06 (1999).

141 Jonneke Koomen, *"Without These Women, the Tribunal Cannot Do Anything": The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda*, 38 SIGNS: J. WOMEN IN CULTURE & SOC'Y 253, 257-59 (2013).

142 *See* SJOBERG, *supra* note 53, at 73.

143 *See* EPSTEIN, *supra* note 55, at 9-10; *see also* NICOLA PALMER, COURTS IN CONFLICT: INTERPRETING THE LAYERS OF JUSTICE IN POST-GENOCIDE RWANDA 62 (2015) ("[W]hile the objectives of peace, security, and reconciliation are difficult to quantify, the case law provides something definite in its neatly printed words.").

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through a process of discursive repetition, rendering other experiences and narratives illegible to international law practitioners.[144] Genocidal sexual violence became simply one form of "violence against women," and later courts citing *Akayesu* would (re)produce this hegemonic narrative about who experiences sexual violence, why it is committed, and who is harmed by it.[145]

II. WHO GETS TO BE A VICTIM IN THE ROHINGYA GENOCIDE?

A quarter of a century after the *Akayesu* ruling, how do narratives about gender and victimhood guide the interpretation of genocidal sexual violence today? This section provides a novel case study into how international lawyers are articulating sexual victimhood in the ongoing legal processes about the Rohingya genocide. I demonstrate how most international lawyers have categorized sexual violence against cisgender women as "genocidal" (in other words, more serious and/or affecting the entire community) while not linking that criminal label to functionally identical acts of sexual violence against men or gender-diverse Rohingya. I examine four key sites where this process of interpretation has taken place: the U.N. FFM, the ICJ, the ICC, and the ongoing universal jurisdiction cases in Argentina and Germany. I will focus most of my attention in this section on accomplishing the first goal of this Article: tracing the dominant narrative about sexual violence in the Rohingya genocide, demonstrating the contentions and alternative interpretations which could be made based on available evidence, and articulating a normative argument that

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144 *See* EPSTEIN, *supra* note 55, at 9-10; *see also* ADÉBÍSÍ, *supra* note 109, at 74 ("Thus, the marking of bodies produces othered lives, which are, through the logics and practices of colonialism, unintelligible to legal epistemologies of Euro-modernity, its protection, and its justice . . . . Therefore, these body markers of gender and race (and class and disability and sexuality, and so on) function as technologies that produce particular modalities of life through the coercive power of the law that shapes behavio[]r and thinking globally . . . . Therefore, Euro-modern legal knowledge which claims the human/body as its central subject has, ironically, through its colonial logics, made most of its subject unintelligible to itself.").

145 *See also* WIBBEN, *supra* note 22, at 39 ("[N]arratives are performative, constituting a particular order and its corresponding subjects. Narratives—and subjects—that do not fit the confines of this order are relegated to the margins by authorized narratives that conform to and confirm the dominant social, symbolic, political, and economic order.").

current legal processes should be amended to incorporate victims of all genders.

Throughout this section, I also work towards the second goal of this article: analyzing how different legal actors have (re)produced narratives about sexual victimhood that constitute both the identities of the individuals involved and the crimes themselves. Specifically, I show that international lawyers drew from a dominant narrative expectation that "men commit sexual violence against women" when investigating and articulating claims to sexual victimhood in the Rohingya genocide. This was connected to and reinforced by a specific narrative about the actions of the Myanmar military during the clearance operations in which "men were killed and women were raped and killed." These narrative expectations guided how international lawyers interpreted the evidence they encountered, both by (1) assessing whether sexual violence occurred and (2) whether it was serious enough to merit classification as an act of genocide.

Before beginning, however, I want to repeat my strong conviction that the crimes committed against cisgender Rohingya women were indisputably horrific, amounting to some of the worst acts committed during the 21st century. The content of this section, therefore, should never be read as disputing the reality of the violence committed against cisgender women or downplaying the severity of their experiences.[146] To the contrary, I want to assert that the zero-sum game constructed between different victims is false, and that genocidal violence against women, men, and gender-diverse people should not be ranked into a legally unnecessary hierarchy. In other words, this section seeks precisely to undo much of the boundary-drawing that has happened in articulations of genocidal sexual violence. To do so, I will sometimes need to place terrible crimes next to one another and compare them, which I have attempted to do with the utmost respect for victims living and dead.

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[146] Laura J. Shepherd, *Loud Voices Behind the Wall: Gender Violence and the Violent Reproduction of the International*, 34 MILLENNIUM: J. INT'L STUD. 377, 400-01 (2006) ("To speak of construction is in no way to suggest that experiences of gendered violence are somehow wilfully fabricated, or that the life situations of individuals affected by gendered violence should not be a target for thoughtful and effective research and action. Rather it should draw attention to the processes of representation involved in the telling and retelling of these accounts. While the acts of violence are 'true' and their telling is important, it is vital to be aware of the politics of constructing these accounts . . . .").

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If I have been unsuccessful in this regard, I hope for patience and forgiveness from the affected individuals and their communities.[147]

a. The Independent International Fact-Finding Mission on Myanmar

The U.N. Human Rights Council established the FFM in March 2017 in response to allegations of genocide and mass violence against the Rohingya and other ethnic groups in Myanmar.[148] The FFM released several reports during its short tenure (which lasted from March 2017 to September 2019), including two general reports in 2018 which included allegations of sexual violence[149] and a specific report dedicated to sexual violence in 2019.[150] The FFM did more than simple fact-finding: while their reports called for a "competent court" to determine the liability of military leaders for atrocity crimes,[151] the FFM also made various "conclusions" about their findings, drawing from treaties, caselaw, and other international legal standards.[152] Because these conclusions have been repeated as authoritative and binding by other legal teams, I have chosen to start my narrative here.

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147 Here, I take seriously the challenge by Anne Orford to recognize "our own creativity and generativity in the project of making the law and making its history," acknowledging my own interpretations and working methodically through the source material to be aware of my biases. ORFORD, *supra* 23, at 10. Throughout this project, I have felt a general unease at the realities of international law, in which victims become anonymous objects whose experiences are tossed around and debated in never-ending intellectual exercises. Due to these realities of international law, I am also working here with these nebulous victim testimonies, without any input from the affected communities. In future projects, I hope to continue this work with significant input from Rohingya refugees, to highlight their interests while respecting the many contradictory methodological complications inherent in working with victims of mass atrocity. *See* Roxani C Krystalli, *Narrating Victimhood: Dilemmas and (In)Dignities*, 23 INT'L FEMINIST J. POL. 125, 127 (2021).

148 *See* G.A. Res. 34/22, ¶ 11 (Mar. 24, 2017).

149 *See* U.N. Hum. Rts. Council, Report of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/64 (Sep. 12, 2018) [hereinafter FFM Short Report]; *see also* U.N. Hum. Rts. Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/29/CRP.2 (Sep. 17, 2018) [hereinafter FFM Detailed Report].

150 FFM 2019 Report, *supra* note 13.

151 FFM Short Report, *supra* note 149, ¶ 87.

152 FFM 2019 Report, *supra* note 13, ¶¶ 100-17.

i. FFM Statements 2017-2018

Upon arrival in Cox's Bazar, the site of the main refugee camp in Bangladesh, the FFM began to seek out survivors to interview.[153] NGOs and other international organizations which were already operating in the area participated in this process, providing contacts and preliminary information to members of the FFM.[154] Notably, the narrative of "men were killed, women were raped and killed" was already circulating among these international actors; in a future publication I examine the role of these early interveners in articulating this narrative for the international community.[155] However, for the purposes of this Article, it is important to point out that FFM members often relied heavily upon these organizations at the beginning of their investigation: international actors already based in Cox's Bazar helped the FFM navigate the large refugee camp, identify survivors who were willing to testify, and provide connections to translators.[156] Moreover, some of these organizations had established female-only spaces where the FFM could go to interview women about sexual violence—no equivalent spaces existed for other victims, since there was no expectation of systematic sexual violence against men or gender-diverse Rohingya.[157]

The FFM's early reporting from this period (re)produced the dominant narrative among international organizations in Cox's Bazar, articulating sexual violence as a crime which solely affected cisgender women and girls.[158] For example, in a report from late 2017 the FFM stated:

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153 Zoom Interview with lawyer in Geneva (May 2020).

154 Zoom Interview with lawyer in Geneva (Jan. 2023) [hereinafter Interview 2023-1].

155 *See* Thomas Charman, *Sexual Violence or Torture?*, *in* SEXUAL VIOLENCE AGAINST MEN IN GLOBAL POLITICS 198, 198-99 (Marysia Zalewski et al. eds., 2018) (examining how human rights NGOs reach different interpretations about sexual violence depending on the gender of the victim).

156 Zoom Interview with lawyer in Geneva (Sept. 2020); Interview 2023-1, *supra* note 154.

157 Interview 2023-1, *supra* note 154.

158 It is not clear if members of the FFM had interviewed other survivors at this early stage; given the sheer immensity of the refugee situation, it would be understandable that not all groups had equal access to the small FFM team only a short time after the mass exodus from Myanmar. At the same time, the decision to seek out female survivors is similar to the decision by the ICTR Prosecutor to not ask about sexual violence against men, one which was directly influenced by the

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> [Children] told us of witnessing their fathers killed, their mothers and sisters raped, and their siblings burned to death . . . . We have heard testimonies of young girls raped, having their throats slit or being burnt to death after being raped, or simply gang-raped to death. Women described mass rapes in the jungle and the mutilation of victims. In some cases, the site was alleged to be military barracks.[159]

Similarly, in March 2018, the FFM made a formal statement about its work to the Human Rights Council:

> All the information collected by the Fact-Finding Mission so far further points to violence of an extremely cruel nature, including against women. We have collected credible information on brutal rapes, including gang rapes, and other forms of sexual violence, often targeting girls and young women.[160]

The FFM added further evidence to these statements in September 2018 when it released two formal reports detailing serious acts of violence committed by Myanmar's military.[161] The reports were connected: the shorter, 20-page report was a summarized version of the longer, 440-page report.[162] The shorter report concretely stated that, beginning in 2016, Rohingya "[w]omen

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binary narrative about sexual victimhood that became dominant in the 1990s. Moreover, there were structural issues which would have made it difficult to identify some victims: for example, registration documents only allowed for refugees to identify as male or female, and many hijra did not dress in a way which would make them recognizable due to fears of violence. Interview with lawyer in the Hague (Mar. 2022).

159 U.N. Hum. Rts. Council, Statement to the Special Session of the Human Rights Council on the "Situation of Human Rights of the Minority Rohingya Muslim Population and Other Minorities in Rakhine State of Myanmar" (Dec. 5, 2017).

160 Marzuki Darusman (Chairperson of the Independent International Fact-Finding Mission on Myanmar), Statement at the 37th session of the Human Rights Council (Mar. 12, 2018), www.ohchr.org/en/statements/2018/03/statement-mr-marzuki-darusman-chairperson-independent-international-fact-finding [https://perma.cc/M7QV-6BA5].

161 *See* FFM Short Report, *supra* note 149; FFM Detailed Report, *supra* note 149.

162 U.N. Office of the High Commissioner, Myanmar: UN Fact-Finding Mission Releases Its Full Account of Massive Violations by Military in Rakhine, Kachin and Shan States (Sep. 18, 2018), https://www.ohchr.org/en/press-releases/2018/09/myanmar-un-fact-finding-mission-releases-its-full-account-massive-violations?LangID=E&NewsID=23575 [https://perma.cc/WM9C-NRKT].

and girls were subjected to sexual violence, including gang rape."[163] Specifically:

> Rape and other forms of sexual violence were perpetrated on a massive scale. Largescale gang rape was perpetrated by Tatmadaw soldiers in at least 10 village tracts of northern Rakhine State. Sometimes up to 40 women and girls were raped or gang-raped together . . . . Rapes were accompanied by derogatory language and threats to life, such as, "We are going to kill you this way, by raping you." Women and girls were systematically abducted, detained and raped in military and police compounds, often amounting to sexual slavery. Victims were severely injured before and during rape, often marked by deep bites. They suffered serious injuries to reproductive organs, including from rape with knives and sticks. Many victims were killed or died from injuries. Survivors displayed signs of deep trauma and face immense stigma in their community. *There are credible reports of men and boys also being subjected to rape, genital mutilation and sexualized torture*.[164]

This last sentence, informing the world about "credible reports of men and boys" also experiencing sexual violence, was one of the first times anyone in the international community had heard about these harms.[165] At the same time, however, the phrasing of the sentence and its inclusion at the end of a long and detailed list of sexual crimes committed against women suggested that (1) very little was known about these victims, and (2) these crimes were much less prevalent than the detailed, widespread, and violent sexual acts committed against Rohingya women and girls.

Surprisingly, however, if one reads the longer 440-page report, the FFM already had concrete evidence of these "credible reports" about sexual violence against men and boys, with significant testimony dating back several years:

> For the period following the June 2012 violence, there are also credible and consistent reports of men and boys being

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163 FFM Short Report, *supra* note 149, ¶ 45.

164 *Id.* ¶ 38 (emphasis added).

165 The only other major report to present evidence of sexual violence against cisgender Rohingya men in 2018 was published two months later by the Women's Refugee Commission; unfortunately, this NGO report did not garner the same attention as the FFM's work. CHYNOWETH, *supra* note 17.

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> subjected to sexual violence, including rape, sexuali[z]ed torture and humiliation, either by authorities or in their presence. Rohingya boys were detained in the same cells as adult men. Detainees stated that guards anally raped Rohingya boys. At night, groups of boys and young men were subjected to penile rape, both orally and anally, by ethnic Rakhine detainees, often in the same cell as other detainees. One former detainee described how boys were taken into the latrine after dark: "Almost every night they took these boys to the latrine in the cell. They forced them to perform oral sex and raped them. If they refused, they put their face into the latrine. We used to hear the screaming of the victims, but we were helpless and could do nothing." Rohingya men and boys were also subjected to sexual humiliation, often in the presence of other inmates. Detainees experienced the degrading treatment of being forced to walk naked from their cell to the shower and showering in groups of up to 20 to 30 persons in front of one another, including family members, which was particularly uncomfortable and considered shameful. Detainees reportedly had to wait outside their cells naked until they dried. Another detainee described how guards burned the genitals of Rohingya detainees.[166]

The longer FFM report also described sexual violence against Rohingya men and boys in 2016 and 2017, although these sections acknowledged that further research was necessary.[167] For example, in one section the FFM noted:

> Rape and other sexual and gender-based violence were perpetrated on a massive scale during the "clearance operations" from 25 August 2017. This includes mass gang rapes, sexually humiliating acts, sexual slavery and sexual mutilations. Rohingya women and girls were the main victims, although there were some instances involving men and boys.[168]

At another point in the longer report, the FFM stated:

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166 FFM Detailed Report, *supra* note 149, ¶¶ 675-76.

167 *Id.* ¶¶ 920, 940.

168 *Id.* ¶ 920.

> Women and girls were not the sole victims and survivors of sexual violence during the "clearance operations." The Mission received credible reports of sexual violence against men and boys, including rape, genital mutilation and sexuali[z]ed torture, sometimes leading to death. The scale of this sexual violence remains unknown . . . . During detention, which was prevalent during the "clearance operations," there are consistent credible reports of men and boys being subjected to sexual violence, including rape, sexuali[z]ed torture and humiliation by authorities or in their presence.[169]

This abundance of initial evidence in the longer report suggests that sexual violence against men, women, boys, and girls was systematic and inter-connected, both during the "clearance operations" of 2016-2017 and earlier, such as during the repressive crackdowns in 2012.[170] However, this interpretation of the facts is not articulated in the summarized report; instead, sexual violence is described as an almost-unique experience of women, with more than a dozen sentences describing sexual crimes against women in horrific detail while relegating similar experiences by men to the phrasing of "credible reports."[171]

This discursive exclusion of male victims from the summarized report points to the role of interpretation and repetition in legal assessments of sexual harm. While the FFM began in 2017 by prioritizing the investigation of sexual violence against cisgender women and girls,[172] by the middle of 2018, the FFM had significant

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169 *Id.* ¶¶ 939-40.

170 This raises an interesting and important question about when the Rohingya genocide officially "began." Of course, this question pre-supposes that "genocide" is a knowable social phenomenon that exists outside of human identification. Instead, I argue that the timeline of violence about when genocide "began" is inherently linked to politicized constructions of the crime of genocide. Thus, if one understands international crime to be focused on what DeFalco calls "horrific spectacles," then a limited focus on the clearance operations in 2016-17 makes sense. RANDLE C. DEFALCO, INVISIBLE ATROCITIES: THE AESTHETIC BIASES OF INTERNATIONAL CRIMINAL JUSTICE 149 (2022). Alternatively, if one thinks of genocide as a process, meant to erase a population through slow and fast violence, then a wider temporal analysis would be part of that analysis. Sheri P. Rosenberg, *Genocide Is a Process, Not an Event*, 7 GENOCIDE STUD. & PREVENTION 16, 16-18 (2012). This is the interpretation that some Rohingya have supported. *See*, *e.g.*, ROHINGYA LANGUAGE PRESERVATION PROJECT, *supra* note 4, at 5 (articulating a long history of oppression against the Rohingya stretching back decades).

171 FFM Short Report, *supra* note 149, ¶ 38.

172 Interview 2023-1, *supra* note 154.

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evidence of similar harms against cisgender men and boys.[173] Despite this, however, the FFM de-emphasized these harms, hiding them in a long report and placing them in comparison (or competition) with similar harms against cisgender women, the presumed "main victims" of sexual violence.[174] My interpretation of this exclusion is that male victims were illegible as victims of genocidal sexual violence: international actors at the time were actively articulating a narrative of "men were killed, women were raped and killed," and alternative evidence did not fit into that expectation. Instead, sexual violence against cisgender women was recognizable and familiar, fitting into a decades-long discursive narrative wherein women are overwhelmingly the primary victims of conflict-related sexual violence.[175]

This narrative expectation was similarly reflected at the end of the longer 2018 report, in which the FFM stated that there were "reasonable grounds to conclude" that Myanmar's military had committed the crime of genocide.[176] To do so, the FFM compared the facts described in their long report against the legal requirements outlined in the Genocide Convention, concluding that (1) Myanmar's military had genocidal intent based on their actions and statements, fulfilling the *mens rea* requirement of genocide;[177] and (2) the Rohingya qualify as a targeted ethnic, racial, and religious group under international law.[178] The FFM then identified evidence which established four *actus rei* of genocide: (a) killing members of the group, (b) causing serious bodily or mental harm, (c) deliberately inflicting conditions of life calculated to bring about the group's physical destruction, and (d) imposing measures to prevent births.[179]

However, when considering sexual violence as an act of genocide, the FFM only included crimes committed against women in their analysis. For example, with the first act (killing members of the group), the FFM reported that in one instance "villagers were gathered together, before men and boys were separated and killed[, while] women and girls were taken to nearby houses, gang raped,

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173 *Id.*

174 FFM Detailed Report, *supra* note 149, ¶ 920.

175 *See* Anne-Kathrin Kreft & Mattias Agerberg, *Imperfect Victims? Civilian Men, Vulnerability, and Policy Preferences*, AM. POL. SCI. REV. 1, 14-15 (2023).

176 FFM Detailed Report, *supra* note 149, ¶ 1386.

177 *Id.* ¶¶ 1417-41.

178 *Id.* ¶¶ 1390-91.

179 *Id.* ¶¶ 1392-1410.

then killed or severely injured."[180] The use of sexual violence against men, which just a few pages earlier had reportedly "sometimes [led] to death," was not part of this genocide determination.[181]

Regarding the second act of genocide (serious physical and mental harm), the FFM cited *Akayesu*, arguing that sexual violence against women and girls could be found to be genocidal; no mention is made to the sexual violence against men reported by the FFM, such as burning genitals or systematic rape, which in my interpretation would also cause "serious harm":

> Women and girls who had their breasts cut off and those who lost limbs or parts of limbs suffered "serious injury to external organs" rising to the level of serious bodily harm [in the Genocide Convention]. The rape, gang rape and other sexual violence inflicted on Rohingya women and girls before and during the "clearance operations" was often accompanied by the additional infliction of serious bodily harm; victims were severely bitten or otherwise scarred on the face, breasts, thighs, and genitalia, and subjected to other mutilation of their reproductive organs . . . . [Such destruction] has been recognized [in *Akayesu*] as demonstrating an intent to destroy a group "while inflicting acute suffering on its members in the process."[182]

Regarding the third act of genocide (deliberately inflicting conditions of life calculated to bring about physical destruction in whole or in part), the FFM further affirmed the genocidal nature of the sexual crimes against Rohingya women and girls.[183] This argument was reinforced by references to precedent from the ICTR (where women and girls were the only recognized victims of genocidal sexual violence) and the report by Binaifer Nowrojee (in which sexual violence is described as a crime only affecting women and girls):

> Rape has been recognized as a condition of life designed to bring about its destruction . . . . As observed by a scholar in the context of Rwanda [Binaifer Nowrojee], "the evidence illustrates that many rapists expected, consequent to their attacks, that the psychological and physical assault on each

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180 *Id.* ¶ 1395.

181 *Id.* ¶¶ 939-40.

182 *Id.* ¶ 1397.

183 *Id.* ¶ 1406.

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> Tutsi woman would advance the cause of the destruction of the Tutsi people." The scale, brutality and systematic nature of rape, gang rape, sexual slavery and other forms of sexual violence against the Rohingya lead inevitably to the inference that these acts were, in fact, aimed at destroying the very fabric of the community, particularly given the stigma associated with rape within the Rohingya community.[184]

Finally, the FFM labeled sexual violence against Rohingya women as a fourth act of genocide (imposing measures intended to prevent births), again citing *Akayesu* as support in their footnotes:

> [T]he high prevalence of rape and other brutal forms of sexual violence against women and girls in Rakhine State, in particular in the context of the "clearance operations," may have been aimed at affecting their reproductive capacity. The majority of victims were either of childbearing age or younger, and the rapes were often accompanied by deliberate mutilation of genitalia . . . .[185]

In addition to this claim about destruction of women's reproductive capabilities, the FFM also specified that the prevention of pregnancy relied on social factors.[186] This was in part attributed to regressive or patriarchal decisions on the part of Rohingya men and husbands:

> Apart from the obvious physical destruction of the reproductive capacity in such cases, members of the Rohingya community who have experienced sexual violence are less likely to be able to procreate. Where Rohingya women or girls have been subjected to rape, gang rape or other forms of sexual violence, this significantly reduces the possibility of marriage. In some cases, Rohingya husbands have rejected spouses who have been subjected to sexual violence. This is largely due to the cultural stigma surrounding sexual violence, victimhood and perceived gender roles within the community. [According to the judges in *Akayesu*,] [r]ape "can be a measure intended to prevent births when the person raped refuses subsequently to

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184 *Id.*

185 *Id.* ¶ 1410.

186 *Id.*

> procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate."[187]

What conclusion should be drawn from these two reports? On a doctrinal level, I agree with the FFM's legal analysis regarding sexual crimes against cisgender women: I do think that the evidence presented in the 2018 reports makes the case for genocidal sexual violence. At the same time, however, the choice to only categorize sexual crimes against cisgender women as "genocide" demonstrates how identical acts against cisgender men were not legible due to a narrative about what "genocidal sexual violence" looks like, whom it affects, and why it is committed. This can be seen in the FFM's continued references to *Akayesu*, the ICTR, and Nowrojee's report: because the contours of "genocidal sexual violence" are not defined in any international treaty, the FFM instead had to turn to the interpretations contributed by certain feminist international lawyers in the 1990s. These prior interpretations relied upon a binary narrative of "what happens" during armed conflict: "women" experience "sexual violence," "men" are "killed" or perpetrate the sexual violence, and these differences between the two genders in turn *constitute* the gendered categories. Experiences which fell outside of this discursive system of meaning-making—such as men who were killed as a result of sexual violence—were illegible and therefore not incorporated into the dominant narrative about the conflict. This illegibility is particularly striking when one sees how evidence of sexual violence against men—which was described just a few pages earlier in the report—suddenly disappeared from the FFM's legal analysis of genocide, as if it never happened.

ii. FFM Report on Sexual Violence, 2019

The following year, the FFM released a specific report about sexual and gender-based violence.[188] This report reaffirmed the FFM's previous conclusion that sexual violence against cisgender Rohingya women qualified as genocide because it was used to (1) kill female members of the community, (2) cause serious bodily or mental harm to women and girls, (3) inflict on women and girls conditions of life meant to bring about the destruction of the

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187 *Id.*

188 FFM 2019 Report, *supra* note 13.

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community, and (4) impose measures to prevent births among Rohingya women.[189]

The 2019 FFM report also gave more detail about sexual violence against men and boys, asserting that they "have been subjected to sexual and gender-based violence, especially in the context of detention settings."[190] For example, the FFM repeated their claims made in 2018:

> [T]here were credible reports of a prevalence of sexual violence against men and boys during the Rohingya "clearance operations" and in detention settings. The sexual violence that men and boys were subjected to included rape, genital mutilation and sexual torture, sometimes leading to death.[191]

A few paragraphs later the FFM continued: "The Mission found there to be credible and consistent reports of rape and gang rape [of Rohingya men and boys], genital mutilation, forced nudity and other forms of sexual violence, sometimes leading to death."[192] The FFM also reported on sexual violence against men and boys which occurred before the 2016-2017 clearance operations: this included anal and oral rape, genital beatings, sexual humiliation and forced nudity, the burning of pubic hair, being urinated on, and genital mutilation.[193] One refugee also stated that he was forced to rape women alongside prison officials.[194] However, the FFM did not consider that these acts amounted to genocide.[195] No explanation is made in the report; instead, the FFM concluded that such acts instead constituted crimes against humanity and violations of human rights law.[196]

Additionally, the 2019 report included information about sexual violence committed against five "transgender women," whom the FFM categorized as separate from the "women" who experienced

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189 *Id.* ¶ 96.
190 *Id.* ¶ 5.
191 *Id.* ¶ 149.
192 *Id.* ¶ 154.
193 *Id.* ¶¶ 156-167.
194 *Id.* ¶ 162.
195 *Id.* ¶¶ 168-69.
196 *Id.*

genocidal sexual violence.[197] As I mentioned at the beginning of this article, this category of "transgender women" likely refers to Rohingya individuals who would identify as hijra or hizara, a third-gender identity category throughout parts of Southeast Asia.[198] This is a nuanced but vital difference for several reasons. First, many transgender women in the West accurately consider themselves to be women: they live their lives as women and are often perceived by their communities as women.[199] As such, the fact that the 2019 FFM report provides two distinct sections devoted to violent acts against "women" and "transgender women" is problematic, since transgender women are women.[200] Moreover, "hijra" is not necessarily synonymous with "transgender women," since the term can include effeminate men or men who have sex with men.[201] In either case, there is no one phrase in English which perfectly encapsulates the diverse gender expressions of these "transgender women."[202] Most importantly, however, it is impossible to know how the five anonymous individuals included in the FFM report would personally identify themselves.

The use of "transgender women" as an identity category is instead the result of recent efforts in the international legal space to normalize and universalize LGBT identity categories.[203]

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197 *Cf. id.* ¶ 69 (discussing "violence against Rohingya women and girls") *with id.* ¶ 180 (discussing "consistent accounts from transgender women" in a different section of the report).

198 This framing was confirmed by one member of the FFM team, Radhika Coomaraswamy, who spoke about the reporting on "transgender people" who are hijras. U.N., *Report on Myanmar – Press Conference (22 August 2019)*, YOUTUBE, at 7:00 (Aug. 24, 2019), https://youtu.be/S0qJwAoFRxQ [https://perma.cc/9ZD2-JDXD].

199 *See* Julia Serano, *Skirt Chasers: Why the Media Depicts the Trans Revolution in Lipstick and Heels*, *in* THE TRANSGENDER STUDIES READER 2, at 226, 233 (Susan Stryker & Aren Z. Aizura eds., 2013).

200 *See*, *e.g.*, Natalie Wynn, *Transcripts/Gender Critical*, CONTRAPOINTS (Mar. 30, 2019), www.contrapoints.com/transcripts/gender-critical [https://perma.cc/L3GF-562Y] ("I live as a woman now. And that's kind of just what's happening whether you like it or not so . . . I'm not sorry?").

201 Duffy, *supra* note 14, at 1064; *see also* Liz Mount, *"I Am Not a Hijra": Class, Respectability, and the Emergence of the "New" Transgender Woman in India*, 34 GENDER & SOC'Y 620, 620–623 (2020) (presenting research from India about how some transgender women construct their identities in contrast to hijra, further demonstrating the complicated politics of identification).

202 *See* VANJA HAMZIĆ, SEXUAL AND GENDER DIVERSITY IN THE MUSLIM WORLD: HISTORY, LAW AND VERNACULAR KNOWLEDGE 31 (2016).

203 *See* Matthew Waites, *Critique of "Sexual Orientation" and "Gender Identity" in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles*, 15 CONTEMP. POL. 137, 153 (2009) ("Even as 'sexual orientation' and 'gender identity'

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International human rights standards, including the non-binding Yogyakarta Principles,[204] have created a discursive framework for universalizing "transgender" as a label.[205] The UN has similarly campaigned for the human rights of "transgender" people, even though the label "transgender" is distinctly Western, becoming prevalent in the United States in the 1990s.[206] "Hijra" and other culturally-situated gender identities, on the other hand, have been used to describe gender-diverse people for centuries.[207] While some have criticized the use of umbrella terms like "transgender" as the erasure of non-Western forms of gender diversity,[208] the classification of hijra as "transgender" also imparts a certain status of victimhood, since "transgender" and "LGBTQIA+" people are often associated with victimhood in international criminal law in a way that "hijra" is not.[209] Despite this, I am going to refer to these

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become at least partially incorporated in the global human rights framework, this does not signal the unqualified dissipation of inequalities in human rights relating to sexuality and gender. Rather it implies the installation of a particular new Western form of Butler's 'heterosexual matrix' in human rights law and discourse, a reconfigured 'grid of intelligibility' in which 'sexual orientation' and 'gender identity' are key nodal points . . . .").

[204] Carsten Balzer & Carla Lagata, *Human Rights*, 1 TSQ: TRANSGENDER STUD. Q. 99, 100-01 (2014); Ryan Richard Thoreson, *Queering Human Rights: The Yogyakarta Principles and the Norm that Dare Not Speak Its Name*, 8 J. HUM. RTS. 323, 323-24 (2009).

[205] *See* Otto, *supra* note 112, at 312-13 (examining how the Yogyakarta Principles promote the rights of transgender people by describing gender as an intelligible identity, excluding certain forms of gender expression). International human rights courts have also increasingly established "transgender" as an intelligible category. *See*, *e.g.*, Alejandro Fernández Muñoz & Gloriana Rodríguez Álvarez, *In the Name of Vicky: Prosecuting Transfemicide in Honduras*, 34 PEACE REV. 518, 524-26 (2022).

[206] Susan Stryker, *(De)Subjugated Knowledges: An Introduction to Transgender Studies*, *in* THE TRANSGENDER STUDIES READER 1, at 4-6 (Susan Stryker ed., 2006).

[207] HEYAM, *supra* note 28, at 208-14.

[208] *See* Evan B. Towle & Lynn M. Morgan, *Romancing the Transgender Native: Rethinking the Use of the "Third Gender" Concept*, 8 GLQ: J. LESBIAN & GAY STUD. 469, 471 (2002).

[209] This came across, for example, in an interview with an international lawyer talking about the FFM report: "These people are triple victimized—as members of an ethnic group, for their sexual orientation . . . , and then within the camp you get targeted by fellow refugees for being different." Interview 2023-1, *supra* note 154. *See also* B Lee Aultman & Paisley Currah, *Politics Outside the Law: Transgender Lives and the Challenge of Legibility*, *in* LGBTQ POLITICS: A CRITICAL READER 34, 35-39 (Marla Brettschneider et al. eds., 2017) (discussing how transgender people are often made legible in American law through their suffering or difference); Laura J. Shepherd & Laura Sjoberg, *Trans- Bodies in/of War(s): Cisprivilege and Contemporary Security Strategy*, 101 FEMINIST REV. 5, 13-17 (2012) (discussing how different interpretations of gender-diverse identities make queer individuals both invisible and "hypervisible" to international actors).

individuals as hijra for the remainder of this article, based on my conversations with individuals in Bangladesh and also to avoid repeating the FFM's categorization of "transgender women" as something different than "women."

So, what did these hijra tell the FFM about sexual violence during the genocide? While the small number of participants limits the scope of the reporting, these five hijra nevertheless testified to the same systematic campaign of sexual violence that was used against cisgender women and men, involving rape, violence to the genitals, sexual humiliation, and mental anguish.[210] For example, the FFM repeated the experience of one survivor:

> Three days after the "clearance operations" began in 2017 . . . a transgender person was gang raped multiple times by six men . . . . They tied her hands, made her lie down and raped her repeatedly, forcefully inserting their penises inside her mouth and anus. The gang rape left her bleeding from her penis and anus and caused her to faint.[211]

Another survivor reported similar violence:

> In 2017 . . . an 18-year-old transgender girl was raped anally almost weekly by police officers. During one such rape, she was forced to undress and stimulate the penises of police officers until they ejaculated. They would beat her if she refused.[212]

However, despite the fact that this evidence is very similar to other episodes of gang rape experienced by cisgender women, the FFM nevertheless declared that the sexual crimes against hijra only amounted to crimes against humanity, possible war crimes, and violations of human rights law.[213] Similar to the determination made about sexual violence against men, the FFM did not articulate why the gang rape of a cisgender woman is "genocidal" whereas the gang rape of a "transgender woman" is not.

It is also worth noting that the 2019 report includes language which links sexual violence against men with sexual violence against transgender people. For example:

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210 FFM 2019 Report, *supra* note 13, ¶¶ 180-88.

211 *Id.* ¶ 187.

212 *Id.* ¶ 183.

213 *Id.* ¶ 188.

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> [T]he Mission conducted further investigations into the situation of sexual and gender-based violence against men and boys in the context of Myanmar's ethnic conflicts. Sexual and gender-based violence has distinct dimensions in relation to transgender persons. A recent study on gender in Myanmar found that "currently, public awareness and understanding of diverse sexual orientations and gender identities (SOGI) are limited across Myanmar . . . ." Societal attitudes drive high levels of social discrimination and pressure to conform to expectations. In schools, teachers apply pressure on gender non-conforming boys, pointing out their mannerisms, forcing them to change their clothes, or to change their behavio[]r, leading many to drop out before completing high school . . . . [T]here is no express legislation protecting transgender persons under Myanmar law. To the contrary, Article 377 of the Penal Code, which forbids "carnal intercourse against the order of nature", is often used to persecute people from the LGBT community, according to activists.[214]

This is likely all very true—I have no doubt that queer individuals in Myanmar face societal discrimination, as they do in every country in the world.[215] At the same time, however, sexual violence against men and boys is not solely committed against queer men and boys, nor do "transgender women" face the same challenges as "men" in my understanding of the terms.[216] The fluidity with which the FFM moved between these different groups suggests a conflation of the two, especially given the interpretation of these experiences as universally "not genocidal." Instead, it appears that the FFM is generating two gendered groups, one which experienced the worst sexual violence known to international law and one which did not. Conveniently, these two categories correspond perfectly with a biologically essentialist construction of sex and gender: genocidal sexual violence was committed against

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214 *Id.* ¶¶ 150-53.

215 This includes both people who would identify as part of the LGBTQIA+ acronym as well as people who are perceived to be queer. *See* Meredith Loken & Jamie J Hagen, *Queering Gender-Based Violence Scholarship: An Integrated Research Agenda*, 24 INT'L STUD. REV. 1, 11-12 (2022).

216 David Eichert, *"Homosexualization" Revisited: An Audience-Focused Theorization of Wartime Male Sexual Violence*, 21 INT'L FEMINIST J. POL. 409, 413 (2019).

individuals with a womb and vagina, but not against individuals with a penis and prostate.[217]

Taking a step back, it is useful to examine which acts of sexual violence have been reported by the FFM. The table below shows the different *actus rei* reported by the FFM between 2017 and 2019, as well as the gender categories used by the FFM to describe victims of those acts:

Actus Reus	Specific Act	Women	Men	Hijra
Killing	Murdered after Rape	X		
	Raped to Death	X	X	
Serious Physical or Mental Harm	Violent Rape	X	X	X
	Gang Rape	X	X	X
	Forced to Rape		X	
	Destruction of Reproductive Organs	X		
	Genital Mutilation	X	X	X
	Burning Genitals		X	
	Forced Nudity	X	X	X
	Psychological Trauma	X	X	X
	Sexual Assault in Detention Facilities	X	X	X
Conditions of Life	Lack of medical care	X		
	Destroying Community Social Fabric	X		
	Forced Witnessing of Sexual Violence	X	X	
Preventing Births	Destruction of Reproductive Organs	X		
	Abduction/Arrest/Slavery	X	X	X

This is certainly not a complete list of sexual crimes committed against the Rohingya, but rather just a summary of the FFM's interpretations (for example, I would argue that systematic sexual violence against men and hijra can also destroy a community's social fabric, but this interpretation was not reached by the FFM). Similarly, this table does not report the number of crimes committed against individuals of each gender, nor is such an analysis necessary:

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217 For a greater critique of the biological narratives connected to genocide, *see* Lily Nellans, *A Queer(Er) Genocide Studies*, 14 GENOCIDE STUD. & PREVENTION 48, 62-64 (2020).

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the Genocide Convention does not require a minimum number of victims before an act becomes genocidal, only that the act in question is committed in the wider context of genocidal violence against "the group."[218] What is important, however, is that functionally identical acts were committed against cisgender women, cisgender men, and hijra, and the FFM interpreted this to mean that genocidal sexual violence was only committed against one of those groups.

I have devoted a significant amount of space to understanding the FFM's findings about genocidal sexual violence for two reasons. First, while the FFM was not the first to report about sexual violence in the Rohingya genocide, the FFM is by far the most authoritative of these early reporters, and their findings of "genocide" and "not genocide" have been reproduced by the lawyers I discuss below. Second, the FFM was not making determinations about sexual victimhood in a vacuum; rather, members of the FFM drew from a pre-existing discursive understanding of "what happens" during armed conflict to make their interpretations. Sexual violence against cisgender women was expected, and men were the expected perpetrators (either as members of the Myanmar military or as husbands rejecting their wives). Sexual violence against men or hijra was intelligible when brought into a global discourse about people with "diverse sexual orientations and gender identities," although those acts were nevertheless excluded from the most serious category of "genocidal sexual violence." Instead, while the FFM affirmed that sexual violence *happened* to all three group, only the sexual harms committed against women were interpreted as being severe enough to amount to genocide.

b. The International Court of Justice and The Gambia v. Myanmar

Less than two months after the publication of the FFM's 2019 sexual violence report, lawyers for The Gambia submitted their first filing against Myanmar before the ICJ.[219] As I mentioned at the beginning of this Article, The Gambia's case alleges that genocidal sexual violence was only committed against Rohingya women and

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[218] Genocide Convention, *supra* note 68, art. II; *see also* Diane M. Nelson, *Bonesetting: The Algebra of Genocide*, 18 J. GENOCIDE RSCH. 171, 172-84 (2016) (discussing the lack of necessity for providing a certain number of victims to prove genocide, versus the politics of counting and presenting statistics about the extent of atrocity crimes).

[219] ICJ Application, *supra* note 1.

girls.[220] To support this allegation in their original filing, The Gambia cited the FFM's work and other early reports, illustrating their argument with multiple block quotes about sexual violence against women and girls.[221] The Gambia had the opportunity to do their own fact-finding and introduce new evidence beyond these U.N. reports;[222] their decision to simply reproduce the FFM's conclusions and only tell stories about female victimhood thus demonstrates how these lawyers agreed with those conclusions about genocidal sexual violence being something that can only happen to women and girls.[223]

While the case has progressed slowly in the years since the initial filing, The Gambia's legal team has nevertheless repeated this narrow construction of genocidal sexual violence. For example, during oral arguments in December 2019, lawyers for The Gambia cited *Akayesu* while articulating how sexual violence against cisgender women was an act of genocide (specifically, by causing serious bodily or mental harm):

> I refer in particular to what the [U.N.] Mission [FFM] described as "widespread sexual violence" intended "to contribute to the destruction of the Rohingya as a group and the breakdown of the Rohingya way of life." In the landmark 1998 *Akayesu* judgement, the [ICTR] made clear that when committed with the requisite intent, "rape and sexual violence . . . constitute genocide in the same way as any other act." It stressed that this was "one of the worst ways" of inflicting harm, because it "resulted in physical and psychological destruction of Tutsi women, their families and their communities"; "destruction of the spirit, of the will to live, and of life itself."[224]

Similarly, in 2022 lawyers for The Gambia reported that the Court's temporary provisional measures had resulted in "no new

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220 *See supra* notes 1 to 8 and accompanying text.

221 *See*, *e.g.*, ICJ Application, *supra* note 1, ¶¶ 65-66 (citing FFM Detailed Report, *supra* note 149, ¶¶ 1091-93).

222 *See* JAMES G. DEVANEY, FACT-FINDING BEFORE THE INTERNATIONAL COURT OF JUSTICE 8-9 (2016).

223 *See* Hospodaryk, *supra* note 21, at 9.

224 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, ¶ 16 (Dec. 10, 2019), https://www.icj-cij.org/public/files/case-related/178/178-20191210-ORA-01-00-BI.pdf [https://perma.cc/2KZF-MR74] [hereinafter ICJ Application, Verbatim Record].

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mass killings of Rohingya, no new mass rapes or gang rapes of Rohingya women and girls, and no new burning of populated Rohingya homes."[225]

I was able to interview several members of the Foley Hoag team and other lawyers involved with the ICJ case. In each interview, I concluded our conversation about sexual violence by asking why the case focused solely on sexual violence against women.[226] I received several different responses to this question, which suggested to me that many of the lawyers I interviewed were only offering informed guesses.[227] After all, the case is complex and the allegation about sexual violence is just one small part of a much larger argument about genocide. Moreover, I am not interested here in identifying *why* a certain decision was made (I am not sure if interviews can reveal anything more than a post-hoc reasoning for a past decision);[228] instead, I include these interview responses to understand the discursive elements which made it possible for these lawyers to articulate identity and the crime of genocidal sexual violence to me.[229]

For example, the primary response I received to my question was that lawyers involved with the ICJ case did not know about sexual crimes against men or hijra. In the words of one lawyer, "There has probably been evidence of sexual violence against men,

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[225] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, at 13-14 (Feb. 23, 2022), https://www.icj-cij.org/public/files/case-related/178/178-20220223-ORA-01-00-BI.pdf [https://perma.cc/KQ3E-TA8Q].

[226] For interviews, my approach was to ask questions about sexual violence without specifying gender or other identity characteristics. In almost all interviews that informed this article, interviewees would (unprompted) associate my questions about "sexual violence" with "sexual violence against women" and tell me stories about (presumed cisgender) women. As such, I would wait until the end of interviews, and if the interviewee had not mentioned male or gender-diverse victims of sexual violence, I would prompt them with a question. *See* Dvora Yanow, *Qualitative-Interpretive Methods in Policy Research*, *in* HANDBOOK OF PUBLIC POLICY ANALYSIS: THEORY, POLITICS, AND METHODS 410, 417 (Frank Fischer et al. eds., 2007).

[227] *See* CHRISTIAN BUEGER & FRANK GADINGER, INTERNATIONAL PRACTICE THEORY 89 (2014).

[228] *Id.*

[229] In other words, understanding how discourse is articulated tells us much more about the political agenda being espoused by the people speaking than it does about the actual object of discourse. *See* LAURA SJOBERG & CARON E. GENTRY, MOTHERS, MONSTERS, WHORES: WOMEN'S VIOLENCE IN GLOBAL POLITICS 204-05 (2013); Jennifer Bonham & Carol Bacchi, *Cycling "Subjects" in Ongoing-Formation: The Politics of Interviews and Interview Analysis*, 53 J. SOC. 687, 689 (2017) (emphasizing that interviews are useful not because they reveal the world to the researcher but rather allow the researcher to interfere with the world).

although [there is] no clear evidence of that on the ground, at least in the documents I've reviewed."[230] Another lawyer told me, "I don't remember there being much in the way of evidence, against the plethora of evidence of violence against women and girls."[231] A third simply responded that "there is not enough evidence" to include it in the case.[232] For me, these responses demonstrate the illegibility of sexual violence against men and hijra, since there is ample evidence that these acts occurred. Most notably, the FFM reports cited in The Gambia's case specifically describe significant acts of sexual violence against these groups; they are even explicitly listed in the table of contents.[233] Rather than accuse these lawyers of having a bad memory, however, these responses point to the overwhelming dominance of the narrative that "men were killed, women were raped and killed." Moreover, many of these lawyers have not traveled to the Rohingya refugee camps; rather, they have relied upon an international narrative that has emerged through U.N. reports, NGO publications, and news articles about "what happened" during the genocide. The key advantage of narratives like this one is that narratives are recognizable, familiar, and packaged in a cohesive format; the disadvantage, however, is that narrative must fundamentally exclude details which complicate the story.[234] These victims, because they were different than expected and because their harms were not repeatedly cited by prior international actors, were too complicated and thus fell out of memory.[235]

Other responses from lawyers involved with the ICJ case instead articulated a legal definition of "genocidal sexual violence" as a crime that only occurs against cisgender women (a mainstream

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230 Zoom Interview with lawyer in Brussels (May 2022) [hereinafter Interview 2022-2].

231 Zoom Interview with lawyer in Washington, D.C. (May 2022).

232 Interview with lawyer in Washington, D.C. (Oct. 2020) [hereinafter Interview 2020-3].

233 FFM 2019 Report, *supra* note 13, at 2.

234 Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 40 (1994).

235 Chris Deacon, (*Re)producing the "History Problem": Memory, Identity and the Japan-South Korea Trade Dispute*, 35 PAC. REV. 789, 796-97 (2022); *see also* William L. Randall & Cassandra Phoenix, *The Problem with Truth in Qualitative Interviews: Reflections from a Narrative Perspective*, 1 QUALITATIVE RES. SPORT & EXERCISE 125, 128 (2009) ("At best, memories are trimmed-down, summed-up, backward-looking *facsimiles* of actual events; more specifically, of the astoundingly restricted set of such events that we have ended up preserving . . . .").

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argument that mirrors how the crime is articulated in caselaw from the ICTR and other courts).[236] One lawyer, for example, stated:

> [S]exual violence against women is genocidal because it aims at . . . reducing births among the group. Raped women tend not to procreate. So, even if we had evidence of widespread sexual violence against men, it would have a different legal significance . . . . In other words, whether we like or not, what genocide means and what nature allows (bearing a child and giving birth, which is still inaccessible to men) must be thought together.[237]

Another lawyer told me that "caselaw focuses on the prevention of births within a population," whereas sexual violence against men and hijra did not demonstrate "an intent to destroy biologically."[238] A third interviewee stated that

> Myanmar is claiming that it's conducting counterterrorism operations, but there's no counterterrorism strategy that involves raping women. There is no explanation for brutal acts of rape other than they were trying to destroy this group, directly eliminating the ability of the group to reproduce and maintain its family structure.[239]

These comments are useful because they articulate a connection between genocide and biological destruction as well as a connection between cisgender women and the biological reproduction of a community. "Women" are responsible for the "family structure" and "giving birth," but somehow "men" are not. Of course, an alternative articulation of gender could state that "men" (or at least people who produce sperm) are in fact essential to biological reproduction, and that many of the sexual crimes committed during the Rohingya genocide (including genital mutilation or psychological trauma) can limit a man's ability to procreate. Moreover, while there is no information about transgender men in existing international law documents about the Rohingya genocide,

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[236] *See* Eichert, *Expanding the Gender of Genocidal Sexual Violence*, *supra* note 74, at 167-71.

[237] Interview 2022-2, *supra* note 230.

[238] Zoom Interview with lawyer in New York, NY (June 2022).

[239] Interview 2020-3, *supra* note 232.

some transgender men around the world actually do have the ability to bear children.[240]

Again, my point here is not to assert that these lawyers lack a basic understanding of human biology—I have heard very similar answers from self-identified feminists and "gender experts" working in international law.[241] Instead, I want to highlight the discursive framework which makes such responses possible. As I described in Part I of this article, international law discourse has long connected "women" with essentialist ideas about motherhood, children, the inability to fight in wars, and a central procreative role. "Men," via an oppositional logic, are violent, uninvolved in childcare, and focused on ending life rather than creating it. As such, for a crime like genocidal sexual violence that has been articulated as an assault on biological reproduction, the normal discursive association would be to think of women as the primary target of such violence. In fact, for "women" to be understood as the primary victims, it is necessary to have "men" as a differentiated category for the people who are perpetrating the harm –the difference is what gives those categories meaning.[242]

Finally, some of the responses I received simply compared victims' suffering and stated that women experienced more severe sexual violence than men, thus rendering it "genocidal." One interviewee told me that sexual violence against men and hijra was not genocidal because it "mainly occurred in detention centers," as opposed to sexual violence against women which was "widespread."[243] Another interviewee simply said that sexual crimes against women were more "brutal" and "horrific," pointing out that the military's use of bite marks to "brand" women was particularly shocking.[244] There is no caselaw or legal precedent that informs these interpretations; certainly an alternative reading of the same evidence could interpret different acts as equally severe and genocidal in nature. Rather, these lawyers articulated a personal response to the stories they encountered, one of disgust and moral

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240 *See* Grietje Baars, *Queer Cases Unmake Gendered Law, or, Fucking Law's Gendering Function*, 45 AUSTL. FEMINIST L. J. 15, 15-16 (2019).

241 Interviews with other international lawyers.

242 *See* ROXANNE LYNN DOTY, IMPERIAL ENCOUNTERS: THE POLITICS OF REPRESENTATION IN NORTH-SOUTH RELATIONS 11-12 (1996).

243 Interview with lawyer in New York, NY (Jan. 2021) [hereinafter Interview 2021-1].

244 Zoom Interview with lawyer in Geneva (Nov. 2020).

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condemnation that is stronger for certain harms than for others.[245] It is worth interrogating, therefore, why sexual violence against men or hijra can be less offensive than sexual violence against women.[246]

What happens next with the ICJ case remains to be seen. In 2020, The Gambia submitted a confidential memorial with specific allegations of sexual violence, but this document has yet to be made public.[247] However, I have been told that several international law NGOs have made contributions regarding sexual violence to this document.[248] I discuss these organizations below, since they are also advocating for sexual violence prosecutions in other contexts.

c. The International Criminal Court

In 2019, the ICC Office of the Prosecutor requested authorization to investigate crimes committed in Myanmar.[249] Because Myanmar is not a State Party to the Rome Statute, the ICC would traditionally lack jurisdiction to prosecute atrocity crimes committed in the country.[250] However, the Prosecutor asserted that the ICC did have jurisdiction given the fact that hundreds of thousands of Rohingya were forcibly driven into neighboring Bangladesh, a State Party to the Rome Statute.[251] As such, the Prosecutor requested authorization to investigate the international cross-border crimes of (1) deportation and (2) persecution on the grounds of ethnicity and/or

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245 Martha C. Nussbaum, "*Secret Sewers of Vice": Disgust, Bodies, and the Law*, *in* THE PASSIONS OF LAW 17, 22 (Susan A. Bandes ed., 1999) (arguing that emotional reactions like disgust or indignation can complicate the fair application of law); *see also* SENTHORUN SUNIL RAJ, FEELING QUEER JURISPRUDENCE: INJURY, INTIMACY, IDENTITY 50-59 (2020) (discussing how lawyers use disgust to interpret the meaning and severity of hate crimes).

246 Rodney Roussell, *The Rape Jokes We Still Laugh at*, N.Y. TIMES (Jul. 9, 2018), www.nytimes.com/2018/07/09/ opinion/contributors/the-rape-jokes-we-still-laugh-at.html [https://perma.cc/ZAS4-K6F3].

247 *ICJ Rules Gambia Genocide Case Against Myanmar Can Proceed*, FOLEY HOAG LLP (Jul. 22, 2022), foleyhoag.com/ news-and-insights/news/2022/353uly/icj-rules-gambia-genocide-case-against-myanmar-can-proceed-14b2df99733fb18890f1017f1fd25387/ [https://perma.cc/YK8F-4B83].

248 Interview 2020-3, *supra* note 232; Interview 2021-1, *supra* note 243; Interview with lawyer in New York, NY (Mar. 2021).

249 Situation in Bangladesh/Myanmar, ICC-01/19-7, Request for Authorization of an Investigation Pursuant to Article 15, (July 4, 2019) [hereinafter ICC Request for Authorization].

250 *How the Court Works*, *supra* note 51.

251 ICC Request for Authorization, *supra* note 250, ¶¶ 112-14.

religion.[252] Judges at the ICC granted this authorization in November 2019.[253] Because of these jurisdictional limits, the ICC will likely be unable to formally charge anyone with the crime of genocide, although observers would understand any criminal case to be a response to the genocide.[254]

While the ICC may never charge or convict anyone for violence against the Rohingya,[255] the ICC is an interesting site for understanding how the dominant narrative about genocidal sexual violence is being (re)produced and sometimes even challenged by legal actors. For example, in her 2019 request, the ICC Prosecutor largely framed sexual violence as a zero-sum phenomenon, devoting several paragraphs to describing how "[t]he main victims of rape and other forms of sexual violence were female."[256] While

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[252] *Id.* ¶ 75. Deportation is a violation of international law according to article 7(1)(d) of the Rome Statute; persecution is a violation according to article 7(1)(h) of the Statute. Rome Statute, *supra* note 78, art. 7.

[253] ICC Request for Authorization, *supra* note 250, ¶ 110.

[254] Of course, there are several advocacy efforts aimed at opening up the ICC's jurisdiction in Myanmar, including a U.N. Security Council referral and/or the Court's recognition of Myanmar's National Unity Government, which has issued a declaration accepting the Court's jurisdiction in Myanmar. It is currently unclear if any of these efforts will result in greater jurisdiction for the Court. For more context, see Ralph Wilde, *Can the National Unity Government (NUG) of Myanmar Represent That State for the Purposes of Accepting the Jurisdiction of the International Criminal Court?*, OPINIOJURIS BLOG (Aug. 17, 2022), https://opiniojuris.org/2022/08/17/can-the-national-unity-government-nug-of-myanmar-represent-that-state-for-the-purposes-of-accepting-the-jurisdiction-of-the-international-criminal-court/ [https://perma.cc/BUX4-SCL4].

[255] Whether the ICC project is failing, or is already a failure, is an active subject of debate among an increasing number of international law scholars, and the current lack of any public arrest warrant for members of the Myanmar military suggests that the ICC will offer little immediate benefit to the Rohingya. *See* CR Abrar & Rezaur Rahman Lenin, *Has the ICC Lost Traction on Rohingya Genocide Case?*, DAILY STAR (July 5, 2023), www.thedailystar.net/opinion/ views/news/has-the-icc-lost-traction-rohingya-genocide-case-3361646 [https://perma.cc/V5V8-CPVX]; *see also* Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis*, 20 MELB. J. INT'L L. 401, 408-09 (2019) ("In terms of concrete achievements in its 20-year life, and in the 17 years since its first Prosecutor was sworn in, the Court has secured only four convictions for 'core crimes' . . . . Put simply, the core raison d'être of the ICC is expressive or retributive justice, of which it has delivered very little.").

[256] ICC Request for Authorization, *supra* note 250, ¶¶ 96-101. This was not the first time that the Prosecutor articulated a narrative about sexual violence in the Rohingya genocide. In 2018, the Prosecutor requested clarification on the jurisdictional question in Bangladesh. This document cited the destruction of one village where "[h]undreds of men were allegedly separated from women and children, rounded up along the river bank, and executed in front of their families. Many women and children were then killed or raped." Situation in Bangladesh/Myanmar, ICC-RoC46(3)-01/18-1, Prosecution's Request for a Ruling

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the Prosecutor did acknowledge that "available information also shows that men and boys were subjected to rape and other forms of sexual violence,"[257] the Prosecutor only illustrated this point by recounting stories about female victims.[258] Moreover, at the end of the section on "Rape and Other Forms of Sexual Violence," the Prosecutor simply stated that the Myanmar military committed "rape and other forms of sexual violence against Rohingya women (including pregnant women) and girls;" no mention is made of male victims, even though the document the Prosecutor cited for support (the detailed FFM report from 2018) explicitly included those stories.[259] Finally, towards the end of her request, the Prosecutor repeated the claim that the Rohingya were forced to leave Myanmar due to "the massive and systematic rape and sexual violence against women and girls (and to a lesser degree men and boys)."[260]

This framing of cisgender women and girls as the "main" victims is not unbiased; rather, it is the expression of a certain competitive victimhood framing that has been dominant in international legal discourse since the 1990s. An alternative interpretation of the same evidence could instead say that there is no "main" victim of sexual violence: the Myanmar military attacked men and women, and each one of those acts was a horrible violation of international law. This is not difficult to imagine, since the Prosecutor uses this framing for other crimes in her request: for example, she does not describe the mass killings as affecting men more than women, nor does she claim that women experienced property destruction "to a lesser degree."[261] This is because there is no discursive framework which requires a zero-sum articulation of victimhood for these crimes to be intelligible. The dominant framing

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on Jurisdiction Under Article 19(3) of the Statute, (Apr. 9, 2018). I have focused primarily on the 2019 request because at that point, it is clear that evidence of sexual violence against men was available to the Prosecutor, whereas she may not have had as much evidence when filing her 2018 request. I have similarly excluded two amicus briefs from this analysis because they were filed before the FFM released its 2018 reports. *See* Situation in Bangladesh/Myanmar, ICC-RoC46(3)-01/18-9, Submission on Behalf of the Victims Pursuant to Article 19(3) of the Statute, ¶ 123 (May 30, 2018); Situation in Bangladesh/Myanmar, ICC-RoC46(3)-01/18-22, Joint Observations Pursuant to Rule 103 of the Rules, (June 18, 2017); *see also* Hospodaryk, *supra* note 21, at 10 (discussing the ICC case and related amicus briefs).

257 ICC Request for Authorization, *supra* note 250, ¶ 96.

258 *Id.* ¶ 96-101.

259 *Id.* ¶ 101.

260 *Id.* ¶ 204.

261 *Id.* ¶¶ 89-93, 106-11.

of sexual violence, on the other hand, has been repeatedly articulated as something that happens overwhelmingly to women and (via a logic of differentiation) rarely to men.

My interviews with ICC staff and investigators also revealed a similar binary framing for interpreting sexual victimhood. To understand these comments, it is important to note the specific context of the ICC, one in which gender is explicitly defined as binary[262] and where an equal 50-50 gender parity among staff remains a political necessity for many people.[263] This understanding of gender also influences how cases are conducted: most notably, one of the documents used by the ICC to gather testimony from Rohingya survivors only had "male" or "female" as gender options.[264] Moreover, one lawyer told me about her concerns that the ICC would be unable to include evidence of sexual violence against hijra because of the binary definition of gender in the Rome Statute.[265]

Even in discussions where gender was articulated as something more than "men" and "women," ICC lawyers continued to compare the severity of sexual harms against different gendered groups. For example, one lawyer told me, "We are gathering evidence of sexual violence against women, men, and transgender." He then added his interpretation of the violence, stating, "My feeling of the evidence we've gathered so far is that it is just shocking the level of sexual violence directed against *women* [here he paused] and males in those clearance operations." The forceful way he said "women," followed by a pause for dramatic effect, expressed to me that he understood the sexual harm as existing in a hierarchy: most severe for women,

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262 The Rome Statute explicitly defines "gender" as "the two sexes, male and female, within the context of society." Rome Statute, *supra* note 78, art. 7(3). For context behind the negotiations that produced this definition, see Valerie Oosterveld, *Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court*, 16 INT'L FEMINIST J. POL. 563, 564-68 (2014).

263 The Rome Statute requires that states "take into account the need" for "[a] fair representation of male and female judges." Rome Statute, *supra* note 78, art. 36(8)(a)(iii). For context into the politics of gender in the election of judges, see Louise Chappell, *Gender and Judging at the International Criminal Court*, 6 POL. & GENDER 484, 486-89 (2010); Angela Mudukuti, *Symposium on Gender Representation: The International Criminal Court's "Boy Club" Problem*, OPINIOJURIS BLOG (Oct. 7, 2021), opiniojuris.org/2021/10/07/symposium-on-gender-representation-the-international-criminal-courts-boys-club-problem [https://perma.cc/5VVW-2HUE].

264 VICTIMS PARTICIPATION AND REPARATIONS SECTION, INTERNATIONAL CRIMINAL COURT, VICTIM REPRESENTATION FORM (on file with author).

265 Interview with lawyer in Amsterdam (Apr. 2022).

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less severe for men, and not severe for the people he categorized as "transgender."[266]

There is one final development worth mentioning here. In November 2019, a panel of ICC judges authorized the Prosecutor to begin an investigation into violence against the Rohingya, acknowledging many victims' submissions which described how sexual violence was used against cisgender women and girls.[267] However, the judges also pushed back on the Prosecutor's articulation of sexual violence as an act that "mainly" affected women and girls:

> Although the majority of alleged rapes concern women and girls, the Chamber notes that the supporting material also refers to incidents of rape, forced nudity, forced witnessing of rape, sexual violence humiliation of men during the 2017 clearance operations, in particular while in detention. Moreover, the available information suggests that in some instances 'Hijra' individuals, who are defined as third-gender persons, transgender women, and intersex persons in South Asia who were assigned a masculine gender at birth', were reportedly targeted for rape and sexual violence.[268]

I do not know if the Prosecutor will adjust his strategy in response to this contestation about sexual victimhood. It is worth noting, however, that in this instance the judges drew from the many of the same sources (*i.e.*, NGO reports and FFM findings) that other legal teams have used to reach a different interpretation about "what happened during the Rohingya genocide."[269] This demonstrates the role of interpretation in (re)telling stories about sexual violence: whether a person is included in a narrative often has less to do with available information and more with how their experiences are articulated or conflated by legal actors.[270]

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[266] Interview with lawyer in the Hague (Dec. 2022).

[267] *See* Situation in Bangladesh/Myanmar, ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ¶ 31 (Nov. 14, 2019).

[268] *Id.* ¶ 86.

[269] *Id.*

[270] *See also* Hospodaryk, *supra* note 21, at 11-12 (discussing the inclusion of unexpected victims by ICC judges).

d. Universal Jurisdiction Efforts

Finally, there are several universal jurisdiction efforts currently working their way through domestic legal systems, although it is unclear if any of these will be successful.[271] Universal jurisdiction laws allow domestic courts to prosecute a small number of international crimes like genocide even in situations where the crimes were committed outside the state's territory and by nationals of a different state.[272] In this section, I focus solely on the universal jurisdiction efforts in Argentina and Germany due to their analysis of genocidal sexual violence; other universal jurisdiction efforts in Turkey and Indonesia are at such an early stage that it is unclear if the cases will proceed or if any documents will be made public.[273]

In both the Argentina and Germany universal jurisdiction efforts, genocidal sexual violence has been primarily articulated as a crime committed against women and girls. For example, the NGO Fortify Rights, which filed the request in Germany,[274] has previously published reports about the Rohingya genocide wherein sexual violence was only described as a crime against cisgender women.[275]

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[271] *See* Jennifer Keene-McCann and Aakash Chandran, *Symposium on Myanmar and International Indifference: Rethinking Accountability – Centering Accountability in Asia: Universal Jurisdiction, Grave Breaches, and Cautious Optimism,* OPINIOJURIS BLOG (Aug. 31, 2022), http://www.opiniojuris.org/2022/08/31/symposium-on-myanmar-and-international-indifference-rethinking-accountability-centering-accountability-in-asia-universal-jurisdiction-grave-breaches-and-cautious-optimism/ [https://perma.cc/S5L6-5F53].

[272] *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 82-83 (2001-2002).

[273] *See* Priya Pillai, *Myanmar and the Myriad Efforts Towards International Justice*, USALI PERSPECTIVES, Oct. 17, 2022, at 2; Nick Leddy, *Six Years After the Myanmar Military Committed International Crimes Against the Rohingya, Survivors Are Still Seeking Justice in Courts Around the World*, OPINIOJURIS BLOG (Aug. 25, 2023), https://opiniojuris.org/2023/08/25/six-years-after-the-myanmar-military-committed-international-crimes-against-the-rohingya-survivors-are-still-seeking-justice-in-courts-around-the-world/ [https://perma.cc/UYZ7-H5WY].

[274] *Criminal Complaint Filed in Germany Against Myanmar Generals for Atrocity Crimes*, FORTIFY RIGHTS (Jan. 24, 2023), http://www.fortifyrights.org/mya-inv-2023-01-24/ [https://perma.cc/4VYX-KPHC].

[275] FORTIFY RIGHTS & THE SIMON-SKJODT CTR. FOR THE PREVENTION OF GENOCIDE, U.S. HOLOCAUST MEM'L MUSEUM, "THEY TRIED TO KILL US ALL": ATROCITY CRIMES AGAINST ROHINGYA MUSLIMS IN RAKHINE STATE, MYANMAR 10-11 (2017). These details were similarly repeated in a 2018 report. FORTIFY RIGHTS, "THEY GAVE THEM LONG SWORDS": PREPARATIONS FOR GENOCIDE AND CRIMES AGAINST HUMANITY AGAINST ROHINGYA MUSLIMS IN RAKHINE STATE, MYANMAR 13, 150-53 (2018). A counter-example to this can be found in a 2020 Fortify Rights report about refugee

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This is in part due to the fact that staff investigating sexual violence for these reports only interviewed women and humanitarian staff providing medical care to women.[276] Similarly, while the request in Germany is not available to the public, Fortify Rights did publish a press release about the request in which the only example of alleged sexual violence was an assault against a Rohingya woman.[277]

The complaint filed in Argentina by the Burmese Rohingya Organization U.K. ("BROUK") has also (re)produced the dominant narrative about who experienced sexual violence in the Rohingya genocide.[278] In particular, BROUK's complaint relied heavily on the FFM's reporting, directly reproducing multiple paragraphs from FFM reports[279] and citing the FFM's legal analysis of the Genocide Convention.[280] As a result, the complaint primarily described sexual violence as a crime committed against cisgender women and girls, illustrating this claim with stories of female victims from the FFM reports.[281] BROUK has since repeated this narrative, most notably by inviting six Rohingya survivors and witnesses of sexual violence (all cisgender women) to testify from Bangladesh.[282] Moreover, in webinars and other public events, individuals involved with the

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mental health, based on a survey led by a Rohingya research team, which reported high rates of sexual violence against both men and women. However, the focus of the report is on mental illness, not international criminal institutions, and there is no articulation of how sexual violence fits into genocide beyond including it in a long list of acts which can qualify as "serious bodily or mental harm as a prohibited act of genocide." FORTIFY RIGHTS, *supra* note 16, at 15.

276 FORTIFY RIGHTS, *supra* note 16, at 10-11, 27-28.

277 *Criminal Complaint Filed in Germany Against Myanmar Generals for Atrocity Crimes*, *supra* note 275.

278 Complaint at 23, Cámara Nacional de Casación Penal [C.N.C.P.] [National Court of Appeal on Criminal Matters], 11/19 (Arg.), https://burmacampaign.org.uk/media/Complaint-File.pdf [https://perma.cc/RHW3-8Y4M] [hereinafter Argentina Complaint].

279 *Cf. id.* at 23 *with* FFM Short Report, *supra* note 149, ¶ 38.

280 Argentina Complaint, *supra* note 278, at 32-33.

281 *Id.* at 32. However, the complaint does allege that the violence against the Rohingya "also involves the gang rape of women, girls and boys." *Id.* at 2. The inclusion of "boys" here is unique among Rohingya cases and seems almost accidental, since the rest of the complaint says nothing about these victims. However, it does demonstrate how adult "men" are sometimes the least legible group of victims, since sexual violence victims are usually articulated as weak and vulnerable. *See* Vandermaas-Peeler et al., *supra* note 31, at 4-5.

282 *BROUK President Highlights Tatmadaw Crimes as Genocide Trial Opens*, *supra* note 10.

case have frequently (re)produced the narrative that Rohingya men were killed while Rohingya women were raped and killed.[283]

Additionally, in November 2022, the Argentina legal team joined with the Global Justice Center ("GJC"), a feminist international law NGO in New York, to submit a document about sexual violence to the court in Argentina.[284] While this document focused primarily on how to best engage with survivors of sexual violence, the submission also reproduced the dominant binary narrative about sexual violence, stating that in general, "[w]hilst men and boys are victims of sexual violence, women and girls are often the primary targets."[285] The submission similarly stated that the FFM found that "ethnic minority women and girls were indeed the primary targets of sexual and gender-based violence" in Myanmar, in effect discursively dismissing similar testimony from men and hijra.[286] This historical narrative has also been articulated in other GJC documents, including a 2018 report which stated that women are "more likely" to experience genocidal sexual violence than men, with no discussion of people outside the gender binary.[287]

While the Argentina case (like the cases at the ICJ and ICC) is progressing slowly, there is one final development that is worth mentioning. In 2021, a group of international lawyers and Rohingya activists submitted a legal brief to the Argentina court featuring testimony from three amici: one hijra, one cisgender man, and one

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[283] *See*, *e.g.*, Webinar, Justice for Rohingya: Nearing 3 Years of the Genocide Case Against Myanmar (Nov. 23, 2022) (transcript on file with author).

[284] GLOBAL JUSTICE CENTER, GLOBAL JUSTICE CENTER SUBMISSION TO THE "JUZGADO NACIONAL EN LO CRIMINAL Y CORRECCIONAL FEDERAL NO 1" (SPA) ON INTERNATIONAL AND REGIONAL BEST PRACTICE FOR ENGAGING WITH VICTIMS AND WITNESSES OF SEXUAL VIOLENCE AND ASSESSING EVIDENCE OF SEXUAL VIOLENCE (2022).

[285] *Id.* ¶ 27.

[286] *Id.*

[287] GLOBAL JUSTICE CENTER, BEYOND KILLING: GENDER, GENOCIDE, & OBLIGATIONS UNDER INTERNATIONAL LAW 61 (2018). At a few points the report also describes "men" as victims of genocidal sexual violence, although the vast majority of stories included in the report focus on sexual violence against women; nevertheless, this inclusion makes the GJC one of a very small number of organizations around the world to articulate an understanding of genocidal sexual violence that affects people other than cisgender women. *Id.* at 20, 35. The Global Justice Center also published a specific report about sexual violence in the Rohingya genocide in which only women are described as victims. However, I have excluded this report from the main text of this article because it simply cites publicly available U.N. documents and NGO reports about sexual violence in the Rohingya genocide, which at the time (early 2018) were very limited and almost entirely focused on testimony from cisgender women. GLOBAL JUSTICE CENTER, DISCRIMINATION TO DESTRUCTION: A LEGAL ANALYSIS OF GENDER CRIMES AGAINST THE ROHINGYA (2018).

https://scholarship.law.upenn.edu/jil/vol45/iss2/2
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cisgender woman.[288] Their testimonies are presented without commentary that compares their experiences: each person's experience with sexual violence exists on its own merits.[289] Rather than situating the violence against female victims as part of a larger story of global "violence against women," the framing of the three testimonies shows how all members of the Rohingya community were victims of the crime of "genocide."[290] This is a fundamentally different way of articulating sexual victimhood in international law, and one that is much more suited to situations of genocide: we will never know the true percentage of men/women/hijra who experienced genocidal sexual violence, and knowing those statistics would do nothing to benefit the victims, each of whom experienced something terrible and life-changing.[291]

Instead, this approach highlights the true core of the crime of genocide, which is that genocide is committed against a group, not individuals. Thus, the rape of any Rohingya, regardless of gender, could be interpreted as a collective harm, especially because there are often powerful affective links between people of different genders: in other words, a man will suffer when his mother is raped, or a hijra will suffer when their brother is raped. This is a much better approach to articulating genocidal sexual violence, since it leaves room for a more accurate historical narrative (*i.e.*, asserting that people of all genders experienced sexual violence) while also resisting any comparison of victims' experiences which could devalue or dismiss serious harm. This is a model which could and should be adopted in other international responses to violence: rather than viewing people like the Rohingya as objects of international law, wholly embodied by the mechanics of a singular gendered label, we should instead understand them as complex, contradictory, and powerful people whose experiences with

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288 Amicus Brief by the Arakan Rohingya Society for Peace and Human Rights, Rohingya Youth for Legal Action, Rohingya Women Development Forum, Rohingya Women's Empowerment and Advocacy Network, Rohingya Student Unity and Rights, and Rohingya Peace Innovation Unity (Aug. 23, 2021) (on file with author).

289 *Id*. ¶¶ 9-12.

290 *Id*. ¶¶ 9-13.

291 *See* Nelson, *supra* note 218, at 183; *see also* Chris Dolan, *Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence*, 96 INT'L REV. RED CROSS 485, 495 (2014) (critiquing advocacy about sexual violence which "implies that the numeric majority automatically trumps and displaces the presumed numeric minority").

violence merit international attention and nuanced understanding.[292]

III. IMPLICATIONS FOR UNDERSTANDING CRIMINAL LAW

What do these various legal articulations about the Rohingya genocide tell us about how lawyers interpret allegations of sexual violence? First, in all of the sites I examined, there was a process of interpretation to confirm *if a sexual harm had occurred*. This is not a simple question of observing the world and reporting on it—rather, the actors I described above drew from past narratives about armed conflict to guide their investigations and predictions. Sometimes this meant only interviewing cisgender women, the expected victims of conflict-related sexual violence. In other situations, where evidence existed of sexual violence against men and hijra, there was no guarantee that this evidence would be cited and (re)articulated by legal actors in subsequent legal proceedings. If evidence is not repeated in authoritative fora like reports and court filings, it disappears from memory, as if it never happened.[293]

Second, legal actors also make interpretations about *the severity of a sexual harm*. In international law, this level of interpretation relies upon a zero-sum narrative for understanding suffering, comparing the violence committed against cisgender women to very similar acts against individuals of other genders. This process of comparison can be seen in multiple statements where international lawyers articulated sexual violence as "primarily" or "predominately" used against cisgender women, the "main victims" of such crimes, while men and hijra experienced "lesser" sexual harms. Importantly, this process of comparing victims according to gender is not at all legally required, since there is no hierarchy of victims listed in the Genocide Convention or the Rome Statute, nor is the dismissal of men or hijra particularly fair or progressive. Rather, identity categories like "men" and "women" or

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[292] *See* Shruti Balaji, *From Colonial Subjecthood to Shared Humanity: Social Work and the Politics of "Doing" in Kamaladevi Chattopadhyay's International Thought*, 3 GLOBAL STUD. Q. 1, 10 (2023).

[293] *See also* Megan O'Mahony, *The Role of Survivor Groups in Advancing Transitional Justice After the Holocaust*, *in* PURSUING JUSTICE FOR MASS ATROCITIES xv, xxiii (Sarah McIntosh ed., 2021) (asserting that historical narratives about genocide or mass atrocity are not inevitable but rather the result of human intervention within political restraints).

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"perpetrator" and "victim" are constituted through this zero-sum binary and its accompanying assumptions about "what happens" during genocide, influencing how lawyers interpret the severity or merit of a particular victimhood claim.

In addition to generating the gender categories of "men," "women," "transgender women," and "hijra," these lawyers also generated the crime of genocidal sexual violence through legal practice. Beginning in the 1990s, international lawyers read sexual violence into the Genocide Convention, identifying multiple ways in which sexual violence could cause death, serious harm, or reproductive limitations. This process of interpretation created an authoritative body of caselaw, reports, and expertise about what genocidal sexual violence "looks like" and against whom it is used. With the Rohingya cases, lawyers are once against (re)generating the category, choosing which sources to cite and which examples to use in their work. These narrative processes inevitably limit the scope of "genocidal sexual violence" to make it familiar and accessible to lawyers, drawing upon gendered assumptions to make certain harms legible and others invisible. In other words, for identity labels and criminal categories:

> Law has the power to define and legitimate some narratives, while at the same time, silence and suppress other meanings or stories. In other words, law pronounces the "truth" about a situation; it creates meaning and is an authoritative, selective and slanted source of the past . . . . It authoritatively dictates which harms are "extraordinary" and who can speak about them.[294]

This article has provided a roadmap for practitioners of international criminal law to understand how genocidal sexual violence in the ongoing Rohingya cases could be charged even in situations where the victims are not cisgender women. Along with my previous work on the topic,[295] I have hopefully made the case for a much broader understanding of genocidal sexual violence. Legally, there is no reason why rape, sexual torture, genital mutilation, psychological trauma, and other sexual harms against men, transgender women, and people outside the gender binary cannot be considered "genocidal." Moreover, a truly progressive

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[294] Henry, *supra* note 26, at 97.

[295] Eichert, *Expanding the Gender of Genocidal Sexual Violence*, *supra* note 74, at 192-99.

international legal system would affirm that each and every act of sexual harm committed during genocide is severe, because every human being (regardless of gender) deserves to live a life free from sexual violence. As I mentioned at the beginning of this article, despite the many problems inherent to prosecuting genocide in criminal courts,[296] it nevertheless remains important for male and queer survivors of such violence to be included in official narratives about sexual violence.[297]

Beyond genocide and international law, it is crucial to understand how legal interpretations about identity and violence (re)produce the "truths" that are told about global gender categories, reducing important distinctions between victims to one factor: gender.[298] Thus, cisgender women who experience gang rape are made identical to cisgender women who experience forced nudity, and those stories are broadcast into a larger narrative about what global "violence against women" looks like and why it happens. These narratives have been tremendously important in challenging artificial legal constructions around the world,[299] but often feminist articulations of gendered harm rely upon an essentialized, universal, and binary concept of gender; in other words, a wealthy white woman in the United States is understood to experience the same oppression as an impoverished woman in the Global South.[300] Recent feminist scholarship has disputed many of these assumptions, substituting intersectional,[301] queer,[302] or postmodern understandings of gendered victimhood in their

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296 *See* Nellans, *supra* note 217, at 62–64.

297 *See* Rosemary Grey et al., *The Khmer Rouge Tribunal's First Reparation for Gender-Based Crimes*, 25 AUSTL. J. HUM. RTS. 488, 492-94 (2019).

298 *See also* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 233 (1990) ("[W]e have tended to treat the categories we use as dictated by the essence of things rather than established by our decision to focus on one trait rather than another. We conceive of our placement of an item in one category instead of another as obvious or self-evident instead of recognizing our decision to reshape a category to accept or reject a new item.").

299 Elisabeth Prügl & J. Ann Tickner, *Feminist International Relations: Some Research Agendas for a World in Transition*, 1 EUR. J. POL. & GENDER 75, 79-85 (2018).

300 *See* GAYATRI CHAKRAVORTY SPIVAK, CAN THE SUBALTERN SPEAK? REFLECTIONS ON THE HISTORY OF AN IDEA 32 (Rosalind C. Morris & Gayatri Chakravorty Spivak eds., 2010). This is a particular problem for international law, which must represent global patterns that are true in *every* situation of armed conflict throughout all human experience (an impossible task). *See* ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 2-6 (2017).

301 GREY, *supra* note 47, at 281, 297-307.

302 Loken & Hagen, *supra* note 215, at 16-18.

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place.[303] I have attempted to add to these contentions here, showing how gendered categorizations and feminist discourse can actually obscure sexual harms against men or queer people. Understanding "women" as a unitary collective that is significantly different than "men" ultimately does a disservice to the diverse voices and experiences of the group[304] while also allowing certain forms of feminist discourse to drown out alternative articulations of gender.[305]

At the same time, however, discourse about gendered harm extends beyond the feminist legal project, and many legal interpretations today draw from non-feminist and anti-feminist political beliefs when adjudicating claims of sexualized violence.[306] As I have written elsewhere, laws about prison rape[307] and human trafficking[308] rely upon particular gendered views of the world in which sexual violence against cisgender women is a scourge which must be eliminated at all costs, while similar harms to men and queer individuals are tolerated or even encouraged. In the most radical cases, this can include extremist views wherein sexual and gender minorities are constructed as pedophilic rapists or the provision of gender-affirming medical care is criminalized as child abuse and mutilation.[309] My analysis in this article does not focus on

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303 Henry, *supra* note 26, at 97.

304 SPIVAK, *supra* note 300, at 32.

305 Janet Halley's work on governance feminism is of course tremendously relevant here. *See* Janet Halley, *Varieties of Governance Feminism*, *in* GOVERNANCE FEMINISM: AN INTRODUCTION ix, 25-35 (Janet Halley et al. eds., 2018).

306 *See* Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 STANFORD L. REV. 755, 821-44 (2023).

307 David Eichert, *Disciplinary Sodomy: Prison Rape, Police Brutality, and the Gendered Politics of Societal Control in the American Carceral System*, 105 CORNELL L. REV. 1775, 1785-89 (2020).

308 David Eichert, *"It Ruined My Life": FOSTA, Male Escorts, and the Construction of Sexual Victimhood in American Politics*, 26 VIRG. J. SOC. POL'Y & L. 202, 209-17 (2020).

309 I wrote this article at a particularly brutal period for American criminal law when multiple state legislatures have passed or attempted to pass laws criminalizing care for transgender individuals or enforcing other forms of heterosexual/cisgender ideology. *See*, *e.g.*, David W. Chen, *Transgender Athletes Face Bans from Girls' Sports in 10 U.S. States*, N.Y. TIMES (May 24, 2022), https://www.nytimes.com/article/transgender-athlete-ban.html [https://perma.cc/3J4S-3HPH] (discussing bans on transgender athletes); Matt Lavietes, *Gay Parents Called "Rapists" and "Pedophiles" in Amtrak Incident*, NBC NEWS (Apr. 15, 2022), https://www.nbcnews.com/nbc-out/out-news/gay-parents-called-rapists-pedophiles-amtrak-incident-rcna24610 [https://perma.cc/HBN7-8SGE] (demonstrating current anti-LGBT rhetoric); Hannah Schoenbaum, *Republican States Aim to Restrict Transgender Health Care in First Bills of 2023*, PBS

these more reactionary articulations of gendered harm, largely because they have not been influential in international law spaces. However, my underlying argument— that allegations of sexual violence are subjected to a narrative process of interpretation which generates the crimes and identities of the actors involved—is just as relevant for understanding these right-wing articulations of gendered victimhood. Notably, many current legal debates about transgender medical care or queer artistic expression rely upon the assumption that biological sex is both immutable and binary; this discursive framing predisposes legal actors to (re)produce victimhood narratives which they present as naturalized or self-evident, even though they are the product of politicized repetition.[310]

I want to make a final comment about the use of identity politics to adjudicate systems of gendered harm. Two conclusions could be drawn from the argument I am making in this paper. First, it could be said that I am arguing for the greater inclusion of cisgender and transgender men, hijra, transgender women, and others who do not correspond to the gender binary in the category of "sexual violence victim." Alternatively, this paper could be read as arguing that the use of gender identities is at best unnecessary and at worst deleterious, (re)producing categories which have no meaning outside of the meaning we give them. While these two arguments may seem to be at odds, I would support both claims.

This kind of balancing act—of advocating for justice based on identity categories while simultaneously working to weaken the power of those categories—is not foreign to critical legal studies.[311] Notably, some legal theorists working with gender have sought to lean into this uncomfortable paradox, being "permanently troubled by identity categories, consider[ing] them to be invariable

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NEWSHOUR (Jan. 7, 2023), https://www.pbs.org/newshour/politics/ republican-states-aim-to-restrict-transgender-health-care-in-first-bills-of-2023 [https://perma.cc/LF4W-6YW3] (discussing further restrictions on transgender healthcare).

310 *See* CURRAH, *supra* note 111, at 40-41.

311 *See* ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY xvii (2004). ("[E]verything is, in a sense, politics. We can acknowledge this truth without giving up on ambitious explanations of social and historical experience. We can rebel against the worlds we have built. We can interrupt our rebellions, and settle down for a while in one of these worlds. We can explain what has happened and what might happen, giving due weight to the reality of constraints on the transformative will, without either diminishing our explanatory ambition or surrendering to the illusions of false necessity.").

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stumbling-blocks, and understand[ing] them, even promot[ing] them, as sites of necessary trouble."[312] The desire to destabilize political categories is limited by the reality that "[f]ull acknowledgment of all people's differences threatens to overwhelm us . . . . Cognitively, we need simplifying categories."[313] Queer and transgender legal theorists in particular are aware that advocating for small identity-based changes (such as the right to change one's legal sex) also reinforces a system in which legal sex is a necessary and cogent concept (a reality which ultimately goes against the long-term interests of queer people).[314] The solution, therefore,

> lies in ensuring that the many, often conflicting, narratives of transgender [or other] identity that now appear in social and legal arenas continue to circulate and proliferate. Rather than trying to make sense of all these contradictory accounts of sex, gender, and the relationship between them, rather than trying to develop the "one perfect theory" to unify them . . . we should, as a movement, be celebrating the incoherencies between them even as we continue to pursue rights claims by invoking particular constructions of gender definition.[315]

In other words, while advocating for better responses to genocide, for an end to sexual violence, or for a more just world in general, legal actors must be constantly reflexive, open to new ideas, and willing to see the political realities of the law.[316] Instead of interpreting violence against cisgender men or queer people as a contrast or foil to violence against cisgender women, thus putting the different groups in competition with one another,[317] we should be seeking to holistically understand the needs of the community as a whole *and* individual needs. Importantly, this holistic

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312 Judith Butler, *Imitation and Gender Insubordination*, *in* INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 11, 14 (Diana Fuss ed., 1991).

313 MINOW, *supra* note 298, at 233-34.

314 Paisley Currah, *The Transgender Rights Imaginary*, *in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 245, 245 (Martha Albertson Fineman et al. eds., 2009).

315 *Id.* at 256.

316 *See* JOSÉ ESTEBAN MUÑOZ, CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY 1 (2009). ("Queerness is not yet here. Queerness is an ideality. Put another way, we are not yet queer. We may never touch queerness, but we can feel it as the warm illumination of a horizon imbued with potentiality . . . . The here and now is a prison house. We must strive, in the face of the here and now's totalizing rendering of reality, to think and feel a *then and there*.").

317 *See* Currah, *supra* note 314, at 245.

understanding of sexual harm would be attentive to how an act like rape affects the victim *and* the victim's family, friends, neighbors, and community; in other words, criminal law is still incapable of addressing the ripples of human suffering that affect a person's loved ones and kin after an act of extreme sexual violence.[318]

Moreover, international law continues to articulate gender as a concrete and knowable value that a person "is," rather than the product of complex power relations that are constantly in flux.[319] If gender truly is socially constructed, then recognizing the productive power of law (including the productive power of progressive and feminist legal interventions) is key to divesting gender of its restrictive and universalizing capacities.[320] Legal actors like investigators and prosecutors should resist the imposition of an "absolute despot duality that says we are able to be only one or the other," instead seeking to meet victims where they are, in all their complexity.[321] Especially in a situation like genocide, where so many have lost so much, the legal system should never contribute to the further isolation of victims because of their identity.

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[318] *See* Fionnuala Ni Aolain, *Sex-Based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law*, 12 YALE J. L. & FEMINISM 43, 80-83 (2000).

[319] BUTLER, *supra* note 24, at 4-5 ("If one 'is' a woman, that is surely not all one is; the term fails to be exhaustive, not because a pregendered 'person' transcends the specific paraphernalia of its gender, but because gender is not always constituted coherently or consistently in different historical contexts, and because gender intersects with racial, class, ethnic, sexual, and regional modalities of discursively constituted identities. As a result, it becomes impossible to separate out "gender" from the political and cultural intersections in which it is invariably produced and maintained."). *See also* ADÉBÍSÍ, *supra* note 109, at 74 (examining the role of law in establishing intelligible identity categories).

[320] Florence Ashley, *Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities*, 41 DALHOUSIE L. J. 339, 376-77 (2018).

[321] GLORIA ANZALDUA, BORDERLANDS/LA FRONTERA: THE NEW MESTIZA 19 (1987).

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