A CHANGE OF NARRATIVE: PROTECTING SEXUAL AND REPRODUCTIVE RIGHTS IN POST-CONFLICT CRIMINAL JUSTICE

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INTRODUCTION

Shortly after Russia invaded Ukraine in February 2022, horrendous, yet unfortunately unsurprising, reports about women and children being raped by the Russian army reached the international community.[1] Many of the victims were impregnated against their will and face limited access to safe abortions or other necessary reproductive health services both in Ukraine and in nearby countries.[2] Several legal and political responses to the news have acknowledged the gendered-nature of this form of violence in Ukraine and called for accountability.[3] However, this analysis is not exclusive to the crisis in Ukraine. When any conflict—ongoing or settled—is studied using proper analytical tools, the deep interconnection between one's lived conflict and post-conflict

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[1] *Reports of sexual violence in Ukraine rising fast, Security Council hears*, UN NEWS (Jun. 6, 2022), https://news.un.org/en/story/2022/06/1119832 [https://perma.cc/CML2-XJCY].

[2] *See* Melanie O'Brien & Noelle Quenivet, *Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict*, EJIL: TALK! (Jun. 8, 2022), https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/ [https://perma.cc/C8KD-NDG4].

[3] *See* Office of the Prosecutor, *ICC Prosecutor Karim A.A. Khan QC Announces Deployment of Forensics and Investigative Team to Ukraine, Welcomes Strong Cooperation with the Government of the Netherlands*, INTERNATIONAL CRIMINAL COURT (May 17, 2022), https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine [https://perma.cc/DDE2-C88E].

experiences and one's gender identity is discernible. In other words, gender affects the forms of violence perpetrators use on their victims, gender adds additional barriers with respect to access to post-conflict criminal justice, and gender determines the visibility of an individual's grievances, losses, and narrative. Though only one example of how conflict and post-conflict situations are gendered, this Article focuses on the poor protection of sexual and reproductive rights violations—both in conflict and post-conflict situations.

An individual's reproductive autonomy and reproductive and sexual health are protected by human rights, and more specifically by sexual and reproductive rights; however, infringements on sexual and reproductive health and autonomy (e.g., no access to contraception and abortion, obstetric care, sexual education, or vice versa: forced contraception, forced termination of pregnancy, forced sterilization, etc.) have gone largely unrecognized in post-conflict justice resolutions, such as when transitional justice mechanisms, including tribunals, are activated. Moreover, traditionally, such violations—although systemic and pervasive—have not received the necessary legal, political and societal attention to which they are entitled. Further, though scholars have been calling out the 'missing gender perspective' in post-conflict justice for decades,[4] the specific sexual and reproductive rights analysis has been regarded as even more absent — the invisible within the invisible.[5] Even amongst scholars, this sexual and reproductive rights analysis was lacking. In fact, it was not until 1997, in Kelly Dawn Askin's ground-breaking book, that violations of reproductive rights (e.g., genocidal rape, forced maternity, the mutilation of reproductive organs, pregnancy caused by rape, forced or coerced maternity) were first framed in the post-conflict context.[6] Following Askin's conceptual work, scholars have since devoted greater attention to the violence in conflict situations that tends to affect

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[4] *See* Kelly Dawn Askin, *Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward*, *in* SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 15 (Anne-Marie de Brouwer et al. eds., 2013; Vasuki Nesiah, *Missionary Zeal for a Secular Mission: Bringing Gender to Transitional Justice and Redemption in Feminism*, *in* FEMINIST PERSPECTIVES ON CONTEMPORARY INTERNATIONAL LAW: BETWEEN RESISTANCE AND COMPLIANCE 137 (Sari Kouvo & Zoe Pearson eds., 2011); Christine Bell & Catherine O'Rourke, *Does Feminism Need a Theory of Transitional Justice? An Introductory Essay*, 1 THE INT'L J. OF TRANSITIONAL JUST. 23, 24–26, 28–29, 38 (2007); Fionnuala Ní Aoláin, *Transformative Gender Justice?* in FROM TRANSITIONAL TO TRANSFORMATIVE JUSTICE 150, 150–156, 162, 164, 169 (Paul Gready & Simon Robins eds., 2019).

[5] Ramona Vijeyarasa, *Putting Reproductive Rights on the Transitional Justice Agenda: The Need to Redress Violations and Incorporate Reproductive Health Reforms in Post-Conflict Development*, 15 NEW ENGLAND J. OF INT'L AND COMPAR. LAW 41, 42–45, 48–52, 54, 57, 61–62 (2009).

[6] *See* KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS (1997).

one's reproductive capacity.[7]

Underlying the analysis of sexual and reproductive rights in the post-conflict context is that sexual and reproductive rights violations may be understood as distinct, yet often overlapping, categories falling under the general umbrella of gender-based violence. In other words, while some reproductive violations are a result of sexual violations, others lack a sexual character. Further, the modern understanding of reproductive violations is broad enough to cover both those violations that are already captured by international law and those that have not. Some have argued reproductive violations inadequately captured by international law, including genocidal rape, forced maternity, the mutilation of reproductive organs, pregnancy due to rape, forced or coerced maternity, and sexual assault or other violence affecting reproductive capacity should be properly labeled.[8] International law also fails to encompass 'collateral' reproductive violence, produced as a consequence of the infliction of other violations in conflict, such as causing women to miscarry as a result of torture and causing forced impregnation through rape,[9] as well as the long-term stigmatization on the mothers who have been raped and on their children who are the product of such rape.[10]

In parallel, or perhaps in response to scholarly work and policy efforts highlighting the importance of defining and addressing reproductive violence in the post-conflict context, international and domestic courts have recently joined the conversation, albeit limitedly. For instance, on February 4th, 2021, the International Criminal Court (ICC) found Dominic Ongwen guilty of the crime of forced pregnancy.[11] Notwithstanding the pending appeal, this was the first time forced pregnancy was charged within any international criminal law system and in which an international judicial decision expressly considered a

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[7] Rosemary Grey, *The ICC's First 'Forced Pregnancy' Case in Historical Perspective*, 15 J. OF INT'L CRIM. JUST. 905, 927 (2017); CENTER FOR REPRODUCTIVE RIGHTS, AN EXAMINATION OF REPRODUCTIVE VIOLENCE AGAINST WOMEN AND GIRLS DURING THE ARMED CONFLICT IN COLOMBIA 5 (2020); *See* Ciara Laverty & Dieneke de Vos, *Reproductive Violence as a Category of Analysis: Disentangling the Relationship between 'the Sexual' and 'the Reproductive' in Transitional Justice*, 15 INT'L J. OF TRANSITIONAL JUST. 616 (2021).

[8] Grey, *supra* note 7, at 918–922; Center for Reproductive Rights, *supra* note 7, at 5, 12–15.

[9] Grey, *supra* note 7, at 910.

[10] Center for Reproductive Rights, *supra* note 7, at 15.

[11] Prosecutor v. Ongwen, ICC-02/04-01/15, Judgment, (Feb. 4, 2021), https://www.icccpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF [https://perma.cc/27TP-YTMR].

victim's reproductive autonomy as a distinct value.[12] According to Tanja Altunjan, "the Ongwen case marks the first explicit prosecution and conviction of a reproductive crime in the recent history of international criminal law."[13] This sentence followed another trailblazing decision taken in 2020 by the Colombian Supreme Court, which recognized the crimes concerning forced abortion and forced contraception against women within a national conflict.[14] Although both the 2020 and 2021 court decisions are commendable stepping stones, we argue that the conversations between different stakeholders feel somewhat fragmented and unclear rather than connected to one all-encompassing (strategic) narrative. Therefore, questions concerning sexual and reproductive rights in post-conflict analysis still remain.

Our Article therefore pushes for a strategic conversation about sexual and reproductive rights in post-conflict justice: answering what steps must be taken to strengthen both the recognition that reproductive violence deserves and the access to justice for victims of these harms. Building on the existing scholarship and the evolving policy work on gender, transitional justice and violence, our contribution unfolds in three parts. We begin with a retrospect on how the international criminal law system has (mis)understood gendered violence, including in its (non)engagement with sexual and reproductive rights protection. We then turn to our more hopeful part of the analysis, and show the potential of post-conflict criminal justice to prosecute sexual and reproductive rights violations, and share an overview of the conceptual contributions of the growing scholarship. Lastly, in order to strengthen the protection of cases concerning reproductive conflict-related violence, we propose a blueprint of the considerations and strategies that should go into the design of further steps.

I. International Criminal Law and its (Mis)Understandings of Gendered Violence

The historical narrative shows that the international criminal law's failure to engage effectively with gender analysis has negatively impacted its ability to protect the sexual and reproductive rights of persons gendered both male and female. As a result, the establishment of the ICC and its developing case law has not set a clear standard for sexual and reproductive rights analysis or provided a framework inclusive of all violent experiences women and girls experience

[12] Grey, *supra* note 7, at 908–909; Judgment, *Ongwen*, *supra* note 13, ¶¶ 2717, 2722.

[13] TANJA ALTUNJAN, REPRODUCTIVE VIOLENCE AND INTERNATIONAL CRIMINAL LAW 189 (2021).

[14] Angélica Cocomá Ricaurte & Juliana Laguna Trujillo, *Reproductive violence: a necessary category of analysis in transitional justice scenarios*, LSE WOMEN, PEACE AND SECURITY FORUM (June 24, 2020), https://blogs.lse.ac.uk/wps/2020/06/24/reproductive-violence-a-necessary-category-of-analysis-in-transitional-justice-scenarios/ [https://perma.cc/HM7F-3FT5].

during and after a conflict. This Section outlines some of the historical barriers to reaching a clear international criminal framework for remedying reproductive violence. This history extends from post-World War II tribunals to the establishment of the International Court of Justice. Throughout this span, protections for sexual and gender-based violence ("SGBV") have been among the most neglected issues; and reproductive rights in particular have been the most invisible within the invisible.

A. World War II and Its Aftermath: Sexual Violence as a Tool of Genocide

Historically, international law courts and tribunals have had a poor record of addressing crimes involving SGBV. First-hand accounts of rape during the Second World War existed.[15] Nonetheless, the Nuremburg Charter (1945), which established the core concepts used in the prosecution of war crimes after World War II, did not explicitly list SGBV as "violations of the laws or customs of war" or "crimes against humanity"; nor did SGBV feature in the Nuremburg trials.[16] Although the Japanese enslaved over 100,000 women, later known as "comfort women,"[17] rape and sexual violence likewise received limited attention in the International Military Tribunal for the Far East, known as the Tokyo Trials.[18] Rape was also not listed as a war crime or crime against humanity in its Charter, although the Tribunal "recorded that approximately 20,000 cases of rape had occurred in the city of Nanking during the first month of its occupation."[19]

The Geneva Conventions, ratified in 1949, include both explicit and implicit prohibitions against SGBV crimes; Common Article 3 expressly prohibited acts against non-combatants, including "outrages upon personal dignity, in particular humiliating and degrading treatment."[20] Articles across the four Geneva

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[15] *Cf.* MARTA HILLERS, *A WOMAN IN BERLIN* (1954).

[16] NIAMH REILLY, WOMEN'S HUMAN RIGHTS. SEEKING GENDER JUSTICE IN A GLOBALIZING AGE 100 (2009).

[17] Patricia Viseur Sellers, *Wartime Female Slavery: Enslavement?*, 44 CORNELL INT'L L.J. 115 (2011).

[18] REILLY, *supra* note 16, at 100.

[19] Dubravka Šimonović (Special Rapporteur on violence against women), *Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention*, ¶ 37, U.N. Doc. A/HRC/47/26 (Apr. 19, 2021).

[20] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Conventions list among the crimes of grave breaches "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health."[21] Finally, Article 27 of the fourth Convention requires states to protect women in international armed conflict "against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."[22] The posture of this early protection is vulnerable to critique: by defining rape as an offense against honor, it facilitates a misconception that women should be protected from men, rather than indicating that rape itself is at the core of the legal problem because it is an attack against human lives. By not calling rape a crime of violence, the provision presents women implicitly "as male and family property"; and suggests that sexual violence is a lesser crime rather than an offense of a distinctly violent and sexual nature.[23]

Fionnuala Ní Aoláin argues that, even in the uncommon instance that wartime prohibitions include SGBV, international law tends to characterize these crimes as "facets of a male status violation."[24] This is significant because, under criminal law, a person cannot be charged with a crime unless the conduct constitutes a criminal offense when the crime was committed. This rule raises questions about whether sexual crimes not expressly prohibited under international law in the postwar years could have been tried successfully. Altunjan argues that, although reproductive violence did not appear in the statutes of the Nuremberg and Tokyo trials or in Control Council Law No. 10, "the prohibition and criminalization of conflict-related reproductive violence was implicit within these broader provisions."[25] As a result, Altunjan argues, these crimes could have been prosecuted before the establishment of the ICC.[26]

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[21] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[22] 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.

[23] HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 314 (2000); REILLY, *supra* note 16, at 101.

[24] Fionnuala Ní Aoláin, *Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War*, 60 ALBANY L. REV. 888 (1997).

[25] ALTUNJAN, *supra* note 13, at 100.

[26] *Id.*

Cases from post-war Germany also suggest that the harm that most troubled the international community in the 1940s were not violations of the victim's dignitary interests, but the attempted destruction of their national, ethnic, racial or religious group.[27] In the Nuremberg trials, Hitler was quoted as saying, "by 'destruction' I do not necessarily mean extermination of these people—I shall simply take systematic measures to prevent their procreation. [...] There are many means by which a systematic and comparatively painless extinction of undesirable races can be attained, at any rate without blood being shed."[28] Consequently, after World War II, international trials that included charges or evidence of reproductive violence dealt only with enforced sterilization and forced abortion, and these crimes if they had a nexus to genocide or ethnicity-related scenarios.[29]

For instance, in the *Greifelt and Others* case, the accused were convicted and imprisoned, among other crimes, for forced abortion of the racially impure (e.g., mixed-race), as well as the forced continuation of the pregnancy of the racially pure by prohibition of abortion as part of Nazi policies to promote racial purification, where the consent of pregnant women was irrelevant, since compelled abortion and forced pregnancy was an instrument of state policy.[30] The 1948 Genocide Convention would reinforce the same perception by linking "imposing measures intended to prevent births" (forced sterilization) to the intent to destroy a group, rather than its impact on the victims themselves.[31] Years later in the *Eichmann* case (District Court of Jerusalem, 1961), Eichmann was convicted of crimes against the Jewish People on the basis that he took measures to prevent births among Jews, among several other crimes.[32] As we

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[27] Grey, *supra* note 7, at 913.

[28] HERMANN RAUSCHNING, THE VOICE OF DESTRUCTION 137 (1940).

[29] ALTUNJAN, *supra* note 13, at 189.

[30] War Crimes Comm'n, Law Reports of Trials of War Criminals, Vol. XIII, Trial of Ulrich Greifelt and Others, 1, 13–14 (1949).

[31] Grey, *supra* note 7, at 913. Altunjan observes that a previous draft of the Genocide Convention had included three categories, namely physical, biological, and cultural genocide, and that with regard to biological genocide, the 1947 draft referred to: "Restricting births by: (a) sterilization and/or compulsory abortion; or (b) segregation of the sexes; or (c) obstacles to marriage." Despite the omission of these individual acts, the provision adopted on "imposing measures intended to prevent births within the group" has been interpreted to include these acts. ALTUNJAN, *supra* note 13, at 107.

[32] *See* Miles Jackson, *A Conspiracy to Commit Genocide: Anti-Fertility Research in Apartheid's Chemical and Biological Weapons Programme*, 13 J. INT'L CRIM. JUST. 933, 943 n.47 (2015). *See also* ALTUNJAN, *supra* note 13, at 179, 181.

will show, the understanding of reproductive harms—beyond forced abortion and forced sterilization and their nexus to the crime of genocide—was expanded by international tribunals in the 1990s.

B. The Shift in the 1990s: The First Convictions of Cases of Sexual Violence

It was not until the 1990s that the issue of conflict-related sexual violence against women started to feature more seriously on the agenda of the international community at a time when women were "routinely raped, sexually assaulted, incarcerated, and forcibly impregnated as part of deliberate military and political strategies to debase and humiliate them."[33] Namely, estimates of the use of rape against women as a tool of war were alarming: there were up to 60,000 cases in the former Yugoslavia (1992–1995), between 100,000 and 250,000 cases during the three months of genocide in Rwanda (1994), and more than 60,000 cases during the conflict in Sierra Leone.[34] In this context, the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994 began viewing the provisions of Geneva Conventions as including the commission of SGBV acts as a war crime and/or crime against humanity. These tribunals started acknowledging the use and extent of rape and other forms of SGBV as international crimes, writing that the infliction of these crimes is about power, domination, and violence.[35] Consequently, the ICTY and ICTR convicted people for sexual violence for the first time in history.[36]

Although these cases were considered major advancements then, the Statutes of both tribunals only criminalized rape. Consequently, there were no charges recognizing the reproductive rights elements of the crimes committed in landmark cases, and the recognition of sexual and reproductive violence remained limited, if not invisible.[37] For instance, the *Foča* case in the ICTY

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[33] ALICE EDWARDS, VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW 7 (2011); Christine Chinkin & Mary Kaldor, *Gender and New Wars*, 67 J. INT'L AFFS. (2013).

[34] U.N. DEPT. OF PUB. INFO., *Sexual Violence: A Tool of War* (Mar. 2014), https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Sexual%20Violence%202014.pdf [https://perma.cc/YP44-A7WM].

[35] Niamh Hayes, *Investigating sexual and gender-based violence,* INVESTIGATORS MANUAL INST. FOR INT'L CRIM. INVESTIGATORS 369–71 (2016).

[36] In the ICTY, "more than 40 percent of cases . . . included charges of sexualized crimes against international law." *See* ALTUNJAN, *supra* note 13, at 52.

[37] Altunjan observes that, while the Statute of the ICTR (as well as the ICTY) lists only rape as a crime against humanity, an important novelty is that the ICTR Statute explicitly categorizes

represented not only the first time that an international criminal tribunal brought charges exclusively for crimes of sexual violence, but was also the first time rape was convicted as a form of torture and sexual enslavement as a crime against humanity. Foča's was the first conviction that established that rape constituted not only a violation of the laws and customs of war, but also a crime against humanity. On the other hand, though *Foča* concerned rape camps, the act of forced impregnation and/or pregnancy was not charged.[38] This act was similarly not charged in the *Karadžić* and *Mladić* case, where the ICTY mentioned the commission of forced pregnancy in stating that some camps "were specifically devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often interned until it was too late for them to undergo an abortion."[39] Indeed, during the Yugoslav wars, records of forced impregnation and/or pregnancy reveal that the reproductive capacity of women was specifically targeted and used as a tool of ethnic cleansing: "evidence pointed towards a deliberate strategy of impregnating women and detaining them until they were unable to terminate the pregnancy, forcing them to give birth to children presumed to be of the perpetrator's ethnicity."[40] As a result, although many women became pregnant, and estimates indicate that the number of children born out of rape range from several hundred to several thousand, the act of forced impregnation and/or pregnancy was never specifically

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sexualized violence as a war crime in non-international armed conflicts: Article 4 lists various individual acts considered serious violations of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977, including "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." She believes that "[i]n classifying these forms of sexualized violence as 'outrages upon personal dignity' instead of serious violations of bodily integrity, the Statute follows the precedent set by Article 75(2)(b) of Additional Protocol I and Article 4(2)(e) of Additional Protocol II to the Geneva Conventions." ALTUNJAN, *supra* note 13, at 53.

[38] Altunjan notes that the fact that Statute of the ICTY lists rape only as a crime against humanity led to two caveats: (1) the Statute does not list rape as an act of genocide or a war crime—regarding the latter, this categorization went against both the widespread agreement that sexualized violence had been used as a "tool" of war as well as the precedent set by the post-World War II trials supported by the U.N. War Crimes Commission, and (2) there was no explicit reference to other kinds of sexualized violence. ALTUNJAN, *supra* note 13, at 51; *Kunarac, Kovač and Vuković Case*, CTR. FOR WOMEN, Peace & Sec., https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/kunarac-kovac-and-vukovic-case/ [https://perma.cc/BLM9-8VD2]; Dieneke De Vos, *Can the ICC prosecute forced contraception?*, EUR. UNIV. INST. (Mar. 14, 2016), https://me.eui.eu/dieneke-de-vos/blog/can-the-icc-prosecute-forced-contraception/ [https://perma.cc/P5TL-R5VB].

[39] AMNESTY INT'L, FORCED PREGNANCY: A COMMENTARY ON THE CRIME IN INTERNATIONAL CRIMINAL LAW 7 (2020); ALTUNJAN, *supra* note 13, at 109; Prosecutor v. Radovan, Case Nos. IT-95-5-R61, IT-95-18-R61, Judgment, § 64 (July 11, 1996).

[40] ALTUNJAN, *supra* note 13, at 85, 108.

charged.[41] The commission of these acts led, nevertheless, to the inclusion of forced pregnancy as part of the ICC Statute.[42]

Further, the international community realized the magnitude of the sexual violence committed during the Rwandan genocide when it saw the number of pregnancies and children born. Human Rights Watch also later established that virtually every Tutsi woman and adolescent girl who survived the genocide had been raped, and the U.N. Special Rapporteur in Rwanda, extrapolating from the number of unwanted pregnancies after the genocide (calculating that 100 cases of rape result in one pregnancy), estimated that the total number of women raped was much higher, ranging from 250,000 to 500,000.[43] Despite this, the ICTR neither prosecuted acts of forced pregnancy nor argued that the commission of enforced sterilization and forced contraception without a genocidal intent could be considered a crime under international law.[44] In the *Akayesu* case—the first conviction where an institution recognized rape and sexual violence as a means of perpetrating genocide[45]—although "rape was not originally included in the charges," it was later added under the insistence of some judges and civil society.[46] In that case, the judgment only touched upon reproductive violence in the context of the genocide in recognizing that forced impregnation could, in some circumstances, amount to the crime of genocide if there is an intent to prevent births within a group.[47] We agree with Altunjan in

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[41] De Vos, *supra* note 38; Altunjan further argues that, despite the fact that the Trial Chamber also stated that "[t]he systematic rape of women . . . is in some cases intended to transmit a new ethnic identity to the child," for unknown reasons, the genocidal intent, namely the intent to destroy the group of the Bosnian Muslims, did not form part of the charges in the ensuing trials of Karadžić and Mladić. ALTUNJAN, *supra* note 13, at 108–09.

[42] ALTUNJAN, *supra* note 13, at 85.

[43] Lyn Graybill, *Gender and Transitional Justice: Experiences from South Africa, Rwanda and Sierra Leone*, *in* DEFYING VICTIMHOOD: WOMEN AND POST-CONFLICT PEACEBUILDING 207, 211–14 (Albrecht Schnabel & Anara Tabyshalieva eds., 2012).

[44] Grey, *supra* note 7, at 917.

[45] *Cf.* Centre for Women, Peace and Security (LSE), *Jean-Paul Akayesu Case*, TACKLING VIOLENCE AGAINST WOMEN (Nov. 11, 2022), https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/jean-paul-akayesu-case/ [https://perma.cc/5EA2-6FGS].

[46] ALTUNJAN, *supra* note 13, at 53–54.

[47] AMNESTY INT'L, *supra* note 39 at 8. In the judgment, the court established that, "in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group." Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, § 507 (Sept. 2, 1998).

arguing that the *Akayesu* case was important for the prosecution of reproductive crimes because (1) "the linkage between reproductive violence and genocide through prevention of births is a significant precedent," and (2) "the trial and judgment surfaced evidence of deliberate targeting of pregnant women and forced miscarriages."[48]

As we will see in the next section, after the initial jurisprudence from the ICTY and the ICTR, the establishment of the ICC in the late 1990s led to the codification of different forms of SGBV.

C. The International Criminal Court's Enlargement of the Category of Sexual Violence

The adoption of the Rome Statute in 1998 marked the first time international criminal law expressly criminalized—in addition to rape—sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, gender-based persecution, trafficking, and other forms of sexual violence as constitutive acts for war crimes, crimes against humanity and, in some circumstances, acts of genocide. Tribunals created after the ICTY and ICTR showcase this trend. For instance, the Special Panels for Serious Crimes (SPSC) in Timor-Leste incorporates a broad conception of sexual violence in its 2000 regulations, criminalizing: "forced pregnancy, enforced sterilization, or any other form of sexual violence."[49] Moreover, the Special Court for Sierra Leone (SCSL) also took an expansive approach in defining sexual violence in its 2002 Statute, which included "forced pregnancy and any other form of sexual violence."[50] Albeit, the SCSL omits enforced sterilization unlike the ICC and the SPSC.[51] Finally, the 2004 Statute of The Extraordinary Chambers in the Courts of Cambodia (ECCC) lists crimes against humanity under the same definition as the 1998 Rome Statute.[52]

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[48] ALTUNJAN, *supra* note 13, at 108.

[49] UNTAET Res. 2000/15, ¶¶ 6(1)(b)(xxii), 6(1)(e)(vi) (Jun. 6, 2000). On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal offences.

[50] U.N. DEP'T OF PEACEKEEPING OPERATIONS, REVIEW OF THE SEXUAL VIOLENCE ELEMENTS OF THE JUDGMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, AND THE SPECIAL COURT FOR SIERRA LEONE IN THE LIGHT OF SECURITY COUNCIL RESOLUTION 1820, at 21, U.N. Sales. No. E.10.VIII.1 (2010).

[51] It also omits "rape and enforced prostitution as war crimes in non-international armed conflicts" as well as it "does not extend to gender-based persecution." ALTUNJAN, *supra* note 13, at 61.

[52] Patricia V. Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation,* 12, https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf [https://perma.cc/RA3A-ZQ9S].

Despite the express criminalization of broad forms of sexual violence, these tribunals have had a poor track record of prosecuting reproductive violence. Although the Trial Chambers of the SCSL referred to statements concerning pregnancies resulting from forced marriage, leading them to view acts such as "impregnating victims and forcing them to bear and raise children" as part of the "defining aspects of the forced conjugal relationship," there were no prosecutions for crimes concerning reproductive violence.[53] The SPSC in Timor-Leste and the ECCC in Cambodia have had one and two convictions, respectively, for sexual violence: one on rape as crime against humanity in Timor-Leste (the *Lolotoe* case), and in Cambodia the conviction for a rape committed in the S-21 prison (Case 001) and on forced marriage and sexual violence against women in those marriages (Case 002). Notably, there have been no prosecutions concerning reproductive violence by these two tribunals.[54]

When the ICC began its functions in 2002, disappointment soon followed because it did not produce any convictions for sexual violence during its first twelve years: their cases revealed a progressive dropping of charges concerning these crimes.[55] Controversially, in the *Kenyatta* case, judges at the ICC ruled that "not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence."[56] In this case, the prosecution brought charges for penile amputation as an "other form of sexual violence," citing the deprivation of men's biological reproductive capacity. However, in a controversial decision, the court ruled that penile amputation "did not constitute acts of a sexual nature."[57] Facing the criticism of her predecessor, the new ICC Prosecutor published in 2014 a "Policy Paper on Sexual and Gender-based Crimes" in which her office committed to adopting a gender-based approach, which requires "an understanding of the differences in status, power, roles and needs between

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[53] ALTUNJAN, *supra* note 13, at 109–10.

[54] Noemí Pérez Vásquez, *Last on the List: The Protection of Sexual and Reproductive Health and Rights in Timor-Leste's Transitional Justice Process*, 40 NORDIC J. HUM. RTS. (2022) (on the invisibility of reproductive violence within the SPSC in Timor-Leste).

[55] LOUISE CHAPPELL, THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: LEGACIES AND LEGITIMACY (2016).

[56] Prosecutor v. Muthaura et al., Case No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ ¶ 265-266 (Jan. 23, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01006.PDF [https://perma.cc/QQ5F-MV39].

[57] De Vos, *supra* note 38.

males and females, and the impact of gender on people's opportunities and interactions."[58]

In March 2016, the *Bemba* case was the ICC's first conviction on the basis of command responsibility for sexual violence. However, the *Bemba* case also showed a progressive dropping of charges: after being convicted on two counts of crimes against humanity (murder and rape), as well as on three counts of war crimes (murder, rape and pillaging), Bemba was eventually acquitted by the ICC Appeals Chamber in June 2018.[59] Rosemary Grey, nevertheless, observes that the *Bemba* case led to increased visibility of reproductive violence. Despite the fact that acts of forced pregnancy were not captured in the charges, documents included with the charges alleged that "many of the women victims of rapes and gang-rapes contracted HIV, and became pregnant as a result of these rapes." In the sentencing decision, the Trial Chamber referred to the "unwanted pregnancies" as an aggravating factor of rape.[60]

In 2016, the *Ongwen* case was the first case in any international criminal court to include charges of "forced pregnancy" as a war crime and crime against humanity and the first one to expressly consider the reproductive autonomy of individual women and girls.[61] More specifically, in the decision to confirm charges against Ongwen, the Trial Chamber noted that "the essence of the crime (...) is in unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy."[62] Moreover, the *Ongwen* case became one

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[58] OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 3 (2014), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf [https://perma.cc/V6NQ-4K7S].

[59] WOMEN'S INITIATIVE FOR GENDER JUSTICE, GENDER REPORT CARD ON THE INTERNATIONAL CRIMINAL COURT 49–51 (2018), https://4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf [https://perma.cc/G4R9-U3RG]; Owen Bowcott, *Congo Politician Guilty in First ICC Trial to Focus on Rape as a War Crime*, GUARDIAN March 21 2016, https://www.theguardian.com/world/2016/mar/21/icc-finds-ex-congolese-vice-president-jean-pierre-bemba-guilty-of-war-crimes [https://perma.cc/M234-NWTP]; CHAPPELL, *supra* note 55.

[60] Grey, *supra* note 7. In July 2019, the ICC Trial Chamber declared Ntaganda guilty of rape and sexual slavery as war crimes and crimes against humanity committed in 2002 and 2003. This is the first case at the ICC—since the Rome Statute entered into force—where an individual will be finally found guilty for crimes of SGBV (if upheld on appeal). Press Release, Statement by UN Women Exec. Director Phumzile Mlambo-Ngcuko on the Conviction of Bosco Ntaganda by the Int'l Criminal Ct., U.N. Press Release (July 8, 2019), https://www.unwomen.org/en/news/stories/2019/7/statement-ed-conviction-of-bosco-ntaganda-by-the-international-criminal-court [https://perma.cc/3L3G-NZ72].

[61] Grey, *supra* note 7, at 908–909, 924.

[62] *Ongwen*, *supra* note 11, ¶¶ 99–100.

of the only cases in which reproductive violence is understood as a crime under international law outside the context of genocide or ethnic cleansing.[63] Subject to confirmation on the appeal, on February 2021, the ICC found Ongwen guilty of the crime of forced pregnancy.[64]

To conclude, sexual and reproductive violations are still in an incipient state: in international criminal law, they are usually conceived to describe specific crimes, such as forced sterilization and forced pregnancy. This narrow conception generates tension with the *nulla poena sine lege* principle on which international criminal law is founded. As Chalmers and Leverick argue, the importance of 'fair labeling,' i.e., describing or designating a category, is critical in criminal law because (1) there must be a description attached to the offender's conduct, and (2) there must be an ability to differentiate between different forms of wrongdoing.[65] Does this mean that other violations of a reproductive nature not codified in the Rome Statute will not be considered by the ICC and other international criminal law tribunals? Can reproductive harms that are not codified be considered under the category of "other forms" of sexual violence? The *Ongwen* case may be a sign that the ICC and post-conflict criminal justice have moved into a new era marked by increased visibility of sexual and reproductive rights violations. In fact, we argue that recent international law developments alongside decisions of various international and domestic courts have opened a door for doctrinal and institutional progress—an opportunity that must not be missed. However, a pre-condition for such progress and the new narrative of sexual violence is the adaptability of international criminal law institutions and a nuanced understanding of the complicated nature of sexual and reproductive rights violations, as will be explained in the next section.

II. Institutional Adaptability and Conceptual Clarity: Gearing Towards Prosecuting Sexual and Reproductive Rights Violations

In the following sections, we outline the potential of the international criminal law frameworks to strengthen prosecution of sexual and reproductive rights violations. In doing so, we also present the strategies that scholars have used to capture the complexities of such violations.

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[63] Grey, *supra* note 7, at 905, 925.

[64] Ongwen, *supra* note 11.

[65] James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 MODERN L. REV. 217, 222 (2008).

A. Acknowledging the Complexity in Defining Reproductive Violence

Scholars have tried to define "reproductive violence." For instance, Grey defines "reproductive violence" as the violence that involves a violation of reproductive autonomy or which is directed at a group of people because of their reproductive capacity.[66] Acts of reproductive violence are gross violations of personal dignity and can cause grave and fatal physical injuries as well as serious psychological harm.[67] Similarly, the Center for Reproductive Rights defines reproductive violence "as those practices that directly or indirectly affect and violate the reproductive autonomy – understood as people's capacity to decide if they want or not to have children, as well as to access information and services concerning sexual and reproductive health, such as contraceptives, abortion and gynecological and obstetric services."[68] Altunjan understands reproductive violence to concern "acts which affect the victim's reproductive system, organs, process, or capacity to reproduce."[69] Moreover, because more commonly recognized reproductive violations such as enforced sterilization and forced pregnancy have historically been associated with the collective, Altunjan argues that, "international criminal law and practice should address reproductive violence as a violation of reproductive autonomy independently of its possible collective dimension."[70] In other words, the focus on the harms of and remedies for reproductive violence should shift away from the collective and toward the individual.

Cocomá Ricaurte and Laguna Trujillo argue that sexual violence and reproductive violence are different conceptual categories. Despite the fact that sexual violence is recognized at the international level as a war crime or a crime against humanity in need of redress, neither gender-based violence nor reproductive violence are listed.[71] More specifically, they claim that although "reproductive violence can be linked to sexual violence," there are other cases where this violence is enacted as part of a gender-based logic because of the specific harm it produces, because it can include other human rights violations, and because it may be related to acts affecting "reproductive capacity or

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[66] Grey, *supra* note 7, at 906.

[67] *Id.* at 907.

[68] Center for Reproductive Rights, *supra* note 7, at 13.

[69] ALTUNJAN, *supra* note 13, at 9.

[70] *Id.* at 77–78.

[71] Cocomá Ricaurte & Laguna Trujillo, *supra* note 14.

reproductive autonomy." Consequently, while reproductive violence is not "developed conceptually and legally" in order to achieve recognition of conflict-related reproductive rights violations, these are all being framed as forms of sexual violence.[72] While Dieneke De Vos makes a distinction between reproductive violence in conflict from sexual violence "for its clear attack at, or use of, [women's] reproductive capacities," she also recognizes that all forms of sexual violence can have serious and long-lasting reproductive health consequences, and can therefore be classified as reproductive violence.[73] In other words, she seems to try to bridge the gap between understandings of sexual and reproductive violence.

Altunjan also references the complexities implicit in defining sexual and reproductive violence. She says that there is a close connection between sexual and reproductive violence and the values of sexual and reproductive autonomy because "reproductive autonomy is often exercised through sexuality, and sexual and reproductive violence often overlap."[74] Due to this overlap, some argue that the distinction between sexual and reproductive violence as well as sexual and reproductive autonomy is meaningless. For example, acts of sexual violence such as rape are used to force pregnancy and enforced sterilization is often committed through a sexual conduct, such as the mutilation of sexual organs. However, these crimes also have the purpose of preventing victims from engaging in sexual behavior that could lead to reproduction (i.e., a sexual dimension).[75]

Others argue that, despite the frequent overlaps between sexual and reproductive violations, they are distinct harms and so these acts should be labelled and separately criminalized. For instance, the loss of reproductive capacity does not automatically affect the victim's sexuality nor do violations of sexual autonomy automatically impact the reproductive system.[76] Altunjan encourages understanding reproductive violence as a form of gender-based violence, rather than as a form of sexual violence, because it can also be carried out in non-sexual ways (i.e., "it is committed against persons because of their gender, and more precisely because of their reproductive capacity"), and it allows us to recognize the reproductive dimension of the violation and to criminalize acts that amount to human rights violations, which often have long-

[72] *Id.*

[73] De Vos, *supra* note 38.

[74] ALTUNJAN, *supra* note 13, at 283–284.

[75] *Id.*

[76] *Id.* at 9.

term consequences.[77] She ends by proposing that (1) the ICC Statute include forced abortion, (2) add or create a separate category on "any other form of reproductive violence" and (3) change the categorization of enforced sterilization and forced pregnancy because they should not be considered crimes of sexual violence.[78] Altunjan ends by recognizing that given the approach taken by the Office of the Prosecutor in the past, "'unnamed' forms of reproductive violence may be prosecuted as other forms of sexual violence."[79]

There are other scholars studying reproductive violence as part of sexual violence. For instance, when Marta Valiñas analyzes the case of the Colombian Special Jurisdiction for Peace (SJP), she writes, "this section focuses on non-sexual violence crimes, and therefore does not address crimes of reproductive violence—such as forced abortion, forced contraception, mutilation of sexual/ reproductive organs, enforced sterilization—because these have generally been considered part of sexual violence."[80] In other words, we think the discourse is important, and international criminal law institutions cannot exclude reproductive violence just because it differs from sexual violence.

B. Dealing with Uncodified Harms in International Criminal Law

Despite an increased attention to sexual violence by international criminal courts and the enumeration of a wide range of sexual violence crimes in the Rome Statute, many other types of gender-based violence, including reproductive violence, remain largely invisible in the study and the practice of international criminal law.[81] For instance, as Grey notes, the ICC Statute is silent on forced impregnation, forced miscarriage, and persecution on the grounds of pregnancy, examples of crimes that should be included.[82] As such, she continues, because reproductive autonomy is a distinct value from sexual autonomy, where possible, conduct which offends this value should be punished as a separate crime.[83]

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[77] *Id.* at 9, 283–284.

[78] *Id.* at 283–284, 288.

[79] *Id.* at 284–285.

[80] Marta Valiñas, *The Colombian Special Jurisdiction for Peace: A Few Issues for Consideration When Investigating and Adjudicating Sexual and Gender-based Crimes*, 18 J. OF INT'L CRIM. JUST. 449, 457 n.41 (2020).

[81] Grey, *supra* note 7, at 906.

[82] Grey, *supra* note 7, at 918, 927; Chalmers and Leverick, *supra* note 65.

[83] Grey, *supra* note 7, at 905.

Historically, tribunals have prosecuted unlisted crimes in different ways. The Rome Statute, for instance, includes provisions that serve to prosecute other crimes that were not explicitly enumerated in the text, in response to emerging forms of violence against women that are increasingly being recognized in the evolutionary process of international criminal law. In case of a crime against humanity, the Rome Statute regulates crimes concerning "any other form of sexual violence" of comparable gravity.[84] Moreover, it establishes "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health" as crimes against humanity, which serves as a catch-all for criminal acts that were not specifically enumerated. [85] In case of a war crime, Articles 8(b)(xxii) and 8(2)(e)(vi) also criminalize forced pregnancy, forced sterilization, "or any other form of sexual violence also constituting a grave breach of the Geneva Conventions." Additionally, when a crime concerning SGBV, such as "outrages on personal dignity"[86] or "violence to life"[87] is committed during an armed conflict, it may also constitute a war crime. Consequently, tribunals have adapted a flexible approach in the prosecution of crimes that are not listed. For example, international criminal law tribunals have prosecuted forced marriage charges as "sexual slavery," "other forms of sexual violence," and "other inhumane acts."[88]

Scholars have also elucidated how those reproductive rights violations should be prosecuted by the ICC within the provisions that currently exist at the Rome Statute. For instance, de Vos shows a concern with the lack of recognition on forced contraception in conflict—a concern that we also share.[89]

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[84] See Article 7(1)(g). Elements of Crimes, defines 'other forms of sexual violence' as 'the perpetrator committed acts of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.' Int'l Criminal Court [ICC], *Elements of Crimes* art. 7(1)(g)-6, at 10, ICC-PIDS-LT-03-002/11_Eng (2011) [hereinafter ICC Elements of Crimes].

[85] *See* Art. 7(1)(k).

[86] *See* Art. 8(2)(c)(ii).

[87] *See* Art. 8(2)(c)(i). Grey, *supra* note 7, at 928.

[88] *cf.* NOEMÍ PÉREZ VÁSQUEZ, WOMEN'S ACCESS TO TRANSITIONAL JUSTICE IN TIMOR-LESTE: THE BLIND LETTERS 63–64 (2022); Valerie Oostveld, *The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments*, 49 CORNELL INT'L LAW J. 49, 74 (2011).

[89] *See* Noemí Pérez Vásquez, *'I asked God', Reparations for Sexual and Reproductive Health and Rights (SRHR) in Timor-Leste's Transitional Justice Process,* LONDON SCHOOL OF ECONOMICS

She argues that prosecutors cannot charge forced contraception as forced sterilization. First, the latter means the deprivation of a person's biological reproductive capacity on a permanent basis and without their genuine consent, and second, a footnote in the ICC Elements of the Crimes provides that forced sterilization "is not intended to include birth-control measures which have a non-permanent effect in practice."[90] De Vos argues that there could be the possibility of charging forced contraception as genocide "by imposing measures intended to prevent births," but because the threshold to prove that acts were committed with specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious groups" is very high, strong evidence would be needed.[91] Indeed, as Jackson notes, "there is yet to be an international criminal prosecution for genocide on the basis of imposing measures intended to prevent births."[92] De Vos then claims that there is the possibility to charge the act of forced contraception as an "other form of sexual violence" or as an "other inhumane act" as part of crimes against humanity—the latter being the most likely charge to succeed—because the controversial decision on the *Kenyatta* case clarifies that "other form of sexual violence" depends on whether an act is of a sexual nature. For instance, suspending the reproductive capacity of women and girls can be a critical component of the conditions that enable rape (as an act of sexual nature) to take place.[93]

In contrast to de Vos, Altunjan finds more similarities between forced contraception and forced sterilization, both of which intend to prevent a victim from reproducing.[94] She observes that while forced sterilization should only encompass permanent measures, and this is not always the case in reality, there are forms of contraception that have long-term effects, such as hormonal implants or intrauterine devices. In this context, she justifies prosecuting forced contraception as sexual violence, given its link to the freedom to choose under which circumstances to engage in sexual relations (i.e., sexual autonomy).[95] She is concerned, however, that this violation's perceived gravity threshold could

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(2022), https://www.lse.ac.uk/women-peace-security/assets/documents/2022/WP29NoemiPerezVas.pdf [https://perma.cc/5TQ7-3XWB].

[90] ICC Elements of Crimes, *supra* note 89, arts. 7(1)(g)-5, 8(2)(b)(xxii)-5, and 8(2)(e)(vi)-5; De Vos, *supra* note 38.

[91] De Vos, *supra* note 38.

[92] Jackson, *supra* note 32.

[93] De Vos, *supra* note 38.

[94] ALTUNJAN, *supra* note 13, at 85.

[95] *Id.*

greatly affect its prosecution.[96] She alternatively suggests the prosecution of forced contraception in the context of rape, to establish the forcible nature of the act, or as an aggravating factor with regard to sentencing.[97]

Turning to the crime of forced impregnation, Altunjan believes it can be likened to crimes such as rape; torture, cruel or inhumane treatment (including biological experiments); sexual slavery; enforced prostitution; any other form of sexual violence; persecution; other inhumane acts; willfully causing great suffering or serious injury to body or health; subjecting persons who are in the power of another party to physical mutilation or to medical or scientific experiments; outrages upon personal dignity.[98] When a forcibly impregnated woman is unlawfully confined,[99] this may also add the possibility of a prosecution for enslavement, unlawful confinement, and imprisonment, or other severe deprivation of physical liberty in violation of fundamental rules of international law.[100]

Altunjan suggests forced impregnation and forced pregnancy can be prosecuted under Article II(b) or Article II(d) of the Genocide Convention if the legal analysis focuses on the violation of the victim's reproductive autonomy, rather than on the birth of children and their potential membership in the mother's group. Serious bodily and mental harm (Article II(b)) can be connected to "the denial of the choice of whether to become or stay pregnant, particularly in situations where there is no access to any reproductive health services," and the intended result of birth prevention (Article II(d)) may be effectuated "by way of damaging the victim's ability to reproduce in the future, or by denying her the ability to reproduce autonomously and in accordance with her own conception of group membership during the period of the forcibly induced or maintained pregnancy."[101] Prosecution of forced pregnancy is therefore possible even without it being listed.

Furthermore, although discussions on sexual and reproductive rights are at an incipient stage in international criminal law, there is value in working within

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[96] *Id.*

[97] *Id.*

[98] ALTUNJAN, *supra* note 13, at 211.

[99] See Rome Statute of the International Criminal Court art. 7(2)(f), July 17, 1998, 2187 U.N.T.S. 38544.

[100] ALTUNJAN, *supra* note 13, at 212.

[101] ALTUNJAN, *supra* note 13, at 176.

these existing frameworks instead of getting frustrated about them until the codes are inclusive of all people's sexual and reproductive rights. In fact, *opinio juris* and emerging case studies demonstrate the expansion of understandings of reproductive rights violations. For instance, although theoretical discussions on reproductive violence and violations have primarily focused on women and girls, sexual and reproductive violence now is recognized to also impact men and boys, showing that addressing this violence is important for all gender identities.[102] In her article on sexual violence against men and boys, Oosterveld, for instance, observes that experiences of male sexual violence—such as forced circumcision, penile amputation, castration, sexual mutilation (e.g., burning of the genitals) and genital electrocution—are not explicitly listed in any international criminal statute or treaty and therefore may not be recognized by justice actors.[103] When Elliot et al. refer to sexual violence against men and boys, they also point out that physical trauma may include "rectal, penile and testicular/scrotal trauma, anal fistulae and fissures, fecal leakage, hemorrhoids, chronic pelvic pain, urinary and bowel incontinence, sexually transmitted infections, sexual dysfunction and chronic constipation."[104] In other words, they refer to reproductive violence, in this case against men and boys.

In their article on Northern Uganda, Denov and Drumbl also implicitly advocate for the sexual and reproductive rights of men and boys. Drawing upon the ICC's 2014 Policy Paper on SGBV crimes and capturing the complex experiences of both males and females, they argue it is necessary to expand the crime of forced marriage (a) to permit the independent condemnation of the full amplitude of the harms of the crime over the general population, and (b) to cover cases of forced procreation, forced sexual relations and forced parenthood in men, so that such state or organizational coercion can constitute a grave act of sexual violence and rape against men and boys as well as against women and girls.[105]

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[102] We acknowledge the problems with dividing violent experiences into experiences of 'men' and 'women'. Such framing leaves out people who do not identify as 'men' or 'women.'

[103] Valerie Oosterveld, *Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals*, 10 WESTERN J. INT'L LAW & INT'L REL. 107, 109 (2014).

[104] Pauline Oosterhoff, Prisca Zwanikken & Evert Ketting, *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, 12 REPRODUCTIVE HEALTH MATTERS 68–77 (2004); Eric Stener Carlson, *The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals*, 46 BRIT. J. OF CRIMINOLOGY 16–25 (2006).

[105] Myriam S. Denov and Mark A. Drumble, *The Many Harms of Forced Marriage: Insights for Law from Ethnography in Northern Uganda*, 18 J. INT'L CRIM. JUST. 349, 367–368 (2020).

C. Inserting Sexual and Reproductive Rights Violations into Existing Frameworks – is it Tangible?

It is not a novel observation that international human rights law has contributed to the development of international criminal law.[106] Accordingly, international criminal lawyers need to more thoroughly prosecute sexual and reproductive rights violations in post-conflict context—especially given that gender-based violence is not only prohibited under international law, but it has also evolved into a principle of customary international law today.[107] In this regard, our observations show that such bridges between international conventions and institutions are already being built. In the 2014 Policy Paper on SGBV, the Office of the Prosecutor committed to incorporating changes in their policy to strengthen the prosecution of SGBV crimes, including taking into account a gendered approach and a commitment to follow the evolution and advancements of international human rights law.[108] Such a commitment requires the Office of the Prosecutor to look beyond the Rome Statute and follow developments in human rights law and the advancements of various human rights committees.

For example, in General Recommendation No. 30 on women in conflict prevention, conflict, and post-conflict situations, the Committee on the Elimination of Discrimination against Women (CEDAW) addresses the issue of safe abortion; CEDAW further understands sexual and reproductive health care in conflict and post-conflict situations to include access to information, family planning services, and emergency contraception; maternal health services; safe abortion services; post-abortion care; prevention and treatment of sexually transmitted infections; and care to treat injuries such as fistula arising from sexual violence.[109] CEDAW also recommends that states prevent, investigate

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[106] Alexandre S. Galand*, The Systemic Effect of International Human Rights Law on International Criminal Law*, HUMAN RIGHTS NORMS IN 'OTHER' INTERNATIONAL COURTS 87, 87 (M. Scheinin ed., 2019).

[107] Comm. on the Elimination of Discrimination Against Women on Its Eleventh Session, U.N. Doc A/47/38, at 1 (1992); Comm. on the Elimination of Discrimination Against Women U.N. Doc CEDAW/C/GC/35 (2017), at 1-2 (2017); The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that the definition of torture or other ill-treatment within CAT may encompass gender-based violence. Rep. of the S.R., *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, at 6, UN Doc. A/HRC/31/57 (Jan. 5, 2016) [hereinafter UNHCR 2016 Report].

[108] INT'L CRIMINAL CT. [ICC] OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 15 (June 2014).

[109] Comm. on the Elimination of Discrimination Against Women, U.N. CEDAW/C/GC/30, at 14 (2013).

and punish gender-based violations such as forced pregnancies, abortions, or sterilization of women and girls in conflict-affected areas.[110] In other words, the Committee insists on the criminalization of forced abortion.

Because a tension arrives in international criminal law concerning the separation between sexual violence and the fact that neither 'reproductive violence' nor 'gender'—the latter of which could include reproductive violence—are included in the Rome Statute, CEDAW further clarifies in the same General Recommendation that "international criminal law, including, in particular, the definitions of gender-based violence, in particular sexual violence must also be interpreted consistently with the Convention and other internationally recognized human rights instruments without adverse distinction as to gender."[111] In a UN resolution on human rights and transitional justice, the Human Rights Council has also established that:

> …the term 'violence against women' is not limited to sexual violence but includes any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, and calls for effective measures of accountability and redress where those acts amount to violations of international human rights and humanitarian law.[112]

Note also that, according to the UN Secretary, conflict-related sexual violence ("CRSV") "refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls, or boys that is directly or indirectly linked to a conflict."[113] In order words, reproductive violence is understood as part of sexual violence. Furthermore, in a 2020 report, the UN Special Rapporteur on the promotion of truth, justice reparations and guarantees of non-recurrence highlighted what taking a gender perspective means in transitional justice, clarifying that:

> The concurrent application of the non-derogable core of human rights, the peremptory norms of general international law,

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[110] *Id.* at 17.

[111] *Id.* at 6–7; Comm. on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2005/4, at 7 (2005).; Comm. on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2000/4, at 1 (2000).

[112] Human Rights Council Res. 21/15, U.N. Doc. A/HRC/RES/21/15, at 4–5 (Oct. 11, 2012).

[113] Rep. of the S.C., *Conflict-related sexual violence*, at 102, U.N. Doc S/2020/487 (June 3, 2020).

> human rights law, humanitarian law and international criminal law and respective case-law makes it possible to include in the list of serious violations of human rights such violations as torture and cruel, inhuman or degrading treatment, sexual violence and violence against children. It also enables the adoption of broad definitions of these violations that cover such gender behaviours as forced nudity, inappropriate touching, genital mutilation and beating, forced prostitution, sexual slavery, rape, forced abortion, forced pregnancy intentionally or unintentionally resulting from rape, forced fertilization, forced sterilization, forced incest, malicious or unintentional transmission of a sexual disease resulting from rape, loss of reproductive capacity intentionally or unintentionally resulting from torture or sexual violence, labour in captivity, baby theft, among other violations.[114]

The Special Rapporteur's Report calls for an understanding of sexual violence entrenched in a gender-based violence logic and encompassing reproductive violence. Moreover, because the ICC mandate involves reparations for victims, the Report advocates for reparations programs that use a progressive typology of victims and violations through a gender-sensitive lens to analyze the different violations of human rights, such as violations of sexual and reproductive rights and impacts on the relatives of surviving victims—including children born of rape—so they are recognized as autonomous victims of sexual violations.[115] The Special Rapporteur further emphasizes the importance of taking into account secondary violations—which by now we know often involve reproductive violations—and implementing additional measures to remedy them. The Special Rapporteur is more explicit where rape is committed: in addition to the immediate physical and moral harm suffered, the victim may suffer from forced pregnancy, sexually transmitted diseases, and the loss of reproductive capacity, among other consequences.[116]

The Office of the Prosecutor already took into account reproductive violations, such as forced contraception and forced abortion, among a list of

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[114] Rep. of the S.R., *The gender perspective in transitional justice processes*, at 6–7, U.N. Doc. A/75/174 (July 17, 2020) [hereinafter, S.R. *Gender Perspective*].

[115] *Id.* at 9. *cf.* Pérez Vásquez, *supra* note 89, at 90. Altunjan observes that where children born as a result of forced pregnancy have been labelled secondary victims of this crime, the crime does not lie in the birth as such but in the denial of freedom of choice and that judges may rely on Article 21(3) concerning non-discrimination to prevent further stigmatization against them ALTUNJAN, *supra* note 13, at 224.

[116] S.R. *Gender Perspective*, *supra* note 114, at 10–11, U.N. Doc. A/75/174 (2020).

possible sex crimes in its 2012 interim report on the Colombian preliminary examination.[117] After the policy on SGBV, which was published after the *Kenyatta* case, there has been *Bemba* and *Ongwen*, but also the *Ntaganda* case, in which the ICC recognized for the first time in international criminal law acts of SGBV (i.e., rape and sexual slavery) as per Article 8 (2)(e)(vi) of the Rome Statute, prohibiting these crimes at all times and against any person of the same armed force.[118] On *Ongwen,* Altunjan says, "one of the trial's most significant aspects was its focus on gender-based crimes. Besides reflecting a new prosecutorial strategy in charging crimes of a gender-based nature, this trial also marked the first prosecution and conviction of the reproductive crime of forced pregnancy."[119] We therefore argue the fact that forced sterilization and forced pregnancy are the only crimes listed in the Rome Statute does not mean other crimes concerning sexual and reproductive rights cannot be prosecuted within the ICC. In summary, while there may be claims that unless there is a reform of the Rome Statute, reproductive harms not labeled cannot be prosecuted,[120] we observe that the institutional and doctrinal framework of international criminal law can be effectively used for prosecuting not only sexual but also reproductive rights violations.

III. A Blueprint for Better Prosecution of Sexual and Reproductive Rights Violations

We have now taken stock of the institutional and doctrinal responses, making the "invisible visible" in order to effectively protect sexual and reproductive rights in post-conflict criminal justice. The previous section shows the recent typological work done by policymakers and scholars to accommodate and make space for reproductive rights violations in post-conflict criminal justice and the SGBV definitions. In the following section, we build on this and present a blueprint of ideas to inform the further steps the ICC, other tribunals, and stakeholders could take toward better protection of sexual and reproductive rights.

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[117] ALTUNJAN, *supra* note 13, at 284–285.

[118] Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment, (July 8, 2019); *See* Women's Link Worldwide, *Convictions and pending prosecutions for sexual and reproductive violence committed against forcibly recruited, civilian, and combatant women and girls in the armed conflict of Colombia*, https://www.womenslinkworldwide.org/en/files/3100/convictions-and-pending-prosecutions-for-sexual-and-reproductive-violence-committed-against-women-and-girls-in-the-armed-conflict-of-colombia.pdf [https://perma.cc/B7EX-2TW9] [hereinafter, Women's Link].

[119] *Ongwen*, *supra* note 11, at 1–2.

[120] *See* Cocomá Ricaurte & Laguna Trujillo, *supra* note 14.

A. Moving Beyond a Male-Dominated Definition of Violence

We have covered in this Article the efforts of scholars to define "violence" in sexual and reproductive rights violations. Our contribution to that conversation tackles the mechanism and workings of gendered harms. Accordingly, a prerequisite for prosecuting sexual and reproductive rights violations in post-conflict criminal justice is fully rejecting a narrow largely male-dominated view of what violence is and what should be considered degrading treatment or torture.[121] On this point, the UN Special Rapporteur on torture has argued the international framework on the prohibition of torture and ill-treatment has failed to respond to the "unique experiences of women" since it does not adopt a gendered lens to adequately address patriarchal and discriminatory power structures and gender stereotypes.[122] This is a familiar quest from the efforts to prevent and fight all gender-based violence—it took decades of advocacy and scholarly work before gender-based violence was indeed regarded as a human rights violation.[123] Gender-based violence is structural, institutionalized, normalized, and tied to unequal power distribution and harmful stereotypes, i.e., generalized views or preconceptions about gender and gender roles.[124] Stereotypes about women's bodies, their sexuality, and what constitutes "real pain" and "real violence" also play a central part in understandings of sexual and reproductive rights violations.[125]

Iris Marion Young argues that oppression by violence is less about the particular acts themselves, though these are often "utterly horrible," but rather the "social context surrounding them, which makes them possible and even acceptable."[126] Applying Young's approach calls for turning the main focus from describing the acts of violence to highlighting how rights-based responses can reject the space where violence occurs and grows systematically and

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[121] *See* RONLI SIFRIS, REPRODUCTIVE FREEDOM, TORTURE AND INTERNATIONAL HUMAN RIGHTS: CHALLENGING THE MASCULINISATION OF TORTURE 19 (2014).

[122] UNHCR 2016 Report, *supra* note 107, at ¶ 5.

[123] *cf.* REILLY, *supra* note 16 (discussing the limited attention given to gender-based violence before the 1990s, specifically in the aftermath of World War II).

[124] REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 9, 12 (2010). *See generally* STEREOTYPES AND HUMAN RIGHTS LAW (Eva Brems & Alexandra Timmer eds., 2016) (evaluating whether anti-stereotyping has been taken on by transnational human rights law forums).

[125] Liiri Oja & Alicia Ely Yamin, *"Woman" in the European Human Rights System*, 32 COLUM. J. GENDER & L. 62 (2016).

[126] IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 61–62 (1990).

indisputably, whether in conflict, post-conflict, or no-conflict. It means understanding how violence in conflict is gendered, and thus how sexual and reproductive rights violations can amount to inhumane, degrading, and cruel treatment—even torture. As explained by the Center for Reproductive Rights, women's sexual and reproductive rights are subjected to "control" which can be inflicted with the objectives "to terrorize, control and dominate the reproductive capacity of women, to use the bodies of girls and adolescents for the war, and to dominate and control populations."[127]

Acknowledging violence is a prerequisite to addressing it, yet several forms of gender-specific violence lack recognition. This neglect often predates any specific conflict. If women already face barriers when trying to access things like safe abortion, obstetric care, contraception, and sexual education, and already have a limited or non-existent say about their bodies and life plans, the neglect of their sexual and reproductive rights is foreseeable. Moreover, issues sewn into the fabric of society—like gender inequalities and narratives of shame, stigma, and secrecy—influence the treatment of sexual and reproductive rights during a conflict.[128] Women and girls are deliberate targets in a conflict because of their gender and experience gender-specific forms of violence, including forced termination of pregnancy, sterilization, and rape. This violence results in a vast range of physical and psychological consequences, including injuries, disabilities, the increased risk of contracting HIV, and the risk of an unwanted pregnancy.[129] But, if violence against women and their sexual and reproductive health is either ignored or not recognized as "real" or "known" violence pre-conflict, then the post-conflict criminal justice system cannot challenge such violence. A nuanced gender analysis can explicitly name and call out such harms, which helps address this issue.

Making the definition of violence more accurate and equal also requires the recognition of so-called "collateral" violence. This violence is a consequence of the infliction of other violations in conflict, such as causing women to miscarry from torture, causing forced impregnation through rape, leaving victims with injuries (e.g., fistulas and/or other chronic gynecological conditions) and diseases, including those sexually transmitted (e.g., HIV, gonorrhea and/or chlamydia).[130] Women forced to take contraception (e.g., pills, injections) for

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[127] CTR. FOR REPROD. RTS. (2020), *supra* note 7, at 5.

[128] Pérez Vásquez, *supra* note 89, at 49, 68, 178.

[129] Comm. on the Elimination of Discrimination against Women [CEDAW], *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, ¶¶ 34, 37, U.N. Doc. CEDAW/C/GC/30 (Nov. 1, 2013).

[130] *See* Grey, *supra* note 7, at 907, 910.

several years, if not decades, without consideration for bodily autonomy, health, and safety, or women forced to terminate a pregnancy in an unsafe environment (e.g., in the bush) without medical care, has impacts beyond the initial act of violence. Women may suffer from great distress regarding their fertility after a conflict. Or they may suffer from long-term socioeconomic consequences, including the stigmatization and exclusion of mothers and their children born after a rape.[131] This "collateral" damage may seem subtle, but it is of great importance for the physical and psychological well-being of victims.[132] These acts may be one of the victims' greatest concerns and biggest harms suffered, yet it can get neglected in post-conflict justice if not viewed as "violence."

Human rights treaty-monitoring bodies' work show how gender analysis can make invisible violence visible; how barriers to women's full sexual and reproductive autonomy are not "unfortunate misfortunes" but are human rights violations; and how reproductive violence is also part of the violence threshold of degrading treatment and torture. For example, the Committee on the Elimination of Discrimination Against Women (CEDAW) has stated that violations of women's sexual and reproductive rights (e.g., forced sterilization, abortion, and pregnancy, criminalization, denial, or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods, and services) are forms of gender-based violence that may amount to torture or cruel, inhumane, or degrading treatment.[133] CEDAW also found in *S.F.M. v. Spain*, pathologizing S.F.M.'s birth through abuse of medication and medical interventionism (including early admission to hospital, numerous unnecessary vaginal examinations, administration of oxytocin without information or consent, the fact that she could not move around and choose birth position, the instrumental extraction and episiotomy performed without information or consent and the separation from her daughter) violated art. 2 (non-discrimination), art. 3 (equality), art. 5 (anti-stereotyping), and art. 12 (non-discrimination in health care) of the Convention on the Elimination of All Forms of Discrimination Against Women. And in *Whelan v. Ireland*, the United Nations Human Rights Committee held that forcing Siobhan Whelan to carry a fetus 'incompatible with life' to term and travel to the United Kingdom to get access to abortion breached the International Covenant on Civil and Political Rights (ICCPR) Art. 7 (prohibition of torture and degrading treatment), Art. 17

[131] *Id.* at 90; CTR. FOR REPROD. RTS., *supra* note 7, at 15.

[132] Pérez Vásquez, *supra* note 89, at 113, 217, 238.

[133] CEDAW, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, ¶ 18, CEDAW/C/GC/35 (July 26, 2017).

(right to privacy), and also Art. 26 (prohibition of discrimination).[134]

While not all decisions from different transnational human rights forums have been as noteworthy as these examples,[135] and while there is still a long way to go also for sexual and reproductive rights protection in no-conflict situations, these outcomes have pushed open the door, making women's experiences more visible. Thus, these examples should serve as an inspiration for protecting sexual and reproductive rights, particularly of those which are not listed, also in conflict and post-conflict justice.

B. Choosing the 'Construction' Approach over the 'Exhaustive Lists' Approach

Sexual and reproductive rights as human rights have come a long way since they were first recognized by the United Nations in the 1994 non-binding Cairo Program of Action, also called the "international conceptual anchor of reproductive rights."[136] The Program of Action of the International Conference on Population and Development (ICPD) explained:

> Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest attainable standard of sexual and reproductive health. It also includes the right of all to make decisions

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[134] Int'l Covenant on Civ. & Pol. Rts. [ICCPR], Hum. Rts. Comm., *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2425/2014*, CCPR/C/119/D/2425/2014, ¶ 8 (July 11, 2017).

[135] *See* Yamin & Oja, *supra* note 128.

[136] Report of the Int'l Conference on Population and Development, U.N. Doc. A/CONF.171/13/Rev.1 (Sept. 5-13, 1994); A. M. Miller & M. J. Roseman, *Sexual and reproductive rights at the United Nations: frustration or fulfilment?*, 19 REPROD. HEALTH MATTERS 102, at 104 (2011). Banda explains that before the ICPD, the central element of reproductive rights within human rights instruments focused on childbearing – the right to determine the number and spacing of children. Fareda Banda, *Blazing a Trail: The African Protocol on Women's Rights Comes into Force*, 50 (1) JOURNAL OF AFRICAN LAW 72-84, 81 (2006).

> concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents.[137]

A defining feature of this definition is the link to "already recognized human rights." Commenting on this development, Alicia Ely Yamin explains that, prior to the ICPD, elements of reproductive health (including family planning, maternal health, and sexually transmitted diseases) were treated as fragmented aspects of women's health. In comparison, population policy largely revolved around utilitarian goals based on demographic imperatives and control of women's fertility leaving women and their needs and rights invisible. The ICPD declaration united these previously disparate aspects into one comprehensive definition.[138]

Thus, ICPD's definition created a new way of thinking; they put forward a transformative way of seeing and legally understanding human reproduction and women's experiences with reproduction. The ICPD neither offered a list of the "certain human rights" nor a list of "reproductive rights." Instead, it explicitly recognized the ways in which culture and law are shaped by patriarchal assumptions about women and their capacity for roles other than motherhood, and called for these underlying assumptions to be subverted in order to realize reproductive rights for women.[139] In short, the ICPD proposed that reproductive rights are constructed by making visible the gender dimensions of human rights.[140]

Recognizing the impossibility to cover all kind of experiences with a "list of violations," we advocate for following the example of the sexual and reproductive rights foundations. Although the "construction" approach might at

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[137] Programme of Action of the International Conference on Population and Development, *supra* note 72, at para. 7.3.

[138] ALICIA E. YAMIN, POWER, SUFFERING, AND THE STRUGGLE FOR DIGNITY: HUMAN RIGHTS FRAMEWORKS FOR HEALTH AND WHY THEY MATTER 92 (2016); Mindy J. Roseman & Laura Reichenbach, *Global Reproductive Health and Rights: Reflecting on ICPD*, *in* REPRODUCTIVE HEALTH AND HUMAN RIGHTS: THE WAY FORWARD 3, 4–5, (Laura Reichenbach & Mindy J. Roseman ed., 2011) (adding that the ICPD was "an innovative model for understanding the connections between health, human rights, population, and development", but also a product of a compromise among different groups – feminists, public health professionals, development economists, demographers, environmentalists, faith communities, donors and governments).

[139] ERIN NELSON, LAW, POLICY AND REPRODUCTIVE AUTONOMY 65 (2013).

[140] *See e.g.*, Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. Rev. 976, 77 (1995); Martin Scheinin, *Sexual Rights as Human Rights – Protected under Existing Human Rights Treaties?*, 67 NORDIC J. INT'L L., 17, 17 (1998); Eszter Kismödi et al., *Advancing sexual health through human rights: The role of the law*, 10 GLOBAL PUB. HEALTH 252, 252 (2014) (Indicating support for this approach by a majority of human rights law scholars).

first invite skepticism as it seems to make sexual and reproductive rights protection too dependent on interpretation, it may actually help to avoid fragmentation and pigeon-holing of sexual and reproductive rights away from 'general' human rights law and, consequently, away from international criminal law. The feasibility of such an approach is exemplified by international consensus documents and jurisprudence from the UN treaty-monitoring bodies regarding sexual and reproductive rights. For example, in 2016, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment No. 22 on the Right to sexual and reproductive health (Article Twelve) which confirmed that the right to sexual and reproductive health is "an integral part of the right to health enshrined in article twelve of the International Covenant on Economic, Social and Cultural Rights."[141] Furthermore, in 2018, the UN Human Rights Committee adopted General Comment No. 36 on the Right to Life that tied the provisions of the ICCPR to sexual and reproductive rights. Namely, the ICCPR itself does not make references to abortion or sexual and reproductive rights, but in the General Comment the Committee confirmed that protecting right to life also means *inter alia*, guaranteeing access to safe and legal abortion, quality, evidence-based sexual education, affordable contraceptive methods, and quality prenatal and post-abortion health care.

The fact that a full list of reproductive rights violations is not explicitly part of the crimes recognized in the Rome Statute does not mean that those violations cannot be prosecuted taking into account their indivisibility to other violations. Constructions rather than lists have defined other crimes, including genocide. On this, Lemkin, the father of the term "genocide," wrote in a letter:

> I think that the inclusion of Genocide in the judgment would contribute to the creation of a preventive atmosphere against repetition of similar acts of barbarity. Indeed, we cannot keep telling the world in endless sentences: – Don't murder members of national, racial and religious groups; don't sterilize them; don't impose abortions on them; don't steal children from them; don't compel their women to bear children for your country; – and so on. But we must tell the world now, at this unique occasion, – don't practice Genocide.[142]

[141] Comm. On Economic, Social and Cultural Rights, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/22 (May 2, 2016).

[142] Letter from Raphael Lemkin to Sir David Maxwell Fyfe, Right Hon., British Deputy Chief Prosecutor (Aug. 26, 1946) (on file with the American Jewish Historical Society, Raphael Lemkin Collection).

In other words, Lemkin understood the statutory crime of genocide to also cover acts such as forced sterilization, forced abortion, and forced pregnancy. Thus, in post-conflict justice we should also focus on "already recognized human rights" when trying to protect sexual and reproductive rights – including for example the right to life, right to health, non-discrimination, or prohibition of degrading treatment and torture. This is an approach at least implicitly suggested also by Ciara Laverty and Dieneke de Vos in their discussion of the *Ongwen* case. There, the crime was framed in terms of "violation of autonomy and choice" (not only as a matter of sexual violence or physical harm), which according to them, "strengthens narratives around women's agency and control over their bodies and reproductive lives" which can, in turn, "challenge embedded structures of gender inequality."[143] In the following section, we review the efforts of domestic courts and international initiatives to strengthen the protection of sexual and reproductive rights.

C. Joining the Efforts of Domestic Courts and Advocacy

It is widely understood that the ICC plays an exemplary role in different national courts. On this point, the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence has observed that the advancements of international tribunals "have raised the standards for the prosecution of sexual and gender-based crimes in national courts, positively guiding representatives of the civil party, the prosecution and/or the judiciary."[144] Reflecting on the role of the tribunals on the emerging domestic jurisprudence concerning SGBV, Daniela Kravetz observes how national courts, such as those in Guatemala and Argentina, are applying international criminal law standards to prosecute the crimes committed in times of repression and conflict.[145]

Domestic courts, however, may have become even more progressive than the ICC in their protection of sexual and reproductive rights. In Argentina, for instance, "some cases have further expanded the categories of gender-based violence examined, for example to include forced abortion… and forcing female prisoners to give birth under inhumane conditions as a form of torture,"[146] which

[143] Laverty & de Vos, *supra* note 7, at 17.

[144] S.R. *Gender Perspective*, *supra* note 114, ¶ 50.

[145] Daniela Kravetz, *Accountability for Sexual and Gender-based Violence During Mass Repression and in Conflict: The Experiences of Argentina and Guatemala*, 18 J. INT'L CRIM. JUST. 307–24 (2020).

[146] *Id.* at 312–13, (citing Tribunal Oral en lo Criminal Federal de Santa Fe [Federal Oral Criminal Tribunal of Santa Fe], 16/10/2018, Aebi, Maria Eva and others (54000012/2007/TO1) (Arg.); Tribunal Oral en lo Criminal Federal de La Rioja [Federal Oral Criminal Tribunal of La Rioja],

are still not prosecuted by the ICC. Similarly, while in the *Ntaganda* case, the ICC established that "a person's status as a combatant or victim of illegal recruitment does not nullify protections against sexual violence under international humanitarian law,"[147] in the *Helena* case, the Supreme Court of Colombia, recognized that women and girls who suffered from forced contraception and forced abortion by their own armed groups should be recognized as "victims of armed conflict."[148] In other words, only a few months after the *Ntaganda* decision, the Colombian court not only recognized that combatants could also be victims, but went even further by recognizing violations of reproductive rights such as forced use of contraceptives and forced abortion committed against female combatants. The Colombian court further stated that if these two violations are committed *intra-force,* they constitute serious human rights violations and war crimes, and noted the coercive nature of the practice of these reproductive rights violations within the FARC, and indicated that these acts were often perpetrated upon girls under age 18, or upon young women who recently reached the age of maturity.[149] The court further

28/06/2016, Menéndez, Luciano, Benjamin, and others (FCB 710018028/2000), (Arg.); Tribunal Oral en lo Criminal Federal de Tucumán [Federal Oral Criminal Tribunal of Tucumán], 03/2014, Arsenal Miguel de Azcuénaga and the Police Headquarters of Tucumán (A-81/12), Reasons for the Judgment, (Arg.) (referring to the various manifestations of sexual violence to which prisoners were subjected in custody, including forced abortion and forced pregnancies); Tribunal Oral en lo Criminal Federal No. 3 (Federal Oral Criminal Tribunal No. 3), 30/10/2018, Bignone, Reynaldo Benito Antonio and others (9243/2007/TO1), (Arg.).

[147] *Ntaganda*, *supra* note 118; Women's Link, *supra* note 118.

[148] In the 'Helena' case, a young woman who had been forcibly recruited into the FARC at the age of 14 was forced to take contraceptives (injections for approximately five years) and to undergo an abortion. As a result of the unsafe conditions of these procedures, she suffered long-term health consequences. After her case was dismissed in both first and second instance, she appealed to the Constitutional Court. Corte Constitucional [C.C.] [Constitutional Court], diciembre 11, 2019, Sentencia SU-599/19; Dieneke de Vos, *Colombia's Constitutional Court Issues Landmark Decision Recognising Victims of Reproductive Violence in Conflict*, INTLAWGRRLS (Jan. 11, 2020), https://ilg2.org/2020/01/11/colombias-constitutional-court-issues-landmark-decision-recognising-victims-of-reproductive-violence-in-conflict/ [https://perma.cc/Q3QM-VSLK]; Cocomá Ricaurte and Laguna Trujillo, *supra* note 14; Christine Chinkin & Keina Yoshida, *Reproductive Violence and Forced Recruitment: Colombia's Landmark Ruling for Ex-Combatant Women and Girls*, CENTRE FOR WOMEN, PEACE AND SECURITY (Dec. 18. 2019), https://blogs.lse.ac.uk/wps/2019/12/18/reproductive-violence-and-forced-recruitment-colombias-landmark-ruling-for-ex-combatant-women-and-girls/ [https://perma.cc/U287-Q2LG].

[149] While data from the Colombian Prosecutor's Office suggests there were over 1,000 abortions a year within the FARC's ranks, the armed group has denied that forced abortion occurred. Based on the recollection of testimonies, there is data that suggests that the reproductive control over women and girls, particularly through forced contraceptives and forced abortion, was a policy established by the guerrilla movement since 1993. *See* Women's Link, *supra* note 118; Steven Grattan, *Ex-FARC woman forced to have abortion granted 'victim status'*, AL JAZEERA (Dec. 12, 2019), https://www.aljazeera.com/news/2019/12/farc-woman-forced-abortion-granted-victim-

took into account sexual and reproductive rights within the reparations scheme and ordered that Helena must be provided with gender-sensitive physical and psychological support by the Reparations Unit.[150] Since this decision is one of the very few in the world to specifically recognize reproductive violence as a form of harm committed against women and girls in times of conflict, it sets an important legal precedent in recognizing a form of gender-based violence that has been invisible.[151]

The importance of promoting the investigation of sexual and reproductive rights has also been echoed by influential initiatives that seek to strengthen international criminal investigations. For instance, in 2019, more than 50 civil society organizations established the Hague Principles on Sexual Violence in order to increase understanding about the many forms an act of sexual violence may take. This document defines sexual violence as all violations of sexual autonomy and sexual integrity, often characterized by humiliation, domination, and destruction, and states that sexual violence can be committed by many means, including through controlling a person's sexual or reproductive capacity, or intrusion into their physical, mental, or emotional space.[152] By framing reproductive violations as forms of sexual violence, sexual violence would include depriving someone of reproductive autonomy such as by subjecting them to forced pregnancy, forced sterilization, reproductive sabotage (i.e., tampering with or damaging condoms and other contraceptives), forced parenthood, or prevention of the ability to make choices as to whether or not to use contraception, undergo sterilization, impregnate another person, or carry a pregnancy in their own body to term.[153] To the civil society organizations that participated, sexual violence also comprises denying access to procedures, measures, or products related to menstruation, reproduction, or sexual health (e.g., "depriving someone of access to hygiene, treatment, or medicine related to menstruation, pregnancy, childbirth, fistula care, rectal hematoma, HIV or other sexually transmitted infections, sexual maiming, disfigurement, gynecological, urological or urinary treatment, or any other aspect of sexual health or reproductive health").[154] When it comes to the gravity of "other forms of sexual

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status-191212220221797.html [https://perma.cc/MV38-DESK].; De Vos, *supra* note 148; Cocomá Ricaurte & Laguna Trujillo, *supra* note 14.

[150] Chinkin & Yoshida, *supra* note 148.

[151] De Vos, *supra* note 148.

[152] Women's Initiatives for Gender Justice (WIGJ), *The Hague Principles on Sexual Violence*, at 33 (2019), https://4genderjustice.org/wp-content/uploads/2019/11/The-Hague-Principles-on-Sexual-Violence.pdf [https://perma.cc/DE4G-DBWM] [hereinafter WIGJ].

[153] *Id.* at Part 4, para 2 (b).

[154] *Id.* at 8, 19.

violence" crimes, the Principles establish that they may be exacerbated if there are consequences concerning "a loss of reproductive autonomy or reproductive capacity as a result of the act, including such examples as where they were forced to impregnate, 'breed,' or to conceive; or where the act or omission led to infertility, amenorrhea, pregnancy, miscarriage, unsafe abortion, or difficulties in conception, pregnancy, childbirth, or parenthood."[155] The civil society organizations that participated are, therefore, arguing the importance of a much broader understanding of crimes concerning sexual violence and are advocating for the inclusion of reproductive violence as necessary to the definition of these crimes.

Similarly, in 2020, the Murad Code Draft was published as a global code of conduct that aims to reshape the documentation and investigation of conflict related sexual violence.[156] The Murad Code emphasizes, *inter alia,* that there is a need for a broader approach in order to "avoid strengthening the international community's fixation on conflict-related sexual violence to the exclusion of conflict-related gender-based crimes, SGBV in peacetime and of non-SGBV crimes and violations."[157] The Institute for International Criminal investigations (IIC), a leading institution in the training of international criminal law investigators, including ICC legal officers and investigators, supports the Murad Code. This Article echoes the Murad Code's mission to create and hold on to momentum for the better prosecution of all gender-based violence, including all those of reproductive nature.

CONCLUSION

This paper is a response to the invisibility of sexual and reproductive rights violations in post-conflict justice, particularly by international criminal tribunals. Our analysis takes a step back from the conversations surrounding the elements or definitions of specific reproductive harms (e.g., forced contraception, forced abortion etc.), and instead offers a helicopter view of what is and should be possible for people's sexual and reproductive rights protection

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[155] *Id.* at 50–51.

[156] INSTITUTE FOR INTERNATIONAL CRIMINAL INVESTIGATIONS, NADIA'S INITIATIVE & FOREIGN & COMMONWEALTH OFFICE, Background Paper & Draft Global Code of Conduct for Documenting & Investigating Conflict-Related Sexual Violence ("The Murad Code") (June 2020), https://www.muradcode.com/draft-murad-code [https://perma.cc/JD65-GB8U] (The Murad Code can be found in PDF or Microsoft Word Document format under the subsection "Background Draft Paper & Murad Code." It is available in Arabic, English, French, Spanish, and Swahili.)

[157] *Id.* at 5.

irrespective of the institutional and doctrinal challenges of the post-conflict criminal justice.

We start off with a three-element retrospect: the period after the Second World War, followed by the momentum of the 1990s, to the establishment and explosion of international criminal law courts to lay the institutional and doctrinal context in which a change for sexual and reproductive rights violations needs to happen. The second part of the paper analyzes the complexity of what reproductive violence entails, and demonstrates that better prosecution of sexual and reproductive rights violations is not an over-ambitious project given the adaptability of the international institution (including the ICC itself), especially in dealing with uncodified harms.

In the last section of the paper, we present a blueprint of inspirations that could take the prosecution of sexual and reproductive rights further. Namely, we argue that, just like in general human rights law, it is also vital in post-conflict justice for sexual and reproductive rights for the very understanding of what is violence (what is "violent enough") to be broad and not discriminatory and exclusionary. We also direct attention to an alternative to "lists of crimes of reproductive violence" as seen from the no-conflict sexual and reproductive rights discourse, a more sustainable and conceptual approach would be to rely on "construction" from already existing rights. We end by referring back to the adaptability theme of the Article and argue that the international institutions should be taking inspiration from the progress presented by some domestic courts as well as the dynamic work by civil society.

There is a need to dig deeper into the complex harms of sexual and reproductive rights violations and how such violence affects people with different gender identities. In this regard, although in this Article we mainly refer to the experiences of women and girls, we recognize the importance to acknowledge how different gender identities – for example, non-binary or trans persons – impact people's experiences. Moreover, more needs to be done to understand reproductive violence committed against men and boys in conflict. Finally, while this Article focuses on the response of criminal law to sexual and reproductive rights violations, justice is broader, and reparations for victims, including their rehabilitation, should become a reality.