

CREATING INTERNATIONAL LAW: GENDER AS LEADING EDGE

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Gender as reality, analysis, and rubric has created some of the fastest and most far-reaching transformations in international law in our time. Gender crime in particular presents a striking trajectory of innovation on the international legal scene, going from nonexistence as such to accepted institutionalization in under thirty years—by any legal measure, the speed of light. The reality in which this evolution is grounded has been one of atrocity: atrocities that have become more visible as women and some men have spoken out to expose them, often through non-governmental organizations (NGOs), atrocities that have themselves evolved to fill dynamic functions in the conflicts among men in which they have become variously instrumental.

The feature that perhaps most distinguishes these developments, in contrast with others that have stimulated international legal innovation, is how utterly familiar the acts are. Sexual atrocities are normal in everyday life, occur in peace as well as in war, and are by no means confined to official actors or to conflict that is recognized as organized. In one form or another, the acts that make up gender crime are illegal in every legal system in the world. Yet they are breaking paths in international law while being largely ignored in mainstream international legal literature. Analysis of the evolution of gender crime reveals an emerging paradigm through which new international law is being created.

As conceptual innovation, the fundamental idea of gender crime originated in the early 1970s in the creation of sexual harassment law.¹ Substantively, it was in sexual harassment law that rape was first legally recognized as based in gender inequality, hence a violation of human and civil rights and a form of sex discrimination. The fundamental idea that originated here is that sex crimes are gender-based—that is, they happen because of the social meaning of sex: being a woman or a man in societies of femininity and masculinity. Crimes that happen because of gendered and sexualized roles, meanings, stereotypes, and scripts socially assigned to groups on the

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¹ See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

basis of their sex were understood as criminal forms of sex discrimination: crimes of sex inequality. What had always been classified as a socially ungrounded sex crime—specifically rape²—was first understood as occurring because of the social status location and power differential of the parties in the gendered domain. This idea was conceived, and law created accordingly, because women listened to women and believed them and took what they were saying seriously. Nothing more, nothing less.

Among other things, this legal conceptual re-situation of these familiar facts meant that, although individuals victimized by these atrocities are often violated alone, in isolation and one at a time, the violation itself is intrinsically collective and group-based, not individual. Everyone who is raped is harmed personally, but rape (as one example) is understood in this approach as an attack on (most frequently) a woman because she is a member of the social group ‘women,’ socially defined and targeted as such for this specific violation. What had been thought of as a crime without social particularity, considered a crime against an individual victim, when understood as a gender-biased violation became reconfigured as a crime against groups being inflicted on its members. Women in this view are raped or otherwise sexually violated as women, men as men who are specifically marked for the humiliation, denigration, and conquest of feminization, typically based as well on their physical stature, age, ethnicity or religion or race, or perceived sexuality or gender. Rape, understood as a gender crime, became seen as an attack on gendered groups as such, often including their racial and ethnic particularities, at times imposed on each person one at a time, out of sight, sometimes en masse and in public.

The legal innovation termed “sexual harassment” has been widely accepted in national systems around the world, often if not always as sex discrimination.³ Its underlying realization—that sexual aggression is gender-based—has been widely embraced and extended to many sex-based abuses, given international normative dimension by the United Nations Committee on the Elimination of Discrimination against Women in its General Recommendation 19 in 1992,⁴ and has become stronger in operation as many nations have adopted CEDAW’s Optional Protocol.⁵ The core insight of the centrality of gender inequality to crimes of sexual violence has been further

² *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing sex discrimination on facts of multiple rape). *See also* *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (district court recognizing sexual pressure as sex discrimination for first time); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (appeals court recognizing sexual abuse as sex discrimination for first time).

³ *See generally* DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

⁴ U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, U.N. Doc. A/47/38 ¶ 7 (Feb. 1, 1992).

⁵ Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 54/4, U.N. Doc. A/RES/54/4 (Oct. 15, 1999) (80 signatures, 104 state parties) (last checked Nov. 20, 2012).

developed by regional systems in a series of human rights cases in Europe, many on torture,⁶ and instruments and cases in Latin America,⁷ made especially concrete and detailed in the Convention of Belém do Pará,⁸ and recently creatively extended in the African Protocol.⁹ On facts of gender crime, state responsibility for inaction expanded from state actors to some nonstate actors in the human rights setting from the late 1980s to the early 2000s.¹⁰ During the same period, attention to facts of gender crime, if seldom initially so called, migrated back into the international criminal justice system through ad hoc tribunals. The International Criminal Tribunal for

⁶ See *Suheyla Aydin v. Turkey*, 25 Eur. Ct. H.R. 251 (1997) (holding official act of rape to be torture under the European Convention on Human Rights); *Akkoc v. Turkey*, 34 Eur. Ct. H.R. 51 (2000) (holding official sexual assault short of rape to be ill treatment under the European Convention on Human Rights). For further developments, see *M.C. v. Bulgaria*, 15 Eur. Ct. H.R. 627 (2004) (on rape), and *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009) (on domestic violence).

⁷ See, e.g., *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶¶ 55–58 (2001) (finding that Brazil's years-long failure to prosecute the attempted murder of da Penha by her husband constituted state-condoned violence against women in violation inter alia of equal protection guarantees).

⁸ Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Jun. 6, 1994, 33 I.L.M. 1534.

⁹ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the African Union, Maputo, July 11, 2003, CAB/LEG/66.6 (entered into force Nov. 25, 2005), *available at* <http://www.africa-union.org> (last visited Nov. 20, 2012), defines violence against women in art. 1(j) as "all acts perpetrated against women which cause or would cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war." Its innovative comprehensive approach to gender crime is evident throughout its over twenty articles, calling upon States Parties, for example, to "prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public," *id.* at art. 4(2)(a), "prevent the exploitation and abuse of women in advertising and pornography," *id.* at art. 13(m), and "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest . . ." *id.* at art. 14(2)(c), the first mention of abortion in a multilateral international treaty. The Protocol also prohibits female genital mutilation. *Id.* at art. 5.

¹⁰ In the gender area, this has been a gradual development through case law on the human rights side, often in the same cases that recognize the sex inequality dimensions to the facts. See *M.C. v. Bulgaria*, 15 Eur. Ct. H.R. ¶¶ 166, 185 (concluding through equality analysis that States are required to effectively prosecute nonconsensual sex acts and holding that Bulgaria did not fulfill its positive obligation to effectively criminalize rape in situation of acquaintance rape of young girl); *González et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 esp. ¶ 236 (Nov. 16, 2009) (finding, on facts of multiple rape and murder of women by unknown assailants, a state duty to investigate effectively, identify and punish perpetrators, and compensate victims); *Opuz*, Eur. Ct. H.R., ¶ 159 ("As regards the question whether the State could be held responsible . . . for the ill-treatment inflicted on persons by non-state actors, the Court recalls that the obligation on the High Contracting Parties . . . requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals."). *Opuz* is especially stunning in holding Turkey responsible for sex inequality when a previously-reported batterer killed his mother-in-law with impunity.

Rwanda (ICTR) gave depth and dimension to the pursuit of gender crimes implicitly if powerfully in the Akayesu¹¹ case and others following its definition of rape;¹² the International Criminal Tribunal for the former Yugoslavia (ICTY) developed tools for individual liability for collective criminality.¹³ In the process, often in cases prosecuting facts of gender crime, criminal responsibility, including for acts of less-than-official actors, became more readily attributable to superiors.¹⁴ The concept of gender crime has tacitly influenced other international rubrics as well—often the more so when the sex and the inequality do not appear as such on the page—for example in the international definition of trafficking in the Palermo Protocol.¹⁵ These developments culminated in provisions of the Rome Statute of the International Criminal Court (ICC), where gender crime has received its highest expression to date, made explicit and mainstreamed in, as well as superimposed on, international criminal and humanitarian law¹⁶ and embodied in the charging practices of its first Prosecutor.

¹¹ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 688 (Sept. 2, 1998) (defining “rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. . . sexual violence, which includes rape, [is] any act of a sexual nature which is committed on a person under circumstances which are coercive.”).

¹² See CATHARINE A. MACKINNON, *Defining Rape Internationally: A Comment on Akayesu, in ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 237, 237–46 (2006).

¹³ See Patricia Viseur Sellers, *Individual(s’) Liability for Collective Sexual Violence, in GENDER AND HUMAN RIGHTS* 153, 153–94 (Karen Knop ed., 2004). The ICTY brought few cases principally for rape, Prosecutor v. Kunarac being exceptional. Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Appeals Judgment (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

¹⁴ See Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgment and Sentence, ¶¶ 1919–24 (Dec. 18, 2008) (holding Bagosora, a military officer, liable for command responsibility at trial for sexual atrocities by forces including unofficial ones); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶¶ 475–79 (May 15, 2003) (finding Semanza criminally responsible under arts. 6(1) and 6(3) for rape in a situation where he “addressed a crowd and . . . encouraged them to rape Tutsi women before killing them. Immediately thereafter, one of the men from the crowd had non-consensual sexual intercourse with Victim A[.]”); *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 692–695 (holding civilian *bourgmestre* individually criminally responsible for acts including rape, forced undressing, and sexual humiliation as crimes against humanity when committed by individuals he did not officially command); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 394–399, (Int’l Crim. Trib. for the Former Yugoslavia, Feb. 22, 2001); see also Prosecutor v. Gacumbtsi, Case No. ICTR-2001-64-T, Judgment, ¶¶ 327–8 (June 17, 2004) (holding defendant liable under Art. 6(1) for verbally “instigat[ing] the rape of Tutsi women and girls” who “were raped by young men who, being in the neighbourhood, heard the *bourgmestre’s* [Gacumbtsi] instigation.”).

¹⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25 (II), U.N. Doc. A/RES/55/383, at 54–55 (Nov. 2, 2000) (including “the abuse of power or of a position of vulnerability” for purposes of sexual exploitation as part of the definition of trafficking).

¹⁶ Rome Statute of the International Criminal Court, arts. 7(1)(g), 7(1)(h), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (enumerating as crimes against humanity, “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterili-

Gender crime thus evolved from tears in the eyes of women confiding in women to a national and transnational norm to an international crime in a few short years through the interaction of theory with practice, civil with criminal approaches, and domestic with international responses. In a dual motion, domestic and international human rights and civil rights rubrics cognized formerly principally criminal acts of violence against women as gendered even as criminal law on the international level incorporated gender analysis—now explicitly seen as effectuating human rights through criminal law¹⁷—into its treatment of sex crimes. The international community embraced the understanding that sexual assaults against women and girls are based on the sex of the victim or the perpetrator or both—that is, it grasped the gendered inequality of the relation of the parties to this criminal act in its social context—as reflected in the magisterial conceptually cogent report of the Secretary General in 2006.¹⁸ Under the aegis of the concept of gender crime, international criminal and humanitarian law began paying more attention than it ever had to rape in conflict, giving new life and muscular practice to long existing but little used prohibitions,¹⁹ creating something that had not been there before.

zation, or any other form of sexual violence of comparable gravity” and “[p]ersecution against any identifiable group or collectivity on . . . gender. . . grounds” respectively); *id.* at art. 8(2)(e)(vi) (establishing as war crimes “rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions”).

¹⁷ One strong example is found in the Rome Statute, *id.* at art. 21(3), which explicitly requires that the enforcement of applicable law under it be consistent with international human rights law and not discriminate based on gender.

¹⁸ U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women: Rep. of the Secretary-General*, U.N. Doc. A/61/122/Add.1 (July 6, 2006) [hereinafter *U.N. Study on Violence Against Women*] (applying and explaining the international understanding that sexual assault of women and girls is based on sex).

¹⁹ See, e.g., HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*, IN *THREE BOOKS* bk. III ch. 5 § XIX, at 572–73 (J. Barbeyrac ed., Lawbook Exch. 2d prtg 2004) (1625) (discussing “[w]hether [r]avishing of [w]omen be against the Law of Nations” and concluding that it should be “as much punished in [w]ar as in [p]eace” and that “whoever ravishes [w]oman tho’ in [t]ime of [w]ar deserves to be punished in every [c]ountry”); Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (The Lieber Code), U.S. War Dep’t General Orders No. 100, § 2 arts. 37, 47 (Apr. 24, 1863), reprinted in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 3, 8–9 (Dietrich Schindler & Jif Toman eds., 2004) (acknowledging that United States troops, while occupying another country, will protect “the persons of inhabitants, especially women” and suggesting that rape in this context should be severely punished); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (protecting women “against any attack on their honour in particular against rape, enforced prostitution, or any form of indecent sexual assault”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 76, June 8, 1977, 1125 U.N.T.S. 3 (protecting women “against rape, forced prostitution and any other form of indecent assault” and giving additional special protection to pregnant women and mothers with dependent infants).

Until the Rome Statute's provisions, the infusion of gender awareness into international law on the criminal side relied upon interpretation that injected the theory into provisions, whose terms and elements had not previously been understood to include it—an approach that remains a fertile possibility. But the Rome Statute also went further. For the first time in black letter international criminal law, it made gender an element of an international crime in its definition of persecution as a crime against humanity.²⁰ Gender is also sensitively referenced and evoked throughout this multilateral international treaty, from its description of crimes to how victims and witnesses are to be treated procedurally.²¹ Here, gender evolved beyond a practical norm or analytic overlay into a feature of positive international law, moving from between and under the lines into the text. In addition to the ground for crimes against humanity, all the sex crimes under the Rome Statute's prohibitions—including “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”²² as well as “trafficking in persons” as a form of enslavement²³—make up this innovative category “gender crime.” Men and boys are covered on the same terms as women and girls, when subjected to sexual atrocities and other forms of gender-based aggression. Regrettably, “gender” as defined in the Rome Statute does not explicitly encompass gays and lesbians as such,²⁴ but they are of course covered as women and men, and crimes of discrimination against them as gay or lesbian are often—in my view, virtually always—gendered.

Like many things in life, this development is better in French—*les crimes à caractère sexiste*—but unlike many things in French, this one is more politically direct. Doing something about such crimes, internationally

²⁰ Rome Statute, *supra* note 16, at art. 7(1)(h) (“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court[.]”).

²¹ *See e.g.*, Rome Statute, *supra* note 16, at art. 43(6) (providing that the Victims and Witnesses Unit of the Registry, which protects and assists witnesses at risk on account of their testimony, “include staff with expertise in trauma, including trauma related to crimes of sexual violence.”); *id.* at art. 68 (discussing protection of the victims and witnesses in cases “where the crime involves sexual or gender violence” and “special means” that “shall be implemented in the case of a victim of sexual violence”).

²² *Id.* at art. 7(1)(g).

²³ *Id.* at art. 7(2)(c) (defining enslavement).

²⁴ *Id.* at art. 7(3) (“For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”). Observers report that the intention of this addition was to exclude coverage of widespread and systematic atrocities committed on the ground of sexual orientation or homosexuality. *See* Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 76–79 (2005).

and otherwise, in the words of the ICC's first Prosecutor Luis Moreno Ocampo, marks a "new era."²⁵

The most striking quality of the pursuit of gender crimes by the ICC has been their variable centrality to almost every prosecution of its first period. Each case shows how sexual abuse is a specific tool of each conflict, exposing the particular work it does in each setting. Thomas Lubanga made boys into rapists and girls into sex slaves in order to make them into child soldiers he could command and use at will.²⁶ In a signal example of gender mainstreaming, the Prosecutor argued that being taught to rape, as well as being raped, harmed the children who were forced to become soldiers.²⁷ Jean-Pierre Bemba and Germain Katanga were charged with sending their forces to rape en masse as retaliation for prior attacks, for resources, or for political power.²⁸ Bemba's troops were said to rape men in authority to destroy their capacity to lead, women to instill terror as well as to attain political control and to shatter community cohesion, aiming to eliminate support for forces politically seen as the enemy.²⁹ The arrest warrant of President Al Bashir of Sudan accused him of using rape in his genocide, no doubt because of its effectiveness in destroying the peoples of the South, and because the evidence it leaves is quieter than death, or so he may think.³⁰ For decades, Joseph Kony had, according to the ICC charges, violated the humanity of his (perhaps) sixty wives and the whole schools of girls he abducted and parceled out to his henchmen.³¹ Very possibly, he wants this many girls at his

²⁵ Luis Moreno-Ocampo, Statement by Prosecutor of the Int'l Criminal Court at the Review Conference of the Rome Statute in Uganda, 3 (May 31, 2010).

²⁶ See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶¶ 32, 589, 892, 913 (Mar. 14, 2012).

²⁷ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Opening Statement by the Prosecutor, 2, 8 (Jan. 26, 2009).

²⁸ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-1/08, Opening Statement by the Prosecutor, 3 (Nov. 22, 2010) (observing that "[w]omen were raped systematically to assert dominance and to shatter resistance. Men were raped in public to destroy their authority, their capacity to lead."); Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 443 (Sept. 30, 2008) (concluding that there was "sufficient evidence to establish substantial grounds to believe that rape was a common practice following an attack and that combatants who forced women to engage in sexual intercourse intended to commit such acts by force or threat of force").

²⁹ See Bemba, Case No. ICC-01/05-1/08, Opening Statement by the Prosecutor, 2-3.

³⁰ Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, ¶ 30 (Jul. 12, 2010) ("The Chamber is therefore satisfied that there are reasonable grounds to believe that acts of rape, torture and forcible displacement were committed against members of the targeted ethnic groups. Accordingly, the Chamber finds that there are reasonable grounds to believe that the material element of the crime of genocide by causing serious bodily or mental harm . . . is fulfilled.")

³¹ See Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony, ¶ 16 (Jul. 8, 2005) (as amended Sept. 27, 2005) (Pre-Trial Chamber II noting, *inter alia*, "that the evidence submitted . . . suggests that JOSEPH KONY raped REDACTED and induced the commission of the crime of rape" as bases for the rape and sexual enslavement charges in Counts 1-3 of the Warrant). For a brief overview covering decades of such violence, see, for example, Marc Lacey, *A Mother's Bitter Choice: Tell-*

disposal and for his use as ‘wives,’ together with the power of a cult leader. For this, he needs conflict to continue. Maybe some Hutu *génocidaires* who fled Rwanda into Congo continue to rape in order to have something to bargain away for permission to return home.³² Weaponized rape has proven a highly flexible tactic for multiple criminal strategies.

Rape of women always subordinates the raped as women. These cases provide a window onto the further work it can do in conflicts among men. Rape in war furthers war aims. Genocidal rape destroys peoples. When sexual abuse is a crime against humanity, it often seems to be an end in itself, done in order to do it, much as it is done every day of the week in every part of the world; in these conflicts seen as campaigns of crimes against humanity, the rapes may only be more visible or numerous and executed with more explicitly recognized organization. If rapes that are recognized as crimes against humanity are more frequent in their known occurrence, they are not necessarily more intense in their brutality. (Those who find rapes in conflict unusually brutal³³ are apparently unacquainted with the brutality of many

ing Kidnappers No, N.Y. TIMES, Jan. 25, 2003, <http://www.nytimes.com/2003/01/25/world/the-saturday-profile-a-mother-s-bitter-choice-telling-kidnappers-no.html?page-wanted=3&src=pm> (describing the aftermath of Kony’s infamous 1996 abduction of 139 girls from a Catholic boarding school in northern Uganda); *CAR/DR Congo: LRA Conducts Massive Abduction Campaign*, HUM. RTS. WATCH, Aug. 11, 2010, <http://www.hrw.org/en/news/2010/08/11/cardr-congo-lra-conducts-massive-abduction-campaign> (describing how “[t]he LRA assigns abducted girls to commanders for sex or as servants. Refusing sexual relations often results in death.”); Shantha Rau Barriga & Soo-Ryun Kwon, “As if we Weren’t Human”: *Discrimination and Violence against Women with Disabilities in Northern Uganda*, HUM. RTS. WATCH, Aug. 26, 2010, <http://www.hrw.org/en/reports/2010/08/26/if-we-weren-t-human> (describing the lasting harm of the LRA’s decades-long assault on the women of Uganda).

³² The Democratic Forces for the Liberation of Rwanda (*Les Forces démocratiques de libération du Rwanda*, or FDLR) are widely known to have left Rwanda following the conflict and moved to Congo where they continue to perpetuate violence, including gender atrocities. See generally Ida Sawyer & Anneke Van Woudenberg, “*You will be Punished*”: *Attacks on Civilians in Eastern Congo*, HUM. RTS. WATCH, Dec. 13, 2009, <http://www.hrw.org/en/reports/2009/12/14/you-will-be-punished?print>, for further discussion.

³³ Examples include Jennifer L. Green, *Uncovering Collective Rape*, 34 INT’L J. SOC. 97, 100–108 (2004) (defining “collective rape” as “a pattern of sexual violence perpetrated on civilians by agents of a state, political group, and/or politicized ethnic group” and stating that “[c]ollective rapes are generally more intense and more violent than other forms of rape”); Kathryn Farr, *Extreme War Rape in Today’s Civil-War Torn States: A Contextual and Comparative Analysis*, 26 GEND. ISSUES 1, 6 (2009) (citing Green, *id.*, for proposition that war rapes are more brutal than others). The common brutality of rape need not be comparatively minimized—as it is in an otherwise knowledgeable analysis by Kristine T. Hagen & Sophie C. Yohani, *The Nature and Psychosocial Consequences of War Rape for Individuals and Communities*, 2 INT’L J. PSYCHOL. STUD. 14, 14–15 (2010)—to observe correctly that rapes in conflict are often extremely brutal. For example, Judy El-Bushra observes: “Common features found across the region include the sheer number of rapes, the extreme brutality of sexual encounters, the continuation of sexual violence after the war has ended, including ‘civilian rape’ and the ‘double violation’ whereby victims encounter stigma and are disowned by their families and communities after suffering sexual violence.” These factors, as she rightly implies, are continuous with rape in everyday life outside recognized zones of conflict. Judy El-Bushra, *Understanding Sexual Violence, HIV/AIDS and Conflict*, 35 FORCED MIGRATION REV. (Supp) 22, 22 (Oct. 2010).

rapes outside recognized zones of conflict.) But it is no accident that gender was first recognized as an express element in an international crime under the rubric of crimes against humanity, where the future of conflict lies. Campaigns of crimes against humanity are the messiest of the ‘new wars,’³⁴ least conforming to the junta model, organized principally along social hierarchical lines of which gender is one, often combined with ethnicity or religion or politics or economic interests rather than according to neat military hierarchies that fit the ‘old war’ model. Where reality is headed, international law is also headed, with gender as its leading edge.

Gender crimes, in other words, are prominent in ICC prosecutions because they are prominent in the contexts being prosecuted. This only becomes remarkable against the backdrop of the prior (and still largely existing) norms that ignore and deny their existence, shame their victims, define their injuries in legally unprovable or empirically unrealistic ways, and erect barriers to accountability that play on rape myths in the guise of procedure. Since these crimes have essentially never been taken seriously before domestically or internationally, at least on any large scale, rubrics like fair trial and right of confrontation, as just two examples, have never been shaped with these possible prosecutions and their dynamics in mind, as if the rapes actually happen.³⁵ It is as if there is a tacit agreement underlying enforcement in most jurisdictions to look the other way as women and children and sometimes men are sexually violated: to minimize, trivialize, denigrate, shame, and silence the victims, to destroy their credibility legally and socially and further shatter their psyches and dignity, so these abuses can continue unredressed and unimpeded. This is what impunity looks like. It is the way gender crimes are standardly treated (with occasional remarkable exceptions) every day in every corner of the world. The more power the accused has, the more this dynamic operates. The Rome Statute, and the body of the ICC’s first cases under it, says to the world that here, at least, this deal is off.

What light does the literature on the creation, force, and development of international law shed on gender crime’s emergence? The interesting answer, I think, is little to none. Much of that literature is engaged with questions that have no relevance to these developments. For example, the evolution of gender crime internationally does not illuminate or even ask the canonical question “why is international law obeyed” so central to that literature. As to gender crimes, it overwhelmingly is not. Of gender crimes, one cannot observe, with the sainted Lou Henkin, “that *almost all nations observe almost all principles of international law and almost all of their obligations*

³⁴ See generally MARY KALDOR, *NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA* (Stanford Univ. Press, 1999). Systematic attention to gender would strengthen this already illuminating analysis.

³⁵ For further discussion of the gendered vicissitudes of the right of confrontation in a real world context of sexual violence, see Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 21 (2012).

almost all of the time.”³⁶ The more salient question is why laws against gender crime are largely not obeyed, domestically *or* internationally. The human rights obligations of nations to enforce their own laws against gender crime are largely flouted. Nor are states the principal actors in either disobeying laws against gender crimes or in enforcing obedience to them (something they largely do not do). This throws into relief the fact that sexually violated women, that is most women,³⁷ have been in this respect living on the other

³⁶ LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (emphasis in original).

³⁷ This conclusion is based on empirical studies of sexual violation in many settings, analysis of their empirical predicates, which uncontroversially include underreporting, and decades of experience with the issue working with women all over the world. See CATHARINE A. MACKINNON, *SEX EQUALITY* 742 n.1 (2d ed. 2007) (citing quantitative studies of underreporting of sexual violation in the United States); *U.N. Violence Against Women Study*, *supra* note 18 (providing empirical and analytical context of violence against women worldwide).

Of the empirical studies, it can generally be observed that the more specific and in depth a study is, by location or population or form of sexual assault, and the longer and more in depth the research interview is, the higher the numbers found. Some of the best data on sexual violation has been collected in the United States over the past forty years. On rape alone, Diana E. H. Russell's probability sample of 930 women in San Francisco households in 1977 found that 44 percent of those who completed the in-person interview had experienced rape or attempted rape, half of them more than once. Diana E. H. Russell, *The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females*, 7 *VICTIMOLOGY: AN INT'L J.* 81, 81-93 (1982). Analyzing her data at my request, Diana Russell found that only 7.8 percent of the women in her sample did not report ever experiencing any form of sexual violation. This latter figure includes all the types of rape or other sexual abuse or harassment surveyed, noncontact as well as contact, from gang rape by strangers and marital rape to obscene phone calls, unwanted sexual advances on the street, unwelcome requests to pose for pornography, and subjection to peeping toms and sexual exhibitionists (flashers). DIANA E. H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* 20-37 (rev. ed. 1987); DIANA E. H. RUSSELL, *RAPE IN MARRIAGE* 27-41 (1990). See also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 127 (1989). In a national representative random sample of over three thousand college women, fifty four percent reported experiencing “sexual victimization.” Mary P. Koss, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 *J. OF CONSULTING & CLINICAL PSYCHOL.* 162, 164, 169 (1987) (defining sexual victimization to include unwanted sexual contact, sexual coercion, attempted rape, and rape). See generally MARY P. KOSS ET AL., *NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY* (1994); DIANA E.H. RUSSELL, *SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT* (1984).

As it is more acceptable (hence fundable) to study anything “violent” over anything sexual, many international studies research partner violence, then break out the figures on intimate partner sexual violence separately. See, e.g., Claudia Garcia-Moreno et al., *Prevalence of Intimate Partner Violence: Findings From the WHO Multi-country Study on Women's Health and Domestic Violence*, *LANCET* 1260, 1264 (Oct. 13, 2006) (presenting study of intimate partner violence of over 24,000 women in fifteen sites in twelve countries, sexual violence reported separately, underreporting recognized, finding from 6.3% in Serbia to 58.6% in rural Ethiopia, exceeding 40% in rural Bangladesh and rural Peru); Robin N. Haarr, *Wife Abuse in Tajikistan* 2 *FEMINIST CRIMINOLOGY* 245, 263 (July 2007) (reporting study of 400 women in Tajikistan of which 42.5% stated they experienced sexual violence by their husband); Michael A. Koenig et al., *Coercive Sex in Rural Uganda: Prevalence and Associated Risk Factors*, 58 *SOC. SCI. & MED.* 787, 791 (2004) (reporting that 73% of women in study say they have been subjected to at least “occasional” coerced sex by their current partner); Samia Alhabib et al., *Domestic Violence*

side of Henkin's 'almost all' hedge almost all the time. Nor has this reality significantly distinguished national from international law. It is not only the absence of enforcement, but a very real norm of nonobservance of the prohibition of gender crimes—of nonenforcement as a de facto matter of policy—that stands out.

For gender crimes, why nations obey international laws is thus the wrong question all the way from its unit of analysis to its presumptions and observations of reality. The question here becomes not only why many men disobey almost all laws against sexual assault almost all the time, but why, given this, they even have them. If most international and national laws are mostly obeyed, why are those against gender crimes mostly not? Why, in more pointed terms, do men, in their gendered capacities, first create and then routinely ignore laws against sexual abuse both within and across state lines? What light, if any, does pursuit of this question shed on why nations—meaning men organized into states—obey the laws they do obey, including when they are not enforced by force, which after all is the reason the question is being asked in the international context in the first place. The question then becomes why, given this context so overwhelmingly to the contrary, has it become possible for the ICC to strike out such an exceptional path.

In a gendered perspective—gender analysis being more than observation of demography or a two-part finger-pointing head-counting exercise—

Against Women: Systematic Review of Prevalence Studies, 25 J. FAM. VIOLENCE 369, 373 (2010) (analyzing many studies that include measures of intimate sexual violence, finding values by region of approximately 15%–30% lifetime prevalence); R. T. Naved, et al., *Violence against Women with Chronic Maternal Disabilities in Rural Bangladesh*, 30 J. HEALTH POPULATION & NUTRITION 181, 182 (2012) (reporting that up to 50% of rural Bangladeshi women have experienced “within-marriage sexual violence”).

On these figures alone, taking cultural variation and other cultural factors into account—and given that the figures on intimate partner violence alone do not include, for example, sexual abuse in childhood, stranger rape, sexual harassment in employment or education, or sexual assault in genocide or armed conflict—together with chronic underreporting and variations in definitions, it is highly likely that some studies of all forms of sexual violation have produced major undercounts. See, e.g., HOLLY JOHNSON et al., *VIOLENCE AGAINST WOMEN: AN INTERNATIONAL PERSPECTIVE* 39 (2008) (providing data on lifetime experience of sexual violence among women in nine countries, rate varying from 6% (Philippines) to 41% (Costa Rica)); B. Wijma, et al., *Emotional, Physical, and Sexual Abuse in Patients Visiting Gynecology Clinics: A Nordic Cross-Sectional Study*, 361 LANCET 2107, 2111 (2003) (describing a study conducted in Nordic countries of emotional, physical, and sexual abuse, finding an average of lifetime reports of sexual abuse of women at 24.1% at Table 5).

Granted that definitions of sexual abuse vary, far more realistic are the findings that a majority of women have experienced sexual violence. See, e.g., Elsie Le Franc et al., *Interpersonal Violence in Three Caribbean Countries: Barbados, Jamaica and Trinidad and Tobago*, 24 PAN. AM. J. PUB. HEALTH, 409, 414 (2008) (stating that a majority of women respondents in each country studied have experienced sexual violence). Researcher Liz Kelly concluded, based on her in-depth study of sixty women in the United Kingdom, that “most women had experienced sexual violence in their lives” along a continuum of male behaviors. Liz Kelly, *The Continuum of Sexual Violence*, in *WOMEN, VIOLENCE AND SOCIAL CONTROL* 46, 47 (Jalna Hanmer & Mary Maynard, eds., 1987). Analyzing the data in depth finds that 93% of women surveyed experienced sexual harassment, 83% pressure to have sex, and 70% sexual assault. *Id.* at 53.

the answer may be that, as to gender crimes, men behaving in their gendered roles tend to reflexively create, obey, and enforce on other men those rules that respect and enhance their power as men, according to norms that, because they preserve male dominance over women and other men, are seen as being in their interest. Exceptions to this generalization are still just that: exceptions. Rules that serve this end, they will obey and see to be legitimate. Thomas Franck is thus on the right track in speaking of the power of legitimacy among nations,³⁸ but in omitting gender, he cannot fully illuminate it. The same difficulty besets his definition of legitimacy as “factors that affect our willingness to comply voluntarily with commands.”³⁹ This “our” is a bit gender-neutral. Not asking about gender means not asking, for one simple instance, why women obey laws, which overwhelmingly they do, even more than men do, although they have typically had virtually no voice in their creation. Perhaps the answer is that women are kept in line by an almost perfect combination of force with socialization, by a cultural hegemony that strongly bears upon the question of principle versus interest that the idealists and the realists fight over in international relations. One would think it would interest them.

Assuming Franck’s “voluntarily” means without immediate physical force, his definition of the legitimate could apply to compliance through intimidation or the socialization to sex-based hierarchy that undergirds inequality. Male power is precisely what “affects” women’s “willingness” to comply “voluntarily” with men’s “commands.” Does that make male power legitimate? Unequal social context corrupts true legitimacy. Translated in a gendered perspective, legitimacy is a flag flown for those conditions under which men think it is right to accede to other men’s power. The truth is, committing gender crimes, particularly against women, has seldom before taken away men’s sense that other men rightly exercised power over them. Given the norms of masculinity, these crimes have conferred such legitimacy more than they have undermined it. If this is right, men have essentially known all along that the laws against what are in reality gender crimes have never been the real rules. The real rules are that men with power can commit these crimes, and will allow certain other men to commit them, and may even respect other men because they commit them. This is in part because that is how masculinity is defined, and in part, reflexively and by conditioning rather than consciously, so they can commit these acts themselves if they want to, or can know they can.

On this reading of how male power is organized in this sphere, the laws against sexual violation have functioned fundamentally as window-dressing, as well as a tool men can use against other men when convenient for their hegemonic needs. Perhaps these rules serve a function wholly apart from inducing compliance: to legitimize an unequal social order by distracting

³⁸ See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

³⁹ *Id.* at 150.

from the real impunity for violations that everyone knows will go overwhelmingly undetected and unpunished. In this light, the distinctive contribution of the international arena, particularly the Rome Statute and most stunningly in the initial prosecutions under it, has been to treat laws against gender crimes like other legal prohibitions, as a new normal. Rule of law arrives. The aim of the Rome Statute in this respect is ultimately to delegitimize gender crimes as a means of attaining and exercising power.

Given the magnitude of these legal developments, with the evolving prominence of the instrumentalization of the crimes themselves, particularly striking is the extent to which mainstream literature in international law has largely gone right along in the absence of any deep engagement with gendered dynamics, indeed ignored gender as a factor in international relations altogether. Even as the actors on the real-world stage embrace and develop the concept and highlight its realities, this literature keeps asking its same questions and debating its same answers on the same theoretical terms, turning a blind eye to what these challenging developments and innovations expose and demand and imply and promise. The field's static typologies, long descriptive at best, neither predicted nor usefully describe these changes, far less do they trace or project their trajectory or grasp their significance or portent or contribute to their evolution.

Missing, among other things, is any conception that studying the behavior of nations, including compliance with law or not, is studying male behavior: behavior that is gendered to its core. Any contribution gender might make to analysis of the atrocities that have been formative to international law is absent, for example, when the formidable Hannah Arendt discusses Kant on "radical evil" as a phenomenon "about whose nature so little is known,"⁴⁰ and lovely Carlos Nino asks "how shall we live with evil?"⁴¹ in considering accountability for past atrocities. When the social reference point for the crimes in view is not only the Holocaust as it has ordinarily been understood, or *terrorismo del Estado*, or even the Cold War, but intimacy, atrocities are less likely to be dismissed as blank "evil" nor are they "past." They can be accounted for, explained, and confronted, including when projected onto a large canvas of genocide or war, as the gendered actions of men practicing male dominance with whom their victims are all too familiar into the present moment. Women, who are not baffled moralists, know a lot about this phenomenon (as perhaps Arendt did but did not see what she knew as knowledge), living with it every day. Perhaps a turning point in the relative invisibility of gender analysis in this sphere has been reached, prepared by intrepid nongovernmental organizers and activists, advocates, jurists, and scholars, most of all by women and some men survivors.

⁴⁰ HANNAH ARENDT, *THE HUMAN CONDITION* 241 (1958).

⁴¹ CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* vii (1996).

One truly interesting and potentially consequential question that arises around gender crime that the international literature, notably that on “fragmentation,”⁴² is further useless in illuminating concerns the treatment of sexual atrocities in international legal rubrics. Rape, for example, is now legally a recognized instrument of war, genocide, torture, and terrorism, and a common crime against humanity. It has been found integral to human trafficking, slavery, forced marriage, and the recruitment and training of child soldiers. And so it is. But should it continue to be flushed out everywhere it rears its ugly head, treated as a fact or violation under each legal heading, or instead recognized as a separate international crime on its own terms, and if so, structured how? Should rape be de-fragmented? Arguably rape violates customary international law.⁴³ But what precisely is at stake in the question of

⁴² See Cecilia M. Bailliet, *Introduction to NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES 2-5* (Cecilia M. Bailliet ed., 2012) (for discussion and footnotes on the most relevant contributions to this literature).

⁴³ As rape in some form is a crime virtually everywhere, even if its prohibition is largely ineffective and unenforced, inquiry into this question would develop the literature on customary international law at a crucial point of tension within it. No universally accepted definition of customary international law exists, but a basic introduction can be found at RESTATEMENT (THIRD) OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 (2) (1987) (stating that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation,” noting that such state practice “can be general even if it is not universally followed” and that “it must appear that the states follow the practice from a sense of legal obligation . . . a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law”). Scholars have discussed the process of development of custom for purposes of customary international law extensively. See, e.g., ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 32, 62 (1971). However, because it generally ignores gender crime, this scholarship does not interrogate the relationship between a formal prohibition and its practice with the clarity that investigating this context would provide.

Examples of legal authorities opining on the question of rape as a violation of customary international law include: Partial Award, Central Front Eritrea’s Claims 2, 4, 6, 7, 8 & 22 (Eritrea v. Ethiopia), 43 I.L.M. 1249 ¶¶ 37-38 (Eritrea-Ethiopia Claims Comm’n 2004) (basing agreement to arbitration on view that rape of civilians in conflict violates customary international law under Geneva Conventions); Partial Award, Central Front Ethiopia’s Claim 2 (Eritrea v. Ethiopia), 43 I.L.M. 1275 ¶ 35 (Eritrea-Ethiopia Claims Comm’n 2004) (same); Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, ¶¶ 165, 168 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10 1998), (discussing customary international humanitarian law as including rape as torture or as an outrage on personal dignity); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 406, 408, 436 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶¶ 285–7 (Jan. 27, 2000); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 585, 599, 608 (Sept. 2, 1998); John Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002). See also Int’l Comm. of the Red Cross, *Customary International Humanitarian Law*, 93 (2005); Special Rapporteur, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, ¶ 36, U.N. Doc. E/CN.4/Sub.2/1998/13 (Jun. 22, 1998) (by Gay McDougall).

For discussion by legal scholars, see Christine M. Chinkin, *Women’s International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT’L L. 335, 336 (2001); Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to From Here?*, 13 EUR. J. INT’L L. 697, 719 (2002); Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and*

whether it should be a single separate international crime? The law against rape has developed exponentially in its multiple concrete sites so far without becoming siloed; its jurisprudence has been flexibly cross-referenced and mutually supportive while its factual development has stayed grounded in its manifold contexts, the sexual assaults highlighted in place. Given that its prohibition in context has proven reasonably workable, once focused upon, what difference would it make if rape everywhere, serving every international criminal function, was pulled out and together to define a prohibition to be legally addressed separately? This raises a serious question for law of the relation between the conceptual and the practical. Is this change necessary? What precisely would it accomplish? If the answers are in the negative, what light does this shed on the impetus to de-fragment? No existing international literature I know, in particular that advocating coherence and harmonization, offers a grip on or insight into this matter, revealing the silver lining of neglect: the freedom to develop our own approaches, strategic and principled.

Leading further, the substantive law of gender crime has also opened procedural possibilities that this literature also gets nowhere near, including the possibility to undo, get around, neutralize or change the many obstacles, devices, traditions, and norms that have long operated in law to ensure that sexual assault as an everyday matter is never stopped. These doctrines appear gender neutral but function in the direction of ensuring that the legal system will never respond to the victims' experience, whatever the law criminalizes on its face. Gender crime, as it evolves as a matter of substantive law, is impelling the alteration of major technical rubrics like state versus non-state, challenging jurisdiction and sovereignty, interrogating the standards for fairness in trials and policy and organization in altercations, resisting many traditional cultural practices, and walking right across the line between war and peace. These abstractions may appear empty and neutral, their corresponding legal doctrines fair and principled, but in this setting, they have been anything but.

In this context, the international arena—the ICC in particular—presents a specific opportunity. Sexually violated women and international jurisdiction belong together, I think, not only because both are denigrated for not

Claims to Unchecked Executive Power, 2007 UTAH L. REV. 345, 407–08 (2007); Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT'L L. 287, 297–98, 302 (2002); Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 300 (2003). See also David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 226 (2005) (discussing the legal status of rape in conflict under the even more demanding international norm of *jus cogens*); Dean Adams, *The Prohibition of Widespread Rape as a Jus Cogens*, 6 SAN DIEGO INT'L L.J. 357, 362, 397 (2005). Much of the literature on rape as a violation of customary international law relies on its recognition as a form of torture. Given that rape is also a gender crime, it constitutes a form of sex discrimination, on which international consensus is building that it too violates customary international law.

resorting to force in that neither has an army at its command. Most women and children are most violated at home, or close to home in the localities that form the states that have been, and on one level still are, the traditional units of international law.⁴⁴ The men at home are the least likely to do anything about gender violation because that is where they are most likely to do it themselves, so where they are most likely to identify with others who do it there. As a result, the further away from home women go, the experience has been, the more rights they get. Distance appears to attenuate the male bond, making it more likely that women's violations by men will be recognized as real.⁴⁵ When the men observing do not identify so closely with the doers of the acts, they are more likely to see what they are actually doing to women – i.e., they come closer to attaining what men mean by objectivity. This is both partly why women are inherently not a national group but a transnational one, and largely why gender crimes have been most powerfully recognized in international law first.

With the trans-historical and trans-cultural reality of gender crime is also highlighted the darker fact that as of yet, there is no “post-conflict” for gender crimes. The daily campaign of violence against women, well-documented as a worldwide war on women—with substantial variation but substantially invariant impunity—can be reframed as the longest-running siege of crimes against humanity in the history of the world. The conflict goes on, its weapons forged daily, lying around inexpensively to be seized for accelerated deployment in every conflict among men in which they become convenient, with no embargo imaginable and no disarmament treaties in sight. A gender perspective raises, along with the question of what kind of justice we envision and negotiate, the question of what peace means.

Pursuing the gender crimes the Rome Statute defines, wherever they happen of concern to the international community, presents the chance to develop grounded procedures and reality-based substantive doctrines that respond to the practical imperatives for their effective prosecution. Focus on those most responsible can include the rapists themselves (the so-called “little fish” when they *are* most responsible), as well as those who lead and deploy and permit their actions, sustaining the Nuremberg principle from both the top down and the bottom up.⁴⁶ Positive complementarity⁴⁷ could

⁴⁴ See *U.N. Violence Against Women Study*, *supra* note 18, at ¶ 112 (noting the pervasiveness of different forms of violence against women in intimate relationships is well established empirically and is the most common form of violence experienced by women globally).

⁴⁵ This argument is made more fully in Catharine A. MacKinnon, *Introduction: Women's Status, Men's States*, in *ARE WOMEN HUMAN?* 1 (2006).

⁴⁶ The Principles of the Nuremberg Tribunal, 1950, provide no exemption from international crimes for heads of state or their subordinates by virtue of their positions as such. Rep. of the Int'l Law Comm'n, 2d Sess., *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, §§ 103–04, (1950).

⁴⁷ This ICC standard could be seen as one form of Harold Koh's “transnational legal process,” through which international and domestic become interpenetrated, an accessi-

become a well-travelled two-way street between the national and the international, including the always-crucial NGOs. The opportunity is open for the ICC and other international institutions to act on what women know: there will be no meaningful peace or collective security in a world of gender injustice. By setting an example, supporting institution-building, and through cooperation, the response of the public order to gender crime can be transformed within and beyond recognized zones of conflict, in war and in so-called peace.⁴⁸ Neither utopian nor apologetic⁴⁹—too attuned to the realities of power to fall into irrelevant moralism and too critical of those realities to rationalize *Realpolitik*—the gender paradigm for international law's creative development is taking effective steps toward real security and real peace.

ble discussion of which can be found at Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 337–54 (2004).

⁴⁸ A thoughtful treatment of some preconditions for real peace, sensitive to issues raised here, is ELIZABETH REHN & ELLEN SIRLEAF JOHNSON, UNITED NATIONS DEV. FUND FOR WOMEN (UNIFEM), *WOMEN, WAR, AND PEACE: THE INDEPENDENT EXPERTS' ASSESSMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WOMEN'S ROLE IN PEACE-BUILDING* (2002).

⁴⁹ See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (rev. ed. 2005).

