(Re)Constructing an International Crime:
Interpreting Sexual Victimhood in the Rohingya Genocide and Beyond

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Abstract: This paper demonstrates how different narratives of gendered harm influence the investigation and prosecution of sexual violence. Building upon several critical law traditions, I argue that lawyers working on issues of sexual violence are constantly engaged in a dual process of interpretation wherein they attempt to confirm (1) if a sexual crime has occurred, and (2) whether the crime is severe enough to deserve inclusion in justice efforts. This process draws upon contested ideas about gender and victimhood to construct both the crime and the identities of the legal subjects, (re)producing a particular narrative order which limits how sexual victimhood is understood within a specific legal system. To demonstrate this, I focus on international criminal law, examining the interpretations which influence the categorization of sexual violence as an act of genocide. Using the ongoing legal cases about the Rohingya genocide as a case study, I show how legal actors working with various justice mechanisms (the UN Fact-Finding Mission, the International Court of Justice, the International Criminal Court, and universal jurisdiction cases) engage in this dual process of interpretation, building upon commonplace beliefs about gender and sexuality to understand the reality and severity of the crimes presented to them. Notably, I show that many lawyers understand genocidal sexual violence as a crime committed primarily against cisgender women, despite ample evidence which points to how such acts can also be committed against men, transgender women, and other individuals who do not fit into the gender binary. This belief has resulted in the exclusion of many victims of sexual violence from current international legal proceedings, as well as the construction of a crime – genocidal sexual violence – that is arbitrarily limited in its scope. Building upon this case study, I discuss how different understandings of gendered harm can result in the dismissal of certain crimes according to gender, questioning the utility of "gender" as a tool for interpreting criminal actions. Only by understanding gender as an always-incomplete system of power relations (rather than a concrete value that a person embodies or possesses) can justice systems like international criminal law move beyond the flawed system of interpretation which currently structures the investigation of sexual violence.

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

This last claim – that genocidal sexual violence was only committed against women and girls – has been repeated numerous times by individuals working both on the ICJ case and other international cases about the Rohingya genocide. For example, a recent brief filed at the International Criminal Court (ICC) argued that "whilst [Rohingya] men and boys were separated for execution, women and girls were systematically raped, as well as being tortured and killed."[8] Advocates bringing an international case in Argentina under the principle of universal jurisdiction similarly chose to include testimony about genocidal sexual violence from six Rohingya victims – all cisgender women.[9] In fact, the dominant narrative about sexual crimes in the Rohingya genocide, one that has been repeated in dozens of legal briefs, public statements,

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[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Application Instituting Proceedings and Request for Provisional Measures (Nov. 11, 2019) [hereinafter ICJ Application].
[2] *Id.* at ¶ 116.
[3] Al Jazeera Staff. *Who are the Rohingya?* AL JAZEERA (18 Apr. 2018), https://www.aljazeera.com/features/2018/4/18/who-are-the-rohingya.
[4] ROHINGYA LANGUAGE PRESERVATION PROJECT, *First They Targeted Our Culture and Language: Threats to Rohingya Language, Culture, and Identity in Myanmar and Bangladesh*, 5, 16–17 (2022).
[5] ICJ Application, *supra* note 1, at ¶ 6.
[6] *Id*. at ¶ 116.
[7] *Id.*
[8] Situation in Bangladesh/Myanmar, ICC-RoC46(3)-01/18, Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute, ¶¶ 20-22 (May 30, 2018), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02824.pdf.
[9] Burmese Rohingya Organisation UK, *BROUK President Highlights Tatmadaw Crimes As Genocide Trial Opens* (Dec. 21, 2021), https://www.brouk.org.uk/brouk-president-highlights-tatmadaw-crimes-as-genocide-trial-opens/.

and webinars, is that the Myanmar military committed genocide by ordering the execution of "thousands of Rohingya men, women and children and… the rape of thousands of Rohingya women."[10]

At the same time, however, evidence from investigators on the ground increasingly points to a much larger occurrence of sexual violence against the Rohingya. Most notably, the UN Fact-Finding Mission for Myanmar (FFM) found that systematic sexual violence was used against cisgender women, cisgender men, and "transgender women."[11] As I discuss below, this last category likely refers to individuals who often identify as *hijra* or *hizara*, a distinct third-gender identity that has long historical roots in Southeast Asia.[12] Other organizations have reported similar findings, asserting that sexual violence was committed against Rohingya of all genders, not just cisgender women and girls.[13] For example, in one survey 34% of male respondents reported experiencing either rape or other direct forms of sexual violence.[14] While rates of sexual violence among cisgender women may have been even higher (one survey reported that 52% of female interviewees experienced sexual violence),[15] the dominant legal framing of genocidal sexual violence as a crime that *only* affected Rohingya women and girls fails to account for potentially thousands of instances of sexual violence against men and queer individuals.[16]

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[10] Human Rights Watch event on the Rohingya genocide, February 2022, transcript produced by the author.
[11] Indep. Int'l Fact-Finding Mission on Myanmar, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, ¶¶ 1-7, U.N. Doc. A/HRC/42/CRP.4, (Aug. 22, 2019) [hereinafter FFM 2019 Report].
[12] SILVIA GUGLIELMI ET AL., GENDER-BASED VIOLENCE : WHAT IS WORKING IN PREVENTION, RESPONSE AND MITIGATION ACROSS ROHINGYA REFUGEE CAMPS, COX'S BAZAR, BANGLADESH 9 (2022). For more context on the politics of identifying hijra as "transgender," *see* Sandra Duffy, *Contested Subjects of Human Rights: Trans and Gender-variant Subjects of International Human Rights Law*, 84 THE MODERN LAW REVIEW 1041, 1064 (2021).
[13] *E.g.,* Lindsey Green et al., *"Most of the cases are very similar.": Documenting and corroborating conflict-related sexual violence affecting Rohingya refugees*, 22 BMC PUBLIC HEALTH 700, 9 (2022).
[14] SARAH CHYNOWETH, "IT'S HAPPENING TO OUR MEN AS WELL": SEXUAL VIOLENCE AGAINST ROHINGYA MEN AND BOYS, 8 (2018).
[15] U.N. High Commissioner on Hum. Rts., Flash Report: Interviews with Rohingyas Fleeing from Myanmar since 9 October 2016, at 10 (Feb. 3, 2017). Of course, all of these surveys are just reflections of what has been told to the people assembling data and are not necessary to understanding the individual experiences of victims. Moreover, statistics about sexual violence suffer almost universally from victims being unwilling to disclose their experiences, which makes any effort to understand the true scale of sexual violence in an situation like the Rohingya genocide impossible. As one interviewee told me, "It's helpful to any group documenting mass atrocities that there's so much you don't know and will never know, constantly reminding ourselves that we're working with information that's not available to us." Personal interview.
[16] In this paper I often use the umbrella term "queer" as shorthand to refer to various homosexual, bisexual, transgender, intersex, and gender-diverse identities. My goal is not to affirm "queer" as a distinct and concrete category, but rather to identify individuals and practices which are constructed as non-normative by the current binary application of gendered ideas in the practice of international law. *See* Jamie J. Hagen, *Queering Women, Peace and Security*, 92 INTERNATIONAL AFFAIRS 313, 313–315 (2016).

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What can we learn from such a situation, where so many acts of violence have been excluded from the same legal processes that are meant to address mass atrocity? On one level, my goal in this paper is to present a very specific case study into how narratives about international law and the Rohingya genocide have resulted in a misguided legal approach to adjudicating genocidal sexual violence. As such, in addition to providing a novel perspective into an ongoing legal situation of major global and historic importance, this paper further develops a more holistic legal framework for understanding how genocidal sexual violence is committed against people of all genders, including men and queer individuals.[17]

On another level, however, this paper also demonstrates the complex and often exclusionary role of interpretation that occurs when adjudicating claims of harm in any legal system. This process of interpretation occurs along two axes: (1) did the act in question actually occur, and (2) is the act in question serious enough to merit inclusion as a harm?[18] Legal precedent is of course tremendously influential in making such interpretations, but as I demonstrate below, the process of interpretation also draws from commonplace beliefs about gender, sexuality, violence, and identity. As such, I build upon and extend the assertions made by various critical traditions that legal interpretation is an inescapably political process,[19] arguing that legal processes *generate* the identities and crimes that they seeks to adjudicate.[20] In other words, justice systems like the ones I describe in this article are not neutral arbiters of a pre-existing world, but are instead central to (re)producing categories of identity such as "woman" or

[17] For a more hands-on theorization of this holistic approach to genocide and sexual violence, *see* David Eichert, *Expanding the Gender of Genocidal Sexual Violence: Towards the Inclusion of Men, Transgender Women, and People Outside the Binary*, 25 U.C.L.A. J. INT'L L. FOR. AFFAIRS 157, 159–160 (2021).

[18] A third axis of interpretation could question whether the harm alleged is mitigated by the facts of a case, which in itself can be subject to a whole host of value judgments and interpretations. This paper does not focus on this stage of the justice process due to (1) paper limitations and (2) the fact that the main subject of this paper – the cases about the Rohingya genocide – are far from ever reaching the sentencing phase. A future project could and should question how values about gender, victimhood, and sexuality influence the severity of a crime and mitigating factors during sentencing.

[19] For a discussion of criminal law and the critical legal studies movement, *see* Katheryn K. Russell, *A Critical View from the inside: An Application of Critical Legal Studies to Criminal Law*, 85 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (1973-) 222, 223–226 (1994). For a discussion of criminal law and critical race theory, *see* I Bennett Capers, *Critical Race Theory and Criminal Justice*, 12 OHIO ST. J. CRIM. L. 1, 2–4 (2014). For a discussion of critical and anti-formalist approaches to international law, *see* ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY 315–316 (2021). For a discussion of critical feminist approaches to international criminal law, *see* Doris Buss, *Performing Legal Order: Some Feminist Thoughts on International Criminal Law*, 11 INT CRIM LAW REV 409, 410–411 (2011).

[20] In other words, to cite Judith Butler, "Juridical power inevitably 'produces' what it claims merely to represent." JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 5 (1990).

"sexual violence victim." Moreover, as these identities become enmeshed in a system of repeated interpretation at multiple stages of the justice system, this matrix of connected meanings can lead to exclusionary or overly-restrictive categorizations which *limit* attempts to obtain justice.

This is especially true for the prosecution of sexual violence, which in jurisdictions around the world is consistently inconsistent, influenced by a wide range of beliefs about sexuality and gender. For example, in the United States only a fraction of sexual assault allegations turn into criminal charges, with claims brought by women of color,[21] men,[22] and queer individuals[23] being frequently and improperly dismissed by police and prosecutors.[24] Even claims which do go to trial are subjected to multiple layers of interpretation wherein legal actors like prosecutors and juries draw upon pre-existing assumptions about sexual violence to understand (1) whether a crime has occurred and (2) the extent of harm resulting from such a crime, comparing allegations to wider gendered narratives about how sexual crimes are committed. This pattern of interpretation can be seen repeated all over the world: in the United Kingdom, for example, men who are "forced to penetrate" female partners are not categorized as rape victims because of their gender.[25] In France, the police officers accused of sodomizing and permanently disabling a young Black man in the widely-condemned "Affaire Théo" were acquitted of "rape" but convicted of the non-sexual crime of "willing violence."[26] A recent report from Canada revealed that one in five sexual assault allegations are dismissed by police as being without merit, with huge discrepancies among police departments in different cities for the number of cases determined to be "unfounded."[27] And in India, rape is often considered to be

[21] Michal Buchhandler-Raphael, *Underprosecution Too*, 56 RICHMOND UNIVERSITY LAW REVIEW 409, 411–413 (2022).
[22] Scott M. Walfield, Philip D. McCormack & Kaitlyn Clarke, *Understanding Case Outcomes for Male Victims of Forcible Sexual Assaults*, 37 J INTERPERS VIOLENCE NP6929, 22–23 (2022).
[23] Human Rights Campaign, *Sexual Assault and the LGBTQ Community*, https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community.
[24] The Rape, Abuse & Incest National Network (RAINN) provides further statistics about sexual violence and the criminal justice system. https://www.rainn.org/statistic
[25] E.g., Siobhan Weare, *'Oh you're a guy, how could you be raped by a woman, that makes no sense': towards a case for legally recognising and labelling 'forced-to-penetrate' cases as rape*, 14 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 110, 110–111 (2018).
[26] *Affaire Théo : Le Parquet Requiert le Renvoi de Trois Policiers Devant les Assises*, LIBERATION (Oct. 7, 2020), https://www.liberation.fr/france/2020/10/07/affaire-theo-le-parquet-requiert-le-renvoi-de-trois-policiers-devant-les-assises_1801659/.
[27] Robyn Doolittle, *Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless*, THE GLOBE & MAIL (Feb. 3, 2017), https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/.

more serious (thus resulting in longer prison sentences) for defendants accused of assaulting female victims who are virgins and unmarried.[28]

Similar interpretive questions are central to debates about sexual violence in international law. At the International Criminal Court, for example, evidence of penile amputation and forced circumcision in Kenya was dismissed by a panel of judges because, to them, it was not "sexual" in nature.[29] The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) similarly held that while men and women were required to consummate forced marriages during the Khmer Rouge regime, only the women in these inhumane relationships were counted as victims of "rape."[30] And at the International Criminal Tribunal for the Former Yugoslavia (ICTY), crimes such as rape and genital mutilation were almost entirely adjudicated as "torture" for male victims and "sexual violence" for female victims, even though the acts were functionally identical.[31] Moreover, these acts of "torture" are now categorized on the ICTY's website as "sexual violence," further obfuscating what and who gets to be a victim of "sexual" violence.[32]

In this article I adopt a discursive and performative approach to gender, drawing upon critical feminist, decolonial, and queer understandings of the socially constructed reality of identity. In other words, I assert that commonplace understandings of what constitutes identity categories (e.g., "man" or "victim") are not universal or natural, but rather informed by the repetition of legal and extra-legal interpretations. Such a perspective puts into question seemingly-stable categories of gender and crime, instead asserting that legal actors generate gendered identities by "carv[ing] up human differences into hierarchies capricious enough to accommodate subordination."[33] Victimhood, and especially sexual victimhood, is closely associated with this (re)production of hierarchized gendered identities, since "victims" and

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[28] MRINAL SATISH, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA 73–74 (2016).
[29] ROSEMARY GREY, PROSECUTING SEXUAL AND GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL COURT: PRACTICE, PROGRESS AND POTENTIAL 210–212 (2019).
[30] Melanie O'Brien, *Symposium on the ECCC: Forced Marriage in the ECCC*, OPINIOJURIS BLOG, http://opiniojuris.org/2022/11/02/symposium-on-the-eccc-forced-marriage-in-the-eccc/.
[31] Patricia Viseur Sellers & Leo C. Nwoye, *Conflict-Related Male Sexual Violence and the International Criminal Jurisprudence*, in SEXUAL VIOLENCE AGAINST MEN IN GLOBAL POLITICS 211, 214-24 (Marysia Zalewski et al. eds., 2018); Caitlin Biddolph, *Queering Crimes of Torture: A (Re)Imagining of Torture in International Criminal Tribunal for the Former Yugoslavia Jurisprudence*, 27 AUSTL. J. HUM. RTS. 382, 385-87 (2021).
[32] International Tribunal for the Former Yugoslavia, *Landmark Cases*, https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases.
[33] COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS 40 (2011).

"women" are expected to be weak, vulnerable, and passive, while "men" are rarely connected to such ideas and are thus less likely to be understood as victims of certain crimes.[34] Queer victims are often even more unintelligible to legal actors,[35] although as I discuss below, in international law spaces there is an growing discursive connection of "LGBTQI+ persons" with ideas of weakness and vulnerability, allowing such individuals to be made intelligible through a Western regime of categorization.

While this process of interpretation constructs the identities of victims, it also constructs and delimits the scope of the crime itself. I thus assert that while many legal narratives frame crime as self-evident or easily-recognized, what is "criminal" actually results from a "series of historical articulations… built through practices of speech, writing, and thinking that change over time;"[36] in other words, it is the repeated citation to law itself (in this case, the Genocide Convention) which produces a binding interpretation which delineates the form of the crime.[37] In this article I trace how different discursive constructions of victimhood generate the crimes of "genocide" and "not genocide," but I could similarly examine how common understandings of what qualifies as "rape," "domestic violence," or "sexual harassment" generate components which either qualify or fail to qualify as the crime. Instead of conceiving of law as a formalist system of rules, therefore, I instead assert that legal claims must be understood as a process of linguistic speech acts in which various actors imperfectly attempt to articulate and contest the construction of our social world.[38]

My focus here on the construction of "genocidal" sexual violence (as opposed to sexual acts which are not "genocidal") is also useful for understanding how different categories of victimization and harm are put into hierarchical competition by legal actors. In international law, acts of mass violence can be divided into three categories of crime: genocide, crimes against humanity, and war crimes. While there is no formal distinction among these three categories, genocide is widely understood as "the crime of crimes," establishing it as the "most severe" in the hierarchy of international crimes.[39] Thus we have multiple levels of sexual harm that can be

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[34] Alex Vandermaas-Peeler, Jelena Subotic & Michael Barnett, *Constructing victims: Suffering and status in modern world order*, REV. INT. STUD. 1, 4–5 (2022).
[35] *See* Laura J. Shepherd & Laura Sjoberg, *Trans- Bodies in/of War(s): Cisprivilege and Contemporary Security Strategy*, 101 FEMINIST REVIEW 5, 12 (2012).
[36] BENJAMIN MEICHES, THE POLITICS OF ANNIHILATION: A GENEALOGY OF GENOCIDE 12 (2019).
[37] *See* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX 225 (1995).
[38] MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS 10–13 (2014).
[39] MEICHES, *supra* note 36 at 14.

interpreted into a specific situation: sexual violence which qualifies as an act of genocide, sexual violence which only qualifies as a crime against humanity or war crime, and sexual violence which merely qualifies as an human rights violation or violation of domestic law. As I demonstrate below, while sexual violence against women is sometimes interpreted as genocidal (that is, qualifying as the worst form of sexual violence), identical acts against individuals of other genders are often not interpreted as genocidal and are thus discounted or rendered "less serious" in comparison.

This paper proceeds in three parts. First, I examine the doctrinal history of genocide and sexual violence as international crimes, highlighting the tensions and inconsistencies in what could otherwise be a simple legal narrative. Importantly, I outline how feminist legal interventions based around a binary assumption of gendered victimhood resulted in a juridical narrative about genocidal sexual violence as a crime solely committed against cisgender women. Next, I turn to the Rohingya genocide, examining how previous narratives about genocide influenced the interpretations of legal actors, resulting in a particularly narrow interpretation about the delimitation of genocidal sexual violence. Finally, I conclude with a broad discussion about the inescapable role of interpretation in criminal justice, drawing from several critical legal traditions to emphasize a never-complete understanding of gender as a political framework for adjudicating harm.

To accomplish this goal, I draw from unique empirical work conducted over the course of four years, bringing together document analysis, interviews with over sixty legal actors, and site observation to produce a detailed picture of the (mis)understandings which have led to the current exclusion of certain Rohingya victims. Rather than just interviewing participants and repeating what they told me, however, my analysis has focused on the discursive links between different concepts that are used by legal actors in interviews, documents, and other legal contexts.[40] This search for routine practices seeks to deconstruct what is taken for granted as obvious or as markers of competent behavior.[41] Because of the Covid-19 pandemic, much of this fieldwork has been conducted online, which has demanded a careful and methodical approach to analyzing the statements made during the various webinars and online events focused on justice

[40] Lene Hansen, *Performing Practices: A Poststructuralist Analysis of the Muhammad Cartoon Crisis*, *in* INTERNATIONAL PRACTICES 280, 293 (Emanuel Adler & Vincent Pouliot eds., 2011).
[41] *Id.*

for the Rohingya genocide. I also was able to attend the 2022 ICC Assembly of States Parties in person, and quotes from that week have been included here. For confidentiality purposes, the names and identities of all interviewees were anonymized.

Additionally, before beginning, it is important to clarify that this article should not be read as an unequivocal endorsement of criminal trials as a solution or ideal remedy to incidents of mass violence. As I have written previously, international justice relies heavily on an idealist rhetoric that is often incompatible with formalized criminal proceedings and the right of the accused to be innocent before proven guilty.[42] I am also keenly inspired here by the work of many critical colleagues who have challenged domestic and international criminal systems as cruel, ineffective, and anti-feminist, despite the fact that many international activists have historically embraced criminal law as a solution to gender-based violence.[43] Similarly, I am certainly not calling for the simple "representation" of under-represented minority groups in criminal prosecutions, especially since testifying in a criminal trial can be traumatic or dangerous to a victim without providing much substantive benefit.

However, my interest in criminal justice, and international criminal justice specifically, derives from the important and often-invisible role of law in generating stories about situations of violence. These narratives – of a society, a war, or a genocide – can help vindicate or validate the suffering of victims, creating an official narrative against which individuals can base their claims for justice or reparation.[44] This is especially important in situations of mass atrocity since international criminal law can do little to address the individual wrongs experienced by thousands of people: for example, trials at the International Criminal Court often only feature testimony from a comparatively small handful of witnesses.[45] Instead, criminal law is central for allocating guilt and victimhood, which can be an important resource to help victims come to

[42] David Eichert, *Hashtagging Justice: Digital Diplomacy and the International Criminal Court on Twitter*, 16 HAGUE J. DIPL. 391, 405–409 (2021).
[43] Regarding international law, *see* OLIVIA NANTERMOZ, IMAGINING INTERNATIONAL JUSTICE - A HISTORY OF THE PENAL HUMANITARIAN PRESENT 7-8 (forthcoming March 2024); Mattia Pinto, *Historical Trends of Human Rights Gone Criminal*, 42 HUMAN RIGHTS QUARTERLY 729, 759–761 (2020). Among the cruelties inherent to many domestic criminal systems includes the reality of slave-like labor conditions. *See* Johann Koehler, *Don't Talk to Me about Marx Anymore!*, 22 PUNISHMENT & SOC. 731, 733-735 (2020).
[44] Vandermaas-Peeler, Subotic, and Barnett, *supra* note 34 at 5.
[45] Recent developments, including the ability for parties at the ICC to admit witness statements instead of live testimony, further complicate efforts to understand the benefits of international justice mechanisms for victims. Megan A Fairlie, *The Abiding Problem of Witness Statements in International Criminal Trials*, 50 N.Y.U. J. INT'L L. & POL. 75, 77–78 (2017).

terms with their experiences.[46] Moreover, access to monetary reparations, as well as medical and social support, can sometimes rely upon recognition by legal authorities, which makes the exclusion of certain victims all the more problematic.[47] If men and queer victims of genocidal sexual violence are excluded from official narratives about mass violence, such exclusion could very well carry forward to their future exclusion from post-rape medical care, educational opportunities, and financial support allocated to victims of sexual violence.[48]

I. GENOCIDE AND SEXUAL VIOLENCE – A CONSTRUCTED RELATIONSHIP

In its simplest form, the doctrinal history connecting sexual violence to genocide is fairly short. The Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "Genocide Convention") lists two main elements which comprise the crime of genocide.[49] First, there is a *mens rea* element which requires that violence is committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[50] The Genocide Convention then identifies five broad *actus rei* which can qualify as genocidal:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group; and
(e) Forcibly transferring children of the group to another group.[51]

The Genocide Convention was a direct response to the horrors of the Holocaust, and especially the systematic Nazi policy of extermination centered around concentration camps,

[46] *See* CONSTABLE, *supra* note 38 at 127.
[47] *See, e.g.,* PHILIPP SCHULZ, MALE SURVIVORS OF WARTIME SEXUAL VIOLENCE: PERSPECTIVES FROM NORTHERN UGANDA 131–159 (2020). (assessing how some male survivors in Uganda view reparations and recognition).
[48] Chris Dolan, *Victims Who Are Men*, *in* THE OXFORD HANDBOOK OF GENDER AND CONFLICT 86, 96–97 (Fionnuala Ní Aoláin et al. eds., 2018).
[49] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045 (1988), 78 U.N.T.S. 277 [hereinafter Genocide Convention].
[50] *Id*., art. II.
[51] *Id.*

killing fields, and medical experimentation.[52] This focus on killing, however, meant that there was little discussion of the connection between sexual violence and genocide, and no charges were filed at Nuremberg or the other post-war criminal tribunals regarding the genocidal use of sexual violence against Jews and other minority groups.[53] Moreover, while non-genocidal sexual violence against women was outlawed by the post-war Geneva Conventions,[54] many other Cold War-era treaties (including the Convention on the Elimination of All Forms of Discrimination Against Women, or CEDAW) were silent about the legal status of sexual violence.[55]

By the 1990s, however, the international community regained interest in using international law as a response to mass violence.[56] Two tribunals – the ICTY and the International Criminal Tribunal for Rwanda (ICTR) – were created with the goal of bringing some sense of justice to the mass atrocities committed in both conflicts.[57] The Rome Statute was signed in 1998, creating the permanent International Criminal Court,[58] while the early 2000s saw the establishment of smaller tribunals in places like Sierra Leone, Cambodia, and East Timor to address mass atrocity.[59]

The first case about genocide from this period, *Akayesu*, came out of the ICTR.[60] In that case, in addition to finding the defendant responsible for multiple genocidal murders, the ICTR judges also ruled that acts of sexual violence could constitute genocide if they were committed with the specific intent, required under the Genocide Convention, to "destroy, in whole or in part" the targeted group.[61] Sexual violence, while not explicitly named in the Genocide Convention, could nevertheless qualify as an *actus reus* of genocide, both by "causing serious

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[52] A. Dirk Moses, *Raphael Lemkin, Culture, and the Concept of Genocide*, *in* THE OXFORD HANDBOOK OF GENOCIDE STUDIES 19, 36–37 (Donald Bloxham & A. Dirk Moses eds., 2010).
[53] Elisa von Joeden-Forgey, *Gender and Genocide*, *in* THE OXFORD HANDBOOK OF GENOCIDE STUDIES 61, 78 (Donald Bloxham & A. Dirk Moses eds., 2010).
[54] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. For a greater discussion of whether sexual violence against men violates the Geneva Conventions and their Optional Protocols, *see* Eichert, *supra* note 17 at 165.
[55] Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, 16 (entered into force Sept. 3, 1981). For greater context about this omission, *see* Neil A Englehart, *CEDAW and Gender Violence: An Empirical Assessment*, MICH. STATE L. REV. 265, 266–268 (2014).
[56] ANNE-MARIE DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 15–17 (2005).
[57] *Id.*
[58] Rome Statute of the Int'l Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002).
[59] *See generally* CESARE P. R. ROMANO, ANDRÉ NOLLKAEMPER, JANN K. KLEFFNER, INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA (2004) (discussing the politics behind several international tribunals).
[60] Prosecutor v. Akayesu (*Akayesu*), ICTR-96-4-T, Judgment (Sept. 2, 1998).
[61] *Id.* at ¶ 731.

bodily or mental harm to members of the group" under Article II(b) and by "inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" under Article II(c).[62] The judgment also affirmed that sexual violence could be genocidal under Article II(d) by preventing births within a group through sexual mutilation, forced impregnation, sterilization, the separation of the sexes and the prohibition of marriages; the process of preventing births could also be psychological if a person was so traumatized that they chose not to procreate, which would have the same effect upon the community's biological reproduction.[63] Finally, the judgment also cited to witness testimony of brutal sexual violence being used as a means of killing, which could amount to a fourth *actus reus* of genocide under Article II(a).[64] *Akayesu* was lauded as a ground-breaking case, not only for handing down the first genocide conviction since the post-World War Two period, but also for highlighting the connection between sexual violence and genocide which until then had been outside dominant assumptions about the crime of genocide.[65]

Following *Akayesu*, a number of other trials at both the ICTR and ICTY reaffirmed the principle that sexual violence could constitute an *actus reus* of genocide.[66] Notably, several cases confirmed that sexual violence did not need to be fatal or result in permanent infertility for it to be genocidal in nature.[67] For example, building upon the precedent in *Akayesu*, the Trial Chamber in *Gacumbitsi* ruled that genocidal violence could include acts leading to the "impairment of mental faculties" or serious harm that is later remediable.[68] *Akayesu* has similarly influenced the findings of other post-conflict tribunals about sexual violence as an act of genocide, including the Iraqi High Tribunal and the Guatemalan Court for High Risk Crimes,[69]

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[62] *Id*.
[63] *Id.* at ¶¶ 507-508.
[64] *Id.* at ¶ 429.
[65] Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 318 (2003). Not all feminists were happy, however, interpreting the judgment as suggesting that women's rights were secondary to the harm experienced by the community. KAREN ENGLE, THE GRIP OF SEXUAL VIOLENCE IN CONFLICT: FEMINIST INTERVENTIONS IN INTERNATIONAL LAW 110–112 (2020). Other feminists questioned the reliance on the role of women in biological reproduction as opposed to autonomous rights-having individuals. CHISECHE SALOME MIBENGE, SEX AND INTERNATIONAL TRIBUNALS: THE ERASURE OF GENDER FROM THE WAR NARRATIVE 70–73 (2013), https://null/view/title/509989 (last visited Jun 1, 2020).
[66] *See* Eichert, *supra* note 17 at 169–170, 173. *But see* ENGLE, *supra* note 65 at 103. (discussing complaints about the low conviction rate at the ICTR for genocidal sexual violence).
[67] Eichert, *supra* note 17 at 170.
[68] Prosecutor v. Gacumbitsi (*Gacumbitsi*), ICTR-2001-64-T, Judgment ¶¶ 200-201 (Sept. 2, 1998).
[69] Eichert, *supra* note 17 at 177–178.

as well as several UN Security Council resolutions articulating the connection between sexual violence and genocide.[70]

One key detail, however, is that in *Akayesu* and subsequent cases, genocidal sexual violence is *only* conceived as a crime committed against cisgender women. In *Akayesu*, for example, the ICTR only heard evidence of sexual violence against female victims, concluding that "[s]exual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[71] Later ICTR cases repeated this exclusive narrative about genocidal sexual violence against cisgender women, such as in *Karema et al.* where the Trial Chamber asserted that "Tutsi women and girls were raped and sexually assaulted systematically" and that those acts "were acts of genocide."[72] While I obviously do not dispute these facts and interpretations (many cisgender women *did* experience horrific and systematic genocidal sexual violence during the Rwandan genocide and in later conflicts), the doctrinal framing of these crimes generally excludes men, transgender women, and other queer individuals.[73] In fact, as I discuss in Part Two regarding the Rohingya genocide, the narrow framing of sexual violence contained in *Akayesu* has been used as a *justification* for excluding men and queer victims from the ongoing international cases, despite the fact that there is nothing in the Genocide Convention or subsequent texts which encourages such an exclusionary practice.

It is important to note here that cisgender women were not the sole victims of sexual violence during the Rwandan genocide. The Prosecution at the ICTR discussed evidence of sexual violence against cisgender men in a small number of cases, although this evidence did not result in any charges and was mostly used to demonstrate the general chaos and depravity of the genocide.[74] A number of male survivors of sexual violence have also come forward outside of

[70] S.C. Res. 1820, ¶ 4 (June 19, 2008); S.C. Res. 2106, at 1–2 (June 24, 2013); S.C. Res. 2467, ¶ 32 (Apr. 23, 2019).
[71] *Akayesu*, *supra* note __, at ¶ 731.
[72] Prosecutor v. Karemera, ICTR-98-44-T, Judgment and Sentence, ¶¶ 1665, 1668 (Feb. 2, 2012).
[73] However, the judges in *Akayesu* did leave open the possibility for other victims of genocidal sexual violence, stating that sexual violence is "one of the worst ways of inflict[ing] harm on the victim as *he or she* suffers both bodily and mental harm." *Akayesu*, *supra* note __, at ¶ 731 (emphasis added).
[74] To cite my previous work on the topic, "[I]n *Muhimana*, the Trial Chamber's final judgment did not address allegations that the accused had cut off one man's penis and testicles and displayed them on a pole. Similarly, in *Bagosora*, the Trial Chamber heard evidence that genocidaires used machetes to cut men's scrotums and that the mutilated genitals of men were seen at roadblocks, but this was only considered as background information and the accused were not charged for such actions." Eichert, *supra* note 17 at 171.

the formal ICTR process to testify about their experiences during the Rwandan genocide. Take for example the testimony of Faustin Kayihura:

> "The woman locked me in her house. I was only thirteen, and the horrors I experienced in her house were more than I could endure. She forced me to have sex with her. She raped me three times a day for three days. She made me lie on the floor…. She would stroke my penis up and down with her hands first…. and then she would force my penis into her vagina. Sometimes she forced me to go on top of her, and sometimes she went on top of me. She was much stronger than I was, and since I was afraid, I did everything she told me to do…. After the genocide, I tried to continue my secondary school education. It was very difficult because I constantly saw visions of the woman who had raped me…. I hated myself for a long time. I hated my life and wanted it to end. I am so thankful that I have now found people who care for me…. I also met women who showed an interest in me, who listened to me and wanted to know me. For some time, I hated all women and did not want to see them, but now I am healing."[75]

For me, this story presents a clear instance of genocidal sexual violence. The repeated sexual assault and the trauma of sexual slavery caused Kayihura serious mental harm in violation of Article II(b) of the Genocide Convention, to the point that the traumatic memory of the experience haunted him for a long time and had a serious deleterious effect on his wellbeing. Similarly, Kayihura's experience could be read as a violation of Article II(d) of the Genocide Convention (preventing births), since his experiences made him suicidal and distrusting of women, and thus less likely to have children.

However, testimonies like the one shared by Faustin Kayihura did not enter the jurisprudence of the ICTR. This is partly due to a lack of evidence around such acts: male and queer survivors of sexual violence tend to be less likely to report on their experiences, and there is no record of the Prosecution challenging dominant assumptions of gendered harm by seeking out these survivors.[76] Additionally, this exclusionary framing of genocidal sexual violence was in part due to statutory limitations, since the ICTR's definition of rape excluded certain sexual acts committed by cisgender women. Notably, the crime of "rape" was solely limited to crimes which

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[75] ANNE-MARIE DE BROUWER & SANDRA KA HON CHU, THE MEN WHO KILLED ME: RWANDAN SURVIVORS OF SEXUAL VIOLENCE 93–94, 97 (2009).

[76] Valerie Oosterveld, *Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal*, 107 JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 107, 119 (2014). However, this explanation can often excuse improper investigations – notably, the Prosecutor at the ICTR blamed Rwandan women for not disclosing their experiences as a way of deflecting criticism. MIBENGE, *supra* note 65 at 67.

included penetration "by the penis of the perpetrator," which would not fit with evidence like Kayihura's testimony.[77]

This strange situation suggests that the traditional doctrinal story about sexual violence and genocide is much more complicated than a simple retelling of caselaw would suggest. Instead, it is essential to consider the political understandings of gender and harm which have been used to construct these commonplace understandings of genocidal sexual violence.[78] It is not accidental that the ICTR was accidentally restricted in its definition of rape, or that international lawyers working for the Prosecution did not think to look for male and queer survivors of sexual violence. To the contrary, the crime of sexual violence in international law had been explicitly articulated as a crime committed by men against women for centuries, creating a commonplace understanding of binary gender which has been central to the practice of international law.[79]

A. Constructing Binary Gender

As I have written elsewhere, the earliest international law texts were organized along a Christian, Eurocentric logic whereby gender and sexual victimhood were defined as binary (men and women) and hierarchical (men as more powerful and violent than women).[80] The crime of wartime rape was constructed as an act committed by cisgender men against cisgender women, with no room for victims and perpetrators who fell outside that framing.[81] This construction of the crime also structured how ideas about gender were taught and practiced for hundreds of years: the category of "woman" was constructed as the gender which experienced rape and thus needed the protection of the law.[82] Such a framing, of course, ignored the vast array of gendered

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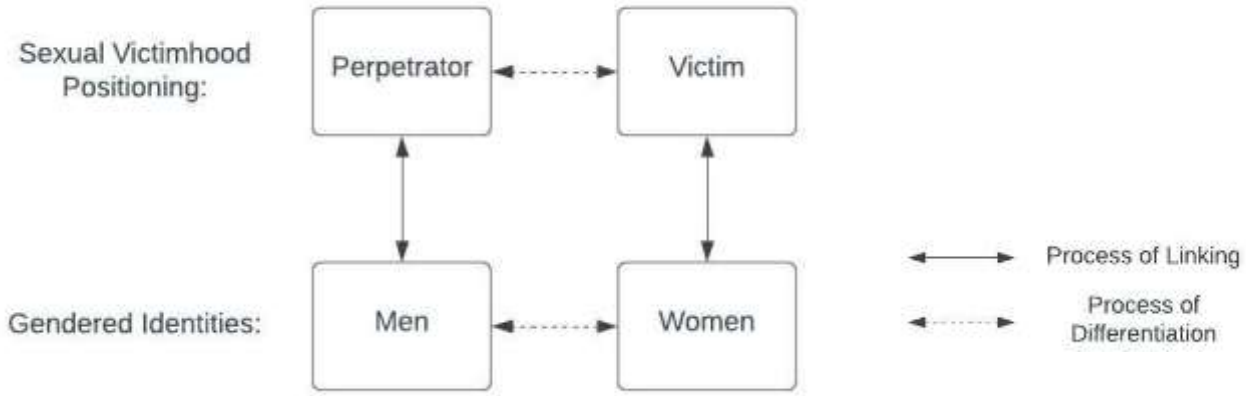
[77] Prosecutor v. Nyiramasuhuko (*Butare)*, Case No. ICTR-98-42-T, Judgement and Sentence, ¶ 6075 (Jun. 24, 2011).
[78] *See* Audrey Alejandro, *Reflexive discourse analysis: A methodology for the practice of reflexivity:*, EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS (2020), https://journals.sagepub.com/doi/10.1177/1354066120969789 (last visited Nov 26, 2020). ("Discourses do not exist in a vacuum. They need to be studied in relation to the social context in which they emerge as well as to other related discourses.").
[79] David Eichert, *Decolonizing the Corpus: A Queer Decolonial Re-examination of Gender in International Law's Origins*, 43 MICH. J. INT'L L. 557, 559 (2022).
[80] *Id.* at 566–576.
[81] *Id.* at 567.
[82] Dianne Otto, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, *in* INTERNATIONAL LAW AND ITS OTHERS 318, 322–325 (Anne Orford ed., 2006).

concepts and identities which existed around the world, with many non-binary or third-gender identities being summarily excluded by the colonizing power of law.[83] Instead, the legal constructions of "men" and "women" in international law were put into a strict binary and linked to the concepts of "perpetrator" and "victim" respectively:



This legal narrative remained dominant up through the "renaissance" of international law in the 1990s, which coincided with the rapid emergence of feminist thought into international law and politics.[84] Notably, a number of prominent feminists turned their attention away from the domestic legal debates of the 1970s and 1980s to focus instead on international law, repeating binary assumptions about gender and harm which understood women (as a unitary group) oppressed by men (another unitary group).[85] For example, (in)famous feminist law scholar Catharine MacKinnon wrote,

> "International law still fails to grasp the reality that members of one half of society are dominating members of the other half in often violent ways all of the time, in a constant civil war within each civil society on a global scale—a real world war going on for millennia… Nothing imagines a conflagration with one side armed and trained, the other side taught to lie down and enjoy it, cry, and not wield kitchen knives."[86]

[83] Eichert, *supra* note 79 at 579–586.
[84] *See* Dianne Otto, *Queering Gender [Identity] in International Law*, 33 NORDIC JOURNAL OF HUMAN RIGHTS 299, 302–309 (2015).
[85] Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1, 121–122 (2008).
[86] CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 266 (2006).

Sexual violence was conceived as the quintessential form of violence committed against women, which was universal both in its ubiquity and the lack of attention from international law. In the words of Australian feminist scholar Judith Gardam,

> "Sexual violence in warfare is the most obvious distinctive experience of women in armed conflict; it is not something they experience to any degree in common with civilians generally, it results in immense suffering and trauma, unrelated to any argument about military necessity, and is almost universal in all types of warfare. The law, however, does not reflect that reality."[87]

Alongside these feminists who were lobbying for a new focus on women's issues, a new discursive category of crime – "violence against women" – was emerging as international actors sought to interpret the armed conflicts occurring in the post-Cold War period.[88] Whereas earlier human rights treaties said nothing about "violence against women," suddenly a whole host of international documents began to advocate for its abolition, drawing from domestic feminist struggles which had successfully brought issues like sexual violence into mainstream awareness.[89] Throughout the 1990s, this category of "violence against women" was articulated through repetition in various international legal recommendations,[90] political speeches,[91] and non-binding declarations like the 1995 Beijing Platform for Action, which stated in its section on "Violence Against Women" that

> "[m]assive violations of human rights, especially in the form of genocide, ethnic cleansing as a strategy of war and its consequences, and rape, including systemic rape of women in war situations… must be punished…. While entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected

[87] Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, 46 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 55, 73 (1997).
[88] MIBENGE, *supra* note 65 at 49–54.
[89] *Id.*
[90] *E.g.,* Rep. of the Comm. on the Elimination of Discrimination against Women, 11th Sess., Jan. 20-30, 1992 at ¶¶ 4-6 U.N. Doc. A/47/38; GAOR, 47th Sess., Supp. No. 38 (1993) (interpreting CEDAW's prohibition on discrimination to include a prohibition on sexual violence while using the new framing of "violence against women").
[91] *E.g., see generally* U.N. GAOR, 48th Sess., 35th mtg., A/C.3/48/SR.35 (Nov. 16, 1993) (featuring statements from a number of diplomats in 1993 about violence against women).

> because of their status in society and their sex. Parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism."[92]

This section of the Beijing Platform continues for several paragraphs, outlining the contours of this new crime of violence against women:

> "The impact of violence against women and violation of the human rights of women in such situations is experienced by women of all ages, who suffer displacement, loss of home and property, loss or involuntary disappearance of close relatives, poverty and family separation and disintegration, and who are victims of acts of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. This is compounded by the life-long social, economic and psychologically traumatic consequences of armed conflict and foreign occupation and alien domination."[93]

Of course, I am obviously not contesting the reality of such statements – it is beyond clear that women experience tremendous violence during, after, and outside of situations of armed conflict.[94] However, the framing of sexual violence as a "distinctive experience of women in armed conflict" which happens to women *in addition* to the generalized violence that affects communities presents a very narrow narrative about sexual victimhood. This discursive construction of harm thus builds to the traditional narrative which has dominated international law for centuries: whereas international lawyers have long been aware of sexual violence against women, this new era of international law emphasized that the experiences of women were both disproportionately more violent and yet disproportionately ignored. Adding such a moral obligation to international law thus produced a new narrative about sexual violence in armed

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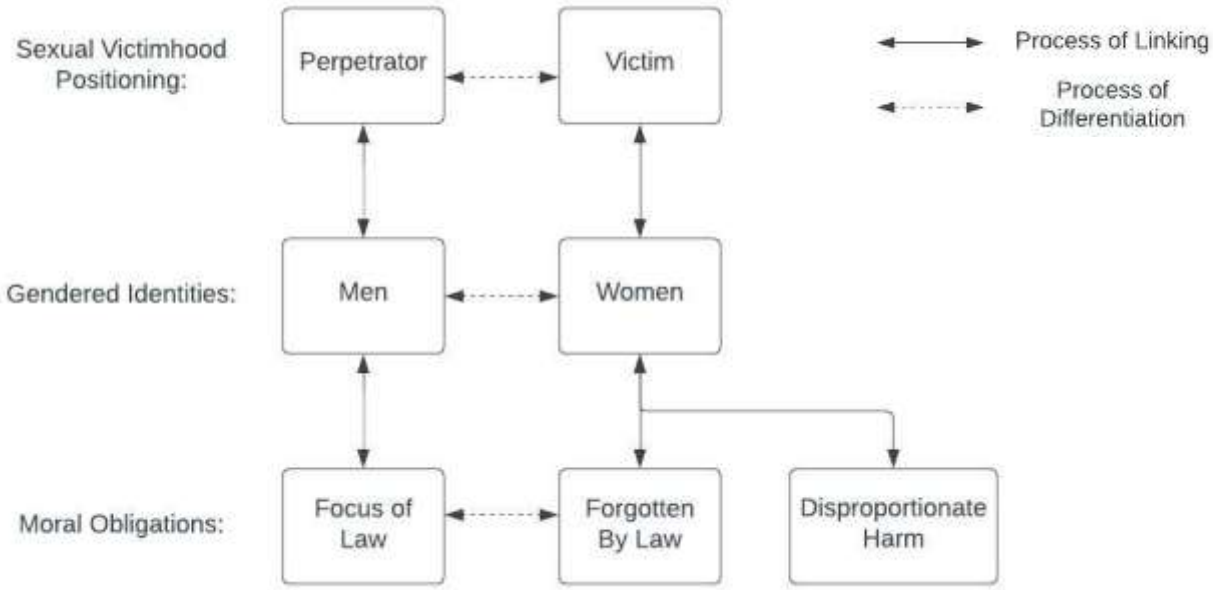
[92] Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995, U.N. GAOR, 1995 Sess., Agenda Item 165, at ¶¶ 131, 135, U.N. Doe. A/CONF.177/20 (Sep. 15, 1995), https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf.

[93] *Id.* at ¶ 135.

[94] In the words of Laura Shepherd, "While the violences reported by those [women] who have experienced them are in no way 'untrue' and it is vital to raise awareness of these issues, it is also important to problematize the politics of constructing these accounts and the ways in which processes of interpretation and representation are implicated in the 'reclamation' of knowledge that is perceived as unproblematic within this conceptualization." LAURA J. SHEPHERD, GENDER, VIOLENCE AND SECURITY: DISCOURSE AS PRACTICE 39 (2008). *See also* Brooke A. Ackerly & Jacqui True, *Reflexivity in Practice: Power and Ethics in Feminist Research on International Relations*, 10 INTERNATIONAL STUDIES REVIEW 693, 698 (2008). (discussing the importance of reflexivity for researchers studying very sensitive subjects like sexual violence).

conflict, one in which international tribunals had a responsibility to focus on sexual crimes against cisgender women:



B. Constructing the Crime of Genocidal Sexual Violence

This narrative was dominant during the early years of the ICTR and ICTY, influencing how legal actors at both courts understood the crime of sexual violence as an act committed by men against women. Moreover, tremendous amounts of evidence emerging from post-genocide Rwanda supported this narrative: thousands of cisgender women were subjected to all forms of sexual violence to horrific ends. These accounts were then gathered by investigators, NGOs, and other fact-finders who were tasked with identifying acts of violence and interpreting them according the ICTR statute and other international legal sources.

One of the most notable accounts of sexual violence in Rwanda came from a report produced by Binaifer Nowrojee at Human Rights Watch's Women's Rights Project.[95] This report, entitled "Shattered Lives: Sexual Violence During the Rwandan Genocide and its

[95] HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996), https://www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf.

Aftermath," recounted the extent of the tremendous violence faced by cisgender women in the conflict:

> "During the Rwandan genocide, rape and other forms of violence were directed primarily against Tutsi women because of both their gender and their ethnicity…. Some Hutu women were also targeted with rape because they were affiliated with the political opposition, because they were married to Tutsi men or because they protected Tutsi. A number of women, Tutsi and Hutu, were targeted regardless of ethnicity or political affiliation."[96]

Importantly, Nowrojee connects the crimes described in her report to the violence experienced by a universal category of women in all parts of the world, drawing upon the moral obligations inherent to feminist international law discourse in the 1990s:

> "Throughout the world, sexual violence is routinely directed against females during situations of armed conflict. This violence may take gender-specific forms, like sexual mutilation, forced pregnancy, rape or sexual slavery. Being female is a risk factor; women and girls are often targeted for sexual abuse on the basis of their gender, irrespective of their age, ethnicity or political affiliation. Rape in conflict is also used as a weapon to terrorize and degrade a particular community and to achieve a specific political end."[97]

This report, with its call for greater accountability for sexual crimes against Rwandan women, was key in motivating other international lawyers who were already interested in the ICTR's work.[98] As such, the opening of the *Akayesu* trial at the ICTR was met with initial interest from feminist activists.[99] The Prosecutor's opening statement included "sexual assault and mutilations" among the crimes which had been committed against the Tutsi population in Rwanda,[100] and a number of witness statements testified to a systematic campaign of sexual

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[96] *Id.* at 3.
[97] *Id.* at 2.
[98] Interviews with several feminist activists involved with advocacy at the ICTR. *See also* Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL LAW JOURNAL 217, 224 (2000). ("Rape was essentially invisible until nine months later…. Nor was it, thereafter, officially documented. That was left to the initiatives of two NGOs, African Rights and the Women's Project of Human Rights Watch").
[99] Copelon, *supra* note __, at 224-225.
[100] Coalition on Women's Human Rights in Conflict Situations, *Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the Competence of the Tribunal*, para. 24, https://4genderjustice.org/ftp-files/legal-filings/Prosecutor_v_Akayesu_ICTR.pdf [hereinafter Akayesu Amicus Brief].

violence against women. However, it soon became clear that neither Akayesu nor other defendants were being charged for these sexual crimes.[101]

A coalition of feminist observers began to lobby the ICTR to charge Akayesu with sexual violence, submitting an amicus brief which asserted that the sexual violence committed against cisgender women could be charged as acts of genocide for (1) causing serious bodily or mental harm; (2) inflicting conditions of life calculated to bring about the physical destruction of the group; and (3) imposing measures to prevent births.[102] At the same time, Judge Navanethem Pillay (one of three judges on the case and the only woman) began to question the prosecutor as to why witness allegations of sexual violence were not being investigated.[103] Judge Pillay, influenced by feminist pressure, ultimately suspended the case, ordering to prosecutor to conduct further investigation into such crimes.[104] A little more than a month later, the prosecution submitted a motion to amend the indictment, adding two new charges for rape and inhumane acts.[105] Additionally, throughout the trial process, the prosecution was assisted by women's rights groups and feminist activists who were working to identify victims of sexual violence who would be willing to testify before the ICTY.[106]

In this section I have sought to trace how a binary assumption about gendered harm dominated the practice of international law around the time of *Akayesu*. Two overlapping

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[101] *Id*. at ¶ 35-36. The Prosecution at the ICTR failure to charge Akayesu with genocide on the basis of sexual violence was not a one-time event. *See e.g.,* Mark A Drumbl, *"She Makes Me Ashamed to Be a Woman": The Genocide Conviction of Pauline Nyiramasuhuko, 201*, 34 MICH. J. INT'L L. 559, 119–120 (2013). (discussing the case of Pauline Nyiramasuhuko, who was only charged with committing rape as a crime against humanity).

[102] Akayesu Amicus Brief, *supra* note __, at ¶ 43.

[103] ENGLE, *supra* note 65 at 106. Judge Pillay had close connections to the international feminist movement and even attended the 1993 World Conference on Human Rights in Vienna, later stating "Women were able to convince the governments of the world that violence against women for instance was as much a public issue, a concern for the world community, as political torture." Quoted in Barbara Frey, *A Fair Representation: Advocating for Women's Rights in the International Criminal Court*, CASE STUDIES ON WOMEN AND PUBLIC POLICY (2004), www.academia.edu/ 826971/A_Fair_Representation_Advocating_for_Womens_Rights_in_the_International_ Criminal_Court.

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

[105] Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 97, 105–106 (1999).

[106] Jonneke Koomen, *"Without These Women, the Tribunal Cannot Do Anything": The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda*, 38 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 253, 257–259 (2013).

narratives emphasized that cisgender women were victims of sexual violence both in Rwanda and around the world, influencing the investigation and prosecution of such crimes. While it is incontrovertibly clear that cisgender women experienced (and continue to experience) sexual violence during situations of genocide, these narratives about binary gendered harm resulted in a category of crime – genocidal sexual violence – that only affects cisgender women. Later, when the *Akayesu* judgment was reproduced in subsequent legal proceedings, the crime of genocidal sexual violence in turn reproduced identity categories about "men" and "women" and their actions during genocide which continues to influence the practice of law to this day.

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

A quarter of a century after the *Akayesu* ruling, how do narratives about gender and victimhood guide the interpretation of genocidal sexual violence? This section provides a novel case study into this process in the ongoing cases related to the Rohingya genocide. Drawing upon document analysis, interviews, and participant observation, I demonstrate how sexual violence against cisgender women is constructed as "genocidal" (or in other words, more serious) than sexual violence against men and queer Rohingya, even though the acts are often functionally identical. I examine four key forums where this process of interpretation is taking place: the UN Fact-Finding Mission, the International Court of Justice, the International Criminal Court, and the ongoing universal jurisdiction case brought by Rohingya activists in Argentina.

Before beginning, however, it is very important to state that the sexual crimes committed against Rohingya women were indisputably horrific, amounting to perhaps some of the worst acts committed during the 21st century. The content of this section, therefore, should never be read as disputing the reality of the violence committed against Rohingya women or downplaying the severity of their experiences.[107] To the contrary, I want to assert that the zero-sum game constructed between different victims is false, and that genocidal violence against cisgender men,

[107] To quote Laura Shepherd, "To speak of construction is in no way to suggest that experiences of gendered violence are somehow wilfully fabricated, or that the life situations of individuals affected by gendered violence should not be a target for thoughtful and effective research and action. Rather it should draw attention to the processes of representation involved in the telling and retelling of these accounts. While the acts of violence are 'true' and their telling is important, it is vital to be aware of the politics of constructing these accounts…." Laura J. Shepherd, *Loud Voices Behind the Wall: Gender Violence and the Violent Reproduction of the International*, 34 MILLENNIUM 377, 400–401 (2006).

cisgender women, and queer people should never be put in competition with each other. In other words, this section seeks precisely to undo much of the boundary-drawing that has happened in the practice of international law around genocidal sexual violence. To do so, I will necessarily need to place terrible crimes next to one another and compare them, which I have attempted to do with the utmost respect for victims living and dead. If I have been unsuccessful in this regard, I hope for patience and forgiveness from the affected individuals and their communities.

A. UN Fact-Finding Mission

The UN Human Rights Council established the FFM in March 2017 as a response to allegations of genocide and mass violence committed against the Rohingya and other ethnic groups in Myanmar.[108] The FFM released several reports, including two general reports in 2018 which included allegations of sexual violence[109] as well as a specific report about sexual violence in 2019.[110] Notably, the FFM did more than simple fact-finding: while their reports called for a "competent court" to determine the liability of leaders for atrocity crimes,[111] the FFM also made various "conclusions" about their findings, drawing from treaties, caselaw, and other international legal standards.[112] Members of the FFM viewed this as part of their mandate: as one interviewee told me, "We're all lawyers, and human rights is a legal system, so you have to make legal conclusions on the basis of fact." These conclusions, as I describe below, have been taken as binding decisions by other legal teams, even though they lacked such legal authority.

However, it is vital to note that the FFM was not the first group to interview Rohingya about their experiences. Beginning in 2016,[113] as waves of refugees crossed the border into Bangladesh and other countries, official narratives about genocidal sexual violence inside Myanmar began to develop through refugee interactions with international actors. Two main groups were responsible for the creation and interpretation of these narratives: NGO workers and

[108] G.A. Res. 34/22, ¶ 11, U.N. Doc. A/HRC/RES/34/22 (24 Mar. 2017).
[109] U.N. Hum. Rts. Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/39/64 (Sep. 12, 2018) [hereinafter "FFM Short Report"]; U.N. Hum. Rts. Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/29/CRP.2 (Sep. 17, 2018) [hereinafter "FFM Detailed Report"].
[110] FFM 2019 Report, *supra* note __.
[111] FFM Short Report, *supra* note __ at ¶ 87.
[112] FFM 2019 Report, *supra* note __ at 2.
[113] This is not to say that the official "genocide" began in 2016. Moreover, many Rohingya have left Myanmar over the past few decades.

journalists. In a forthcoming piece I discuss how these two groups were key to producing an initial narrative about the Rohingya genocide in which "men were killed and women were raped and killed." Part of this was due to the sheer immensity of the exodus out of Myanmar: a number of interviewees talked about sitting on the side of the river watching tens of thousands of Rohingya make the crossing into Bangladesh; the sheer immensity of the tragedy made any kind of scientific or representative sampling impossible.

At the same time, systems were also set up to prioritize the investigation of sexual violence against cisgender women, largely inspired by the aforementioned narrative expectation that sexual violence primarily or solely affects cisgender women in conflict. For example, one interviewee was sent to Bangladesh as part of her work with the women's rights section of a major international human rights NGO. While she heard evidence of sexual violence against individuals of all genders, her report and her short visit to Bangladesh were contractually focused on the experiences of cisgender women. This same interviewee also helped other international actors identify and interview refugees for their work, sometimes even putting these actors in contact with the same female survivors she had already interviewed. This process of targeting female refugees for interviews was on one hand important, revealing the earliest suggestions that sexual violence against cisgender women was a systematic act of genocide committed by Myanmar's military. At the same time, however, these early reports also (re)produced a dominant narrative that sexual violence only affected cisgender women, a narrative that was already circulating by the time the FFM began its work.

1. FFM Statements 2017-2018

Several months after its creation, the FFM began to report back to the United Nations about their findings. Importantly, in early reporting sexual violence was articulated as a crime which solely affected cisgender women and girls. For example, in a report from late 2017 the FFM reported,

> [Children] told us of witnessing their fathers killed, their mothers and sisters raped, and their siblings burned to death…. We have heard testimonies of young girls raped, having their throats slit or being burnt to death after being raped, or simply gang-raped to death.

> Women described mass rapes in the jungle and the mutilation of victims. In some cases, the site was alleged to be military barracks.[114]

Another press release from this period repeats this connection:

> "The accounts of sexual violence that I heard from victims are some of the most horrendous I have heard in my long experience in dealing with this issue in many crisis situations…. One could see the trauma in the eyes of the women I interviewed."[115]

In March 2018, the FFM made a formal statement about its work to the Human Rights Council which similarly reproduced this narrative:

> "All the information collected by the Fact-Finding Mission so far further points to violence of an extremely cruel nature, including against women. We have collected credible information on brutal rapes, including gang rapes, and other forms of sexual violence, often targeting girls and young women. These rapes were often accompanied with severe physical injuries, including the mutilation of parts of the victims' bodies. The Fact-Finding Mission has strong indications that many women and girls who were raped died from the injuries they sustained or were killed. Information also indicates that some women and girls were abducted, detained and raped in the security forces' camps. The Fact-Finding Mission has met with women who showed fresh and deep bite marks on their faces and bodies sustained during acts of sexual violence."[116]

Importantly, the FFM here is not stating that no sexual violence was committed against men or queer individuals in Myanmar. It is also not clear that members of the FFM had interviewed other survivors; given the sheer immensity of the refugee situation in Bangladesh, it would be understandable that not all survivors had equal access to the small FFM team only a few months after the 2017 clearance operations.

However, in September 2018 the FFM released two formal reports detailing serious acts of violence committed by Myanmar's military against the Rohingya and members of other ethnic

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[114] U.N. Hum. Rts. Council, *Statement to the Special Session of the Human Rights Council on the "Situation of Human Rights of the Minority Rohingya Muslim Population and Other Minorities in Rakhine State of Myanmar"* (Dec. 5, 2017), www.ohchr.org/en/statements/2017/12/statement-special-session-human-rights-council-situation-human-rights-minority.

[115] U.N. Hum. Rts. Council, *Experts of the Independent International Fact Finding Mission on Myanmar Conclude Visit to Bangladesh* (Oct. 27, 2017), www.ohchr.org/en/press-releases/2017/10/experts-independent-international-fact-finding-mission-myanmar-conclude.

[116] U.N. Hum. Rts. Council, *Statement by Mr. Marzuki DARUSMAN, Chairperson of the Independent International Fact-Finding Mission on Myanmar, at the 37th session of the Human Rights Council* (Mar. 12, 2018), www.ohchr.org/en/statements/2018/03/statement-mr-marzuki-darusman-chairperson-independent-international-fact-finding

groups in three states (Kachin, Rakhine, and Shan). The reports were connected: the shorter, 21-page report was a summarized version of the longer, 441-page report. The shorter report concretely stated that beginning in 2016 Rohingya "[w]omen and girls were subjected to sexual violence, including gang rape."[117] Specifically:

> "Rape and other forms of sexual violence were perpetrated on a massive scale. Largescale gang rape was perpetrated by Tatmadaw soldiers in at least 10 village tracts of northern Rakhine State. Sometimes up to 40 women and girls were raped or gang-raped together…. Rapes were often in public spaces and in front of families and the community, maximizing humiliation and trauma. Mothers were gang raped in front of young children, who were severely injured and in some instances killed. Women and girls 13 to 25 years of age were targeted, including pregnant women. Rapes were accompanied by derogatory language and threats to life, such as, "We are going to kill you this way, by raping you." Women and girls were systematically abducted, detained and raped in military and police compounds, often amounting to sexual slavery. Victims were severely injured before and during rape, often marked by deep bites. They suffered serious injuries to reproductive organs, including from rape with knives and sticks. Many victims were killed or died from injuries. Survivors displayed signs of deep trauma and face immense stigma in their community. There are credible reports of men and boys also being subjected to rape, genital mutilation and sexualized torture."[118]

This last sentence, informing the world about "credible reports of men and boys" also experiencing sexual violence, was one of the first times anyone in the international community had heard about these crimes. At the same time, however, the phrasing of the sentence and its addition to the end of a long and detailed list of sexual violence committed against women suggests both that (1) more needed to be investigated and (2) these crimes are much less prevalent than the detailed, widespread, and violent sexual acts committed against Rohingya women and girls.

Shockingly, however, if one reads the longer, 441-page report, there is already concrete evidence of these "credible reports" of sexual violence against men and boys, with significant reporting on violence dating back several years:

> "For the period following the June 2012 violence, there are also credible and consistent reports of men and boys being subjected to sexual violence, including rape, sexualised torture and humiliation, either by authorities or in their presence. Rohingya boys were detained in the same cells as adult men. Detainees stated that guards anally raped

[117] FFM Short Report, *supra* note __ at ¶ 45.
[118] *Id.* at ¶ 38.

> Rohingya boys. At night, groups of boys and young men were subjected to penile rape, both orally and anally, by ethnic Rakhine detainees, often in the same cell as other detainees. One former detainee described how boys were taken into the latrine after dark: 'Almost every night they took these boys to the latrine in the cell. They forced them to perform oral sex and raped them. If they refused, they put their face into the latrine. We used to hear the screaming of the victims, but we were helpless and could do nothing.' Rohingya men and boys were also subjected to sexual humiliation, often in the presence of other inmates. Detainees experienced the degrading treatment of being forced to walk naked from their cell to the shower and showering in groups of up to 20 to 30 persons in front of one another, including family members, which was particularly uncomfortable and considered shameful. Detainees reportedly had to wait outside their cells naked until they dried. Another detainee described how guards burned the genitals of Rohingya detainees.[119]

The longer FFM report similarly summarized sexual violence against men and boys in 2016 and 2017, although these sections acknowledge that further research is necessary. For example, in one section the FFM noted,

> Rape and other sexual and gender-based violence were perpetrated on a massive scale during the "clearances operations" from 25 August 2017. This includes mass gang rapes, sexually humiliating acts, sexual slavery and sexual mutilations. Rohingya women and girls were the main victims, although there were some instances involving men and boys. Young women and girls were particularly targeted for sexual violence and were disproportionally affected. The main perpetrators were the Tatmadaw [Myanmar military], although other security forces, and sometimes ethnic Rakhine men, were also involved.[120]

A few pages later, the FFM reported,

> Women and girls were not the sole victims and survivors of sexual violence during the "clearance operations". The Mission received credible reports of sexual violence against men and boys, including rape, genital mutilation and sexualised torture, sometimes leading to death. The scale of this sexual violence remains unknown…. During detention, which was prevalent during the "clearance operations", there are consistent credible reports of men and boys being subjected to sexual violence, including rape, sexualised torture and humiliation by authorities or in their presence. The extent of sexual violence against men and boys in northern Rakhine throughout this period warrants further investigation. [121]

[119] FFM Detailed Report, *supra* note __ at ¶¶ 675-676.
[120] *Id.* at ¶ 970.
[121] *Id.* at ¶¶ 939-40.

Additionally, at one point the FFM articulated a much wider understanding of sexual violence in which "individuals, families and the wider Rohingya community" were targeted by "brutal sexual violence, which they suffered or witnessed."[122] As such, the FFM asserted,

> "Rape was used as a form of torture, to terrorise the community and as a tactic of war. It continues to have a devastating and lasting impact on the individuals who suffered from it, their families and the wider Rohingya community, both physically and mentally. The Mission has concluded that the widespread sexual violence and the manner in which it was perpetrated was an intended effort, at least in part, to weaken the social cohesion of the Rohingya community and contribute to the destruction of the Rohingya as a group and the breakdown of the Rohingya way of life.[123]

Given this abundance of initial evidence which points to a system of sexual violence being used against men, women, boys, and girls, with individuals of both genders either experiencing sexual violence firsthand or witnessing it, the fact that the summarized September 2018 report only devotes one sentence to the existence of sexual crimes being committed against male victims is surprising, to say the least.

The longer FFM report then asserts that there are "reasonable grounds to conclude" that genocide has been committed.[124] In addition to concluding that the Rohingya form a targeted ethnic, racial, and religious group under international law,[125] the FFM also inferred genocidal intent from the actions and statements of the military,[126] fulfilling the *mens rea* requirement outlined in the Genocide Convention. The FFM then identified evidence which established four *actus rei* of genocide: (a) killing members of the group, (b) causing serious bodily or mental harm, (c) deliberately inflicting conditions of life calculated to bring about the group's physical destruction in whole or in part, and (d) imposing measures to prevent births.[127] Their analysis of all four acts, however, solely focused on evidence of sexual violence against women. For example, with the first act (killing members of the group), the FFM reported that in one instance "villagers were gathered together, before men and boys were separated and killed[, while] women and girls were taken to nearby houses, gang raped, then killed or severely injured."[128]

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[122] *Id.* at ¶ 941.
[123] *Id.*
[124] *Id.* at ¶ 1386.
[125] *Id.* at ¶¶ 1390-1391.
[126] *Id.* at ¶¶ 1417-1438.
[127] *Id.* at ¶¶ 1392-1410.
[128] *Id.* at ¶ 1395.

Regarding serious physical and mental harm, the FFM cites to *Akayesu*, arguing that sexual violence against women and girls could be found to be genocidal:

> Women and girls who had their breasts cut off and those who lost limbs or parts of limbs suffered "serious injury to external organs" rising to the level of serious bodily harm. The rape, gang rape and other sexual violence inflicted on Rohingya women and girls before and during the "clearance operations" was often accompanied by the additional infliction of serious bodily harm; victims were severely bitten or otherwise scarred on the face, breasts, thighs, and genitalia, and subjected to other mutilation of their reproductive organs. The bite-marks and other mutilations have left permanent scars and serve as a constant reminder to survivors, their families and community of the crimes to which they have been subjected. Given the substantial number of women and girls affected, it is difficult to believe that this was not an intentional act akin to a form of branding…. [Such destruction] has been recognized as demonstrating an intent to destroy a group 'while inflicting acute suffering on its members in the process.'"[129]

Regarding the act of deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part," the FFM further pointed to sexual violence against Rohingya women and girls.[130] To make their argument, the FFM cite precedent from the ICTR (where women and girls were the only victims of genocidal sexual violence) and the report "Shattered Lives" by Binaifer Nowrojee (in which sexual violence is described as a crime only affecting women and girls):

> "Rape has been recognized as a condition of life designed to bring about its destruction…. As observed by a scholar in the context of Rwanda [Binaifer Nowrojee], "the evidence illustrates that many rapists expected, consequent to their attacks, that the psychological and physical assault on each Tutsi woman would advance the cause of the destruction of the Tutsi people". The scale, brutality and systematic nature of rape, gang rape, sexual slavery and other forms of sexual violence against the Rohingya lead inevitably to the inference that these acts were, in fact, aimed at destroying the very fabric of the community, particularly given the stigma associated with rape within the Rohingya community."[131]

Finally, the FFM identified sexual violence against Rohingya women as evidence of a genocidal policy to impose measures intended to prevent births, again citing *Akayesu*:

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[129] *Id.* at ¶ 1397.
[130] *Id.* at ¶ 1406
[131] FFM Detailed Report, *supra* note __, at ¶ 1406.

> "[T]he high prevalence of rape and other brutal forms of sexual violence against women and girls in Rakhine State, in particular in the context of the "clearance operations", may have been aimed at affecting their reproductive capacity. The majority of victims were either of childbearing age or younger, and the rapes were often accompanied by deliberate mutilation of genitalia…. Apart from the obvious physical destruction of the reproductive capacity in such cases, members of the Rohingya community who have experienced sexual violence are less likely to be able to procreate. Where Rohingya women or girls have been subjected to rape, gang rape or other forms of sexual violence, this significantly reduces the possibility of marriage. In some cases, Rohingya husbands have rejected spouses who have been subjected to sexual violence. This is largely due to the cultural stigma surrounding sexual violence, victimhood and perceived gender roles within the community. [According to the judges in *Akayesu*,] [r]ape 'can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.' Members of security forces perpetrating sexual violence, and certainly their commanders who ordered or condoned it, would be aware of this dynamic."[132]

What conclusion should be drawn from these two reports? On one hand, the FFM faced tremendous obstacles in interviewing refugees in the post-exodus chaos. Moreover, I do not wish to discredit the work of the FFM, who did note in their reporting how social expectations about masculinity among Rohingya men made it difficult to interview them about sexual violence.[133] At the same time, however, the FFM engaged in a clear process of interpretation wherein sexual acts against cisgender women were interpreted as "genocidal" while available evidence of the same acts, when committed against cisgender men, were not. Even if one were to discount the evidence of sexual violence against men from before the 2016-2017 clearance operations (and this would be an arbitrary distinction, since such evidence provides a clearer picture of the long and violent campaign of suppression against the Rohingya), the FFM's own report acknowledges that such crimes were indeed committed during the clearance operations.

2. FFM Report on Sexual Violence, 2019

The following year, the FFM released a specific report about sexual and gender-based violence,[134] following requests from the UN General Assembly and civil society for specific

[132] *Id.* at ¶ 1410.
[133] *Id.* at ¶ 939.
[134] FFM 2019 Report, *supra* note __.

information on the topic.[135] This report reaffirmed the FFM's previous conclusion that sexual violence against Rohingya women qualified as acts of genocide because it was used to (1) kill female members of the community, (2) cause serious bodily or mental harm to women and girls, (3) inflict on women and girls conditions of life meant to bring about the destruction of the community in whole or in part, and (4) imposing measures to prevent births.[136] As suggested above, this is on one hand a very important determination, demonstrating the systematic violence committed against cisgender women as part of the genocidal campaign of terror used to exterminate the Rohingya. On the other hand, such a finding reaffirms the same narrow assumptions about genocidal sexual violence that had structured its 2018 conclusions.

The 2019 FFM report also gave more detail about sexual violence against men and boys, asserting that they "have been subjected to sexual and gender-based violence, especially in the context of detention settings."[137] While a large portion of the text focused on violence prior to the 2016-2017 clearance operations, the FFM nevertheless highlighted that "there were credible reports of a prevalence of sexual violence against men and boys during the Rohingya 'clearance operations' and in detention settings. The sexual violence that men and boys were subjected to included rape, genital mutilation and sexual torture, sometimes leading to death."[138] A few paragraphs later the FFM continues: "The Mission found there to be credible and consistent reports of rape and gang rape [of Rohingya men and boys], genital mutilation, forced nudity and other forms of sexual violence, sometimes leading to death…."[139]

Additionally, the evidence about sexual violence against men and boys which occurred before the 2016-2017 clearance operations similarly testifies to a large-scale and systematic campaign of sexual violence against the Rohingya which could be interpreted as genocidal.[140] The FFM compiled a serious list of sexual crimes against men and boys committed since 2012, including anal and oral rape, genital beatings, sexual humiliation and forced nudity, the burning of pubic hair, genital mutilation, and being urinated on.[141] One detainee also stated that he was

[135] Interview with an FFM member.
[136] FFM 2019 Report, *supra* note __, at ¶ 96.
[137] *Id.* at ¶ 5.
[138] *Id.* at ¶ 149.
[139] *Id.* at ¶ 154.
[140] Such an analysis would, in my opinion, better describe the gradual and pervasive nature of genocide as a process, not a singular event. *See* Sheri P. Rosenberg, *Genocide Is a Process, Not an Event*, 7 GENOCIDE STUDIES AND PREVENTION 16, 16–18 (2012).
[141] FFM 2019 Report, *supra* note __, at ¶¶ 156-167.

forced to rape women alongside prison officials.[142] Based on all of this evidence, the FFM concluded that such acts were not genocidal, but nevertheless constituted crimes against humanity and violations of human rights treaties like the Convention on the Rights of the Child and the ICESCR.[143]

Finally, the FFM reported about sexual acts committed against five "transgender women," whom they categorized as separate from the "women" who experienced genocidal sexual violence.[144] In conversations with NGOs on the ground in Cox's Bazar, this category of "transgender women" likely refers to Rohingya individuals who would identify as hijra, a third-gender identity in Southeast Asia. This is a nuanced but vital difference for several reasons. First, many transgender women in the West correctly consider themselves to be "women," live their lives as women, and are often perceived by their communities as women. As such, the fact that the 2019 report provides two sections devoted to violent acts against "women" and "transgender women" is problematic, since transgender women are women.[145] However, this accident may be more reflective of the true experiences of these individuals, since "hijra" is a much larger category than "transgender women," including effeminate men and men who have sex with men.[146] In either case, there is no one phrase in English which perfectly encapsulates the diverse gender expression of these "transgender women," and it is unknown how the five individuals included in the FFM report would personally identify themselves.

Why was "transgender women" used as a classification, then? From conversations with FFM members, it appears that many international actors on the ground were familiar with recent efforts by the UN at normalizing LGBT identities. International human rights standards, including the non-binding Yogyakarta Principles, have created a legal framework for universalizing "transgender" as a label.[147] The UN has similarly campaigned in recent years for

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[142] *Id.* at ¶ 162.
[143] *Id.* at ¶¶ 168-169.
[144] *Compare id.* at ¶ 69 (discussing "violence against Rohingya women and girls") with *id*. at ¶ 180 (discussing "consistent accounts from transgender women" in a different section of the report).
[145] *See, e.g.,* Natalie Wynn, *Transcripts/Gender Critical* (Mar. 30, 2019), https://www.contrapoints.com/transcripts/gender-critical ("I live as a woman now. And that's kind of just what's happening whether you like it or not so… I'm not sorry?").
[146] Duffy, *supra* note 12 at 1064. *See also* Liz Mount, *"I Am Not a Hijra": Class, Respectability, and the Emergence of the "New" Transgender Woman in India*, 34 GENDER & SOCIETY 620, 620–623 (2020). (presenting research from India about how some transgender women construct their identities in contrast to hijra, further demonstrating the complicated politics of identification).
[147] *See* Otto, *supra* note 84 at 312–313. (examining how the Yogyakarta Principles promote the rights of transgender people by describing gender as an intelligible identity, excluding certain forms of gender expression). International

the human rights of "transgender" people, even though the label "transgender" is distinctly Western, becoming prevalent in the United States in the 1990s.[148] "Hijra" and other culturally-contingent gender identities, meanwhile, have been used to describe gender-diverse people for centuries in some parts of the world. Moreover, some have criticized the use of umbrella terms like this as appropriation or erasure of non-Western forms of gender-diversity.[149] Despite this, the classification of hijra as "transgender" imparts a certain status of victimhood, since "transgender" and "LGBTQI+" people are often associated with victimhood, whereas hijra would be more unintelligible to an international audience.[150] Despite this, I am going to refer to these individuals as hijra for the remainder of this article, based on my conversations with actors in Bangladesh and also to avoid dismissing transgender women's authentic experiences as women.

So, what did these hijra tell the FFM? While the small sample size of five limits the representative nature of the report, these five hijra nevertheless testified to the same systematic campaign of sexual violence that was used against cisgender women and men, involving rape, violence to the genitals, sexual humiliation, and mental anguish.[151] For example, the FFM repeated the experience of one survivor:

> "Three days after the 'clearance operations' began in 2017,… a transgender person was gang raped multiple times by six men…. They tied her hands, made her lie down and raped her repeatedly, forcefully inserting their penises inside her mouth and anus. The gang rape left her bleeding from her penis and anus and caused her to faint.[152]

Another survivor reported similar violence:

> "In 2017,… an 18 year-old transgender girl was raped anally almost weekly by police officers. During one such rape, she was forced to undress and stimulate the penises of police officers until they ejaculated. They would beat her if she refused."[153]

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human rights courts have also increasingly established "transgender" as an intelligible category. *See, e.g.,* Alejandro Fernández Muñoz & Gloriana Rodríguez Álvarez, *In the Name of Vicky: Prosecuting Transfemicide in Honduras*, 34 PEACE REVIEW 518, 524–526 (2022).

[148] Susan Stryker, *(De)Subjugated Knowledges*, SUBJUGATED KNOWLEDGES 17, 4–6.

[149] *See* Evan B. Towle & Lynn M. Morgan, *Romancing the Transgender Native*, 8 GLQ: A JOURNAL OF LESBIAN & GAY STUDIES 469, 471 (2002).

[150] *See also* Shepherd and Sjoberg, *supra* note 35 at 13–17. (discussing how different interpretations of queer identities make those individuals both invisible and "hypervisible" to international actors).

[151] FFM 2019 Report, *supra* note __, at ¶¶ 180-188.

[152] *Id.* at ¶ 187.

[153] *Id.* at ¶ 183.

Despite the fact that these episodes are very similar to other episodes of gang rape experienced by cisgender women, the FFM declared that the sexual crimes against transgender women amounted to a violation of the IESCR, crimes against humanity, and likely war crimes.[154]

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

> "[T]he Mission conducted further investigations into the situation of sexual and gender-based violence against men and boys in the context of Myanmar's ethnic conflicts. Sexual and gender-based violence has distinct dimensions in relation to transgender persons. A recent study on gender in Myanmar found that 'currently, public awareness and understanding of diverse sexual orientations and gender identities (SOGI) are limited across Myanmar, with some increasing understanding in state capitals but very little in rural areas. Socio-cultural prejudices based on perceptions of diverse SOGI as punishment to be suffered for past sins or bad karma from a previous life. This drives high levels of social discrimination and pressure to conform to expectations and to heteronormative marriages.' Societal attitudes drive high levels of social discrimination and pressure to conform to expectations. In schools, teachers apply pressure on gender non-conforming boys, pointing out their mannerisms, forcing them to change their clothes, or to change their behaviour, leading many to drop out before completing high school…. [T]here is no express legislation protecting transgender persons under Myanmar law. To the contrary, Article 377 of the Penal Code, which forbids "carnal intercourse against the order of nature", is often used to persecute people from the LGBT community, according to activists."[155]

This is likely all very true – I have no doubt that queer individuals in Myanmar face societal discrimination, as they do in every country in the world. At the same time, however, sexual violence against men and boys is not solely committed against queer men and boys. At other points in the report, however, the lack of information about sexual violence against men is traced back to the victims themselves:

> "Sexual violence against men and boys is under reported, exacerbated by the patriarchal, lack of awareness and religious nature of the Rohingya community. Gender norms within the community make it difficult for men and boys to engage on the subject of sexual violence, especially as they are expected to be strong and have to live up to cultural assumptions of invulnerability to such violence."[156]

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[154] *Id*. at ¶ 188.
[155] *Id.* at ¶¶ 150-153.
[156] *Id.* at ¶ 158.

My reading of this gender analysis is that the FFM did not quite know what to do with victims who were not cisgender women. It is clear that the FFM experienced pushback from individuals who felt that they could not testify about their experiences due to strict cultural expectations about victimhood. At the same time, however, the FFM seems to conflate sexual victimhood with homosexuality and/or gender diversity, while also not knowing being sure how to categorize hijra. All of this uncertainty – about labels, about evidence, and so on – was then interpreted through a much larger narrative about genocide in which only sexual violence against cisgender women was considered to be genocidal, resulting in a gendered crime (genocidal sexual violence) that only affected one group of Rohingya.

Taking a step back, it is beneficial to examine which acts have been reported by the FFM. The table below shows what specific acts were reported by the FFM between 2017 and 2019, as well as the reported gender(s) of the victims who experienced those acts:

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

This is certainly not a complete list of sexual crimes committed against the Rohingya, but rather just a summary of the FFM's interpretations (for example, I would argue that systematic sexual violence against men and hijra can also destroy a community's social fabric, but this interpretation was not reached by the FFM). Similarly, this table does not report the number of crimes committed against individuals of each gender, nor is such an analysis necessary: the Genocide Convention does not require a minimum number of victims before an act becomes genocidal, only that the act in question is committed in the wider context of genocidal violence against "the group."[157] What is important, however, is that essentially-identical acts were committed against cisgender women, cisgender men, and hijra, and the FFM interpreted this to mean that genocide was only committed against one of those groups.

Ultimately, the FFM reports testify to the unavoidable process of legal interpretation. FFM members with whom I spoke expressed that the stories they heard about violence against cisgender women were simply "more brutal" and "much more graphic" than the sexual violence against cisgender men and hijra. Moreover, in several of the quotes I have included, the FFM states that sexual violence was used with greater frequency against women, or that women and girls were "disproportionately" affected, yet again comparing the violence experienced by three inter-woven groups. This process of comparing victims according to gender is not at all legally required, since there is no hierarchy of victims in the Genocide Convention; rather, it is inherent to a certain interpretive process to understand gendered violence against one group in hierarchical comparison to other groups.[158]

B. The International Court of Justice and *The Gambia v. Myanmar*

As mentioned at the beginning of this article, the team of lawyers working for The Gambia have alleged that genocidal sexual violence was only committed against Rohingya women and girls. This allegation first appeared in the initial submission to the ICJ and has been

[157] Genocide Convention, art. II. *See also* Diane M. Nelson, *Bonesetting: the algebra of genocide*, 18 JOURNAL OF GENOCIDE RESEARCH 171, 172–184 (2016). (discussing the lack of necessity for providing a certain number of victims to prove genocide, versus the politics of counting and presenting statistics about the extent of atrocity crimes).

[158] *See also* Fionnuala Ni Aolain, *Sex-Based Violence and the Holocaust - a Reevaluation of Harms and Rights in International Law*, 12 YALE JOURNAL OF LAW AND FEMINISM 43, 80–83 (2000). (discussing how international law does not properly account for the harms experienced by those who observe mass violence without directly experiencing it).

repeated multiple times. For example, during oral arguments in December 2019, The Gambia articulated how sexual violence against cisgender women was an act of genocide under the Genocide Convention, focusing on how sexual acts could cause serious bodily or mental harm and citing multiple instances of sexual violence against cisgender women:

> "I refer in particular to what the UN Mission [FFM] described as 'widespread sexual violence' intended 'to contribute to the destruction of the Rohingya as a group and the breakdown of the Rohingya way of life.' In the landmark 1998 *Akayesu* judgement, the International Criminal Tribunal for Rwanda ('ICTR') made clear that when committed with the requisite intent, 'rape and sexual violence . . . constitute genocide in the same way as any other act.' It stressed that this was "one of the worst ways" of inflicting harm, because it 'resulted in physical and psychological destruction of Tutsi women, their families and their communities'; 'destruction of the spirit, of the will to live, and of life itself.'"[159]

While later documents submitted to the ICJ, including a long memorandum with witness testimony, have not been released publicly, in 2022 The Gambia reported that the Court's temporary provisional measures have resulted in "no new mass killings of Rohingya, no new mass rapes or gang rapes of Rohingya women and girls, and no new burning of populated Rohingya homes,"[160] further reproducing the narrative that only women were affected by sexual violence.

In discussions with lawyers associated with the case,[161] I was able to ask why they restricted this crime and none of the others (e.g., killing, torture, etc.). The answers I received were diverse and sometimes contradictory, and two interviewees simply stated that they did not know why such a decision was made. Another interviewee stated that there was no evidence for sexual violence against men, which I attributed to the fact that they had not likely read the FFM reports in several years. These differences suggest what I have found to be widely true: the narrative about cisgender women being victimized by genocidal sexual violence was so widespread and self-evident that the framing of sexual violence used by the team has gone unquestioned.

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[159] Application Case (Gam. v. Myan.), Verbatim Record, ¶ 16 (Dec. 10, 2019, 10:00am), https://www.icj-cij.org/public/files/case-related/178/178-20191210-ORA-01-00-BI.pdf.
[160] Application Case (Gambia v. Myanmar), Verbatim Record, 13-14 (Feb. 23, 2022, 1:30pm), https://www.icj-cij.org/public/files/case-related/178/178-20220223-ORA-01-00-BI.pdf.
[161] Here I am including not just lawyers who are working with Foley Hoag, but also lawyers and NGO workers who have advised the Foley Hoag on issues of gender and sexual violence.

Of course, other interviewees provided post-hoc reasoning why they decided to restrict their allegations of genocidal sexual violence. One interviewee pointed out that the FFM did not consider the sexual crimes against men and hijra to be genocidal, and because they wanted their claim to be considered "credible" by the conservative judges at the ICJ, they adopted the FFM's findings. Another interviewee similarly added that the main caselaw on the topic, *Akayesu*, only featured sexual violence against cisgender women, and therefore they followed legal precedent. Neither of these approaches were legally necessary – the team had and still has the ability to make their own allegations in addition to the FFM's findings.

Other interviewees did not cite this problem of convincing the ICJ judges with precedent, but instead offered diverging articulations of how sexual violence could amount to an act of genocide. One interviewee explained that

> "sexual violence against women is genocidal because it aims at, or results in, reducing births among the group. Raped women tend not to procreate. So, even if we had evidence of widespread sexual violence against men, it would have a different legal significance in light of our jurisdictional basis and we would probably not argue it the same way, if at all. In other words, whether we like it or not, what genocide means and what nature allow (bearing a child and giving birth, which is still inaccessible to men) must be thought together."

However, another lawyer with familiarity of the case disagreed:

> "In terms of actus reus there are different categories wherein sexual violence can be categorized: an emphasis on reproduction or an emphasis on harm. There are differing views about how sexual violence should be categorized, but it seems that the emerging consensus is that it should fall in harm. It's not just women as child-bearing members of the community, it's women as individuals first. That's the direction the field is traveling in, and the previous perspective seems inappropriate, but I've only come across that as a position where people are disavowing it…. That isn't how we would plead the case: for us, it falls under serious bodily harm."

This disagreement between colleagues about the proper way to categorize genocidal sexual violence (as harm or as preventing births) is a good illustration of how the crime is constructed by drawing upon other gendered narratives. The first interviewee is speaking from a strongly biological perspective, emphasizing the role of women as child-bearers, whereas the second interviewee is emphasizing a more individualistic perspective on how to assert genocide. Both interviewees are reproducing the narrative that women are the sole victims of genocidal

sexual violence (notably, the first speaker curiously seems to assert that cisgender men are not involved in biological reproduction), but their interpretations of "women" are distinct!

I also found that discussing hijra victims of sexual violence elicited similar statements about gendered victimhood. Several interviewees did not think that such violence had been recorded, again demonstrating how alternative narratives about sexual violence in the Rohingya genocide were not circulating among the legal team. One interviewee went further, suggesting that Rohingya did not identify with such "modern" language:

> "I don't know, you know, with the Rohingya, when we speak about other sexual orientations, I don't know if the Rohingya come out and speak of themselves as gay…. The Rohingya people do not identify themselves as straight or gay, I mean men or women, but all modern codes of gender identity have not yet reached the Rohingya population… because it is a, how to say, it was and still is… a very closed society."

Alternatively, another interviewee did not dispute the existence of queer Rohingya but articulated a view in which sexual violence against them would not be genocidal because "transgender people are on the outer limits of society and are not part of the main Rohingya community. So if you are trying to destroy the Rohingya people, why would you target the people on the outside?"

These reactions surprised me, because they revealed how the lawyers associated with the case viewed queer identity through a distinctly Western lens. It also resolved any question on my part as to whether the allegation about sexual violence "against women and girls" included the FFM's "transgender women" (it does not, at least for now). In their view, there is no way that a gender-diverse person could function within the conservative Rohingya society. While hijra undoubtedly experience social disapproval and violence in many ways, they also were and are a part of Rohingya society.

C. The International Criminal Court

In July 2019 the ICC Office of the Prosecutor requested authorization to investigate crimes committed in Myanmar.[162] Because Myanmar is not a state party to the Rome Statute, the

[162] Request for Authorisation of an Investigation Pursuant to Article 15, Office of the Prosecutor, Bangladesh/Myanmar, ICC-01/19-7 04-07-2019 1/146 RH PT, 4 July 2019.

ICC would traditionally lack jurisdiction to prosecute atrocity crimes committed in the country.[163] However, the Prosecutor asserted that the ICC did have jurisdiction given the fact that hundreds of thousands of Rohingya were forcibly driven into neighboring Bangladesh, which itself is a state party to the Rome Statute.[164] As such, the Prosecutor requested authorization to investigate the international crimes of (1) deportation and (2) persecution on the grounds of ethnicity and/or religion.[165] Judges at the ICC granted this authorization in November 2019.[166]

Because of these jurisdictional limits, however, the ICC will likely be unable to charge anyone with the crime of genocide.[167] Nevertheless, the limited number of public documents and submissions relative to the case demonstrate the contested nature of the narrative regarding sexual violence in the Rohingya genocide. For example, the Prosecutor's initial request for clarification on the jurisdictional question in Bangladesh cited the destruction of one village in 2017 where "[h]undreds of men were allegedly separated from women and children, rounded up along the river bank, and executed in front of their families. Many women and children were then killed or raped…."[168]

Evidence of the contested nature of sexual violence was further evident in discussions I have had with lawyers working on the ICC case. For example, in one interview I asked a high-ranking member of the prosecution team about their approach to investigating sexual violence. Their answer showed the commonplace narrative about sexual violence:

> "Not all investigative bodies have the capacity to investigate sexual violence, and especially cases of sexual violence against children. It is important to get a very honest portrayal of what happened to the women and children. Not all children are the same, not all women respond to sexual violence in the same way, not all victims are the same."

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[163] International Criminal Court, *How the Court Works*, www.icc-cpi.int/about/how-the-court-works.
[164] Request for Authorisation of an investigation pursuant to article 15, Office of the Prosecutor, Bangladesh/Myanmar, ICC-01/19-7 04-07-2019 1/146 RH PT, 4 July 2019, ¶¶ 1-6, 75.
[165] *Id.* Deportation is a violation of international law according to article 7(1)(d) of the Rome Statute. Persecution on grounds of ethnicity and/or religion (article 7(1)(h) of the Statute).
[166] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Bangladesh/Myanmar, ICC-01/19, ICC-01/19-27 14-11-2019 1/58 NM PT, 14 November 2019, ¶ 110
[167] Of course, there are several advocacy efforts aimed at opening up the ICC's jurisdiction in Myanmar, including a UN Security Council referral and/or the Court's recognition of the National Unity Government, which has issued a declaration accepting the Court's jurisdiction in Myanmar. It is currently unclear if any of these efforts will result in greater jurisdiction for the Court. For more context, *see* Ralph Wilde, *Can the National Unity Government (NUG) of Myanmar Represent that State for the Purposes of Accepting the Jurisdiction of the International Criminal Court?*, OPINIOJURIS BLOG (Aug. 17, 2022), https://opiniojuris.org/2022/08/17/can-the-national-unity-government-nug-of-myanmar-represent-that-state-for-the-purposes-of-accepting-the-jurisdiction-of-the-international-criminal-court/.
[168] Request for a Ruling on Jurisdiction under Art 19(3) of the Statute on the 9 April 2018, para. 10.

Relatedly, my interviews revealed different contestations about which sexual crimes are more serious or more worthy of the ICC's attention. In response to a question about men and hijra who have experienced sexual violence, one lawyer responded,

> "We are gathering evidence of sexual violence against women, men, and transgender. My feeling of the evidence we've gathered so far is it's just shocking the level of sexual violence directed against women, [here the lawyer paused and stared at me for a few seconds] and males, in those clearance operations."

D. Argentina Universal Jurisdiction Case

Finally, a small team of Rohingya activists and international lawyers have submitted a request to open a universal jurisdiction case in Argentina.[169] Unlike the legal processes at the ICJ and ICC, universal jurisdiction allows domestic courts to prosecute a small number of international crimes including genocide, even in situations where the crimes were committed outside the state's territory and by nationals of a different state. While Argentina may appear to be a strange choice due to its distance from Myanmar, its law on universal jurisdiction allows such cases to be brought and Argentine courts have a familiarity with such trials.[170] Moreover, one of the Argentine lawyers working on the case, Tomás Ojea Quintana, was previously UN Special Rapporteur on the Situation of Human Rights in Myanmar between 2008 and 2014.[171]

[169] Burmese Rohingya Organization UK, Complainant Files a Criminal Complaint of Genocide and Crimes against Humanity Committed against the Rohingya Community in Myanmar – Universal Jurisdiction, https://burmacampaign.org.uk/media/Complaint-File.pdf [hereinafter Argentina Complaint]. Another universal jurisdiction case was recently filed in Germany, although the complaint is not yet public. Fortify Rights, *Criminal Complaint Filed in Germany against Myanmar Generals for Atrocity Crimes* (Jan. 24, 2023), www.fortifyrights.org/mya-inv-2023-01-24/. Two more attempts at universal jurisdiction are being pursued in Turkey and Indonesia, but have not advanced to the point where their inclusion here would be useful. Priya Pillai, Myanmar and the Myriad Efforts Towards International Justice, U.S.-ASIA LAW INSTITUTE (Oct. 17, 2022), https://usali.org/usali-perspectives-blog/myanmar-and-the-myriad-efforts-towards-international-justice.

[170] María Manuela Márquez Velásquez, *The Argentinian Exercise of Universal Jurisdiction 12 Years After its Opening*, OPINIOJURIS BLOG (Feb. 4, 2022), www.opiniojuris.org/2022/02/04/the-argentinian-exercise-of-universal-jurisdiction-12-years-after-its-opening/.

[171] Tun Khin & Tomás Ojea Quintana, *Symposium on the Current Crisis in Myanmar: Inching Closer to a Historic Universal Jurisdiction Case in Argentina on the Rohingya Genocide*, OPINIOJURIS BLOG (Sep. 30, 2021), www.opiniojuris.org/2021/09/30/symposium-on-the-current-crisis-in-myanmar-inching-closer-to-a-historic-universal-jurisdiction-case-in-argentina-on-the-rohingya-genocide/.

The initial complaint, filed in November 2019, cited heavily to the FFM's work, reproducing multiple paragraphs about the use of genocidal violence[172] and referring to the FFM's legal analysis regarding how such violence violated elements of the Genocide Convention.[173] As such, the complaint does not make a distinct articulation of how sexual violence fits into the Genocide Convention. However, the complaint does interestingly allege that the violence against the Rohingya "also involves the gang rape of women, girls and boys for the purpose of altering, in the most sinister way, their sense of belonging to the ROHINGYA community."[174] The inclusion of "boys" here, instead of "men and boys," seems to conceive of male children as victims, whereas male adults somehow can age out of this victimhood status. However, the complaint does not contain any articulation as to why "boys" are included in the list of sexual victims, instead emphasizing how sexual violence against women and girls amounted to genocide:

> "We wish to make special reference to those crimes against sexual integrity, due to the fact that historically, but particularly during the crimes of the years 2016 and 2017, the ROHINGYA were victims of these heinous actions. So atrocious were these crimes that the International Mission [FFM] decided to produce a special report on the subject. And in its conclusions it pointed out: … '[T]he Mission's consolidation of its materials has led it to conclude on reasonable grounds that the sexual violence perpetrated against Rohingya women and girls in Rakhine state on and after 25 August 2017 was an indicator of the Tatmadaw's genocidal intent to destroy the Rohingya people in whole or in part.'… It is for this reason that we request that the report of the International Mission on sexual violence be properly considered, and that the investigation make special emphasis on these crimes."[175]

This framing of sexual violence has continued since 2019. Most notably, six Rohingya survivors and witnesses of sexual violence (all cisgender women) were able to testify from Bangladesh via an online video connection with the court in Argentina.[176] In webinars and other public events, individuals involved with the case have repeated the narrative that Rohingya men were killed while Rohingya women were raped and killed several times.[177]

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[172] *Compare* Argentina Complaint, *supra* note __ at 23 *with* FFM Short Report, *supra* note __, at ¶ 38.
[173] Argentina Complaint, *supra* note __, at 32-33
[174] *Id.* at 2.
[175] *Id.* at 32.
[176] Burmese Rohingya Organisation UK, BROUK President Highlights Tatmadaw Crimes As Genocide Trial Opens (Dec. 21, 2021), https://www.brouk.org.uk/brouk-president-highlights-tatmadaw-crimes-as-genocide-trial-opens/.
[177] Webinar regarding "Justice for Rohingya: Nearing 3 Years of the Genocide Case Against Myanmar (Nov 23, 2022). Transcript produced by author.

Part of this framing is due to the widespread nature of this narrative. When I spoke with one actor involved in the Argentina case, they said, "Many people are telling us that thousands of women were raped, their sisters were raped, their brothers were murdered. Worst atrocities I have ever heard. So these people want justice, we got a venue in Argentina, they are genocide survivors, they witnessed and talked about what happened to their sons and daughters."[178] This person's physical distance from Bangladesh, as well as their reliance on the FFM report and other published materials, limits the originality of their argument while also reinforcing what has already been said about the genocide.

Finally, in November 2022 the Argentina legal team joined with the Global Justice Center to release a submission about sexual violence in the Rohingya genocide.[179] While this document focuses primarily on how to best engage with survivors of sexual violence, the submission also reproduces the dominant narrative about the genocide, stating that in general, "[w]hilst men and boys are victims of sexual violence, women and girls are often the primary targets."[180] Building upon this claim, the submission then states that the FFM found that "ethnic minority women and girls were indeed the primary targets of sexual and gender-based violence" in Myanmar.[181]

III. IMPLICATIONS FOR CRIMINAL LAW AS A WHOLE

This article has provided a roadmap for practitioners of international criminal law to understand how genocidal sexual violence in the ongoing Rohingya cases could be charged, even in cases where the victims are not cisgender women. In conjunction with my previous work on the topic,[182] I hope have made the case for a much broader understanding of how sexual violence could be included in genocide investigations. As I mentioned before, despite all of the many

[178] Personal Interview.
[179] Global Justice Center, *Global Justice Center Submission to the "Juzgado Nacional en lo Criminal y Correccional Federal No 1" (SPA) on International and Regional Best Practice for Engaging with Victims and Witnesses of Sexual Violence and Assessing Evidence of Sexual Violence* (2022), www.globaljusticecenter.net/files/GJC_SUBMISSION_TO_THE_ARGENTINA_CRIMINAL_PROCESS.pdf
[180] *Id*. at 27.
[181] *Id*. at 27.
[182] Eichert, *supra* note 17 at 192–199. (focusing on genocide broadly and articulating other ways in which men, transgender women, and people outside the gender binary could be included in future genocide investigations).

problems inherent to prosecuting genocide in criminal courts,[183] it nevertheless remains important for men and queer survivors of such violence to be included in official narratives about sexual violence and to be counted as survivors for the purposes of medical care and financial reparations.[184]

More broadly, I have also sought to outline the role of interpretation in generating victims' identities and the crime of sexual violence. This process of interpretation – questioning (1) if such a crime occurred and (2) whether such crime is serious to merit inclusion in the justice system – is useful for understanding how and when certain allegations fail to gain support from systems of power. Notably, I have demonstrated how narratives about sexual victimhood – in this case, the narrative that genocidal sexual violence is a crime that only affects cisgender women – are central to the self-evident decisions made by legal actors.

This emphasis on narrative is informed by the poststructural method of narrative discourse analysis used by Laura Shepherd, Lene Hansen, and others to examine how the practice of legal actors is structured and constrained by this constant process of interpretation.[185] Central to this analysis is the recognition that narratives are both central to the process of interpretation and yet always partial: because a narrative must implicitly exclude certain perspectives and events in order to prioritize a coherent form of communication, a narrative cannot represent a story in its totality.[186] At the same time, however, the process of (re)producing narrative socially constructs the world as we know it, providing us with the words and stories necessary to create meaningful understandings of social facts.[187] As such, identifying the shape and form of a narrative allows the researcher to also identify what has been excluded, de-emphasized, and misrepresented.[188] Because much of language is divided into binary pairs (for example, genocidal/not genocidal, men/women, victim/perpetrator), deconstructing narratives

[183] Another key challenge is the focus on biological reproduction in genocide, which some queer scholars have rightly criticized as creating a hierarchy between heterosexual community members and community members who do not biologically reproduce. Lily Nellans, *A Queer(er) Genocide Studies*, 14 GENOCIDE STUDIES AND PREVENTION 48, 62–64 (2020).
[184] *See* Rosemary Grey, Yim Sotheary & Kum Somaly, *The Khmer Rouge Tribunal's first reparation for gender-based crimes*, 25 AUSTRALIAN JOURNAL OF HUMAN RIGHTS 488, 492–494 (2019).
[185] *See generally* LAURA J. SHEPHERD, NARRATING THE WOMEN, PEACE AND SECURITY AGENDA: LOGICS OF GLOBAL GOVERNANCE (2021).
[186] *Id.* at 10. *See also* CHARLOTTE EPSTEIN, THE POWER OF WORDS IN INTERNATIONAL RELATIONS: BIRTH OF AN ANTI-WHALING DISCOURSE 95 (2008). ("The key function of story-lines is that they bring closure to often highly complex problems and the promise of a clear-cut resolution.").
[187] EPSTEIN, *supra* note 186 at 4.
[188] SHEPHERD, *supra* note 185 at 10–11.

allows for a greater perspective onto what is rendered unintelligible by linguistic processes of interpretation.[189]

Importantly, the narrative order surrounding sexual violence has been indelibly shaped by the contributions of feminist legal actors who have campaigned for greater recognition of the specific burdens created by gendered understandings of the law.[190] These narratives have been tremendously important in challenging artificial legal constructions about gender and advancing equality for women around the world.[191] However, as I note below, often these feminist narratives rely upon an essentialized, universal, and binary concept of gender; in other words, a wealthy white woman in the United States is understood to experience the same oppression as an impoverished woman in the Global South.[192] Recent feminist scholarship has disputed many of these assumptions, substituting intersectional,[193] transfeminine,[194] or postmodern concepts of gendered victimhood in their place.[195] However, many of the binary narrative elements about conflict-related sexual violence which I discuss below remain dominant due to earlier feminist activism and their influence upon international criminal jurisprudence. Gender is not just about "men" and "women," but also identities in between; furthermore, gender also includes codes and norms used to describe sexuality, gender expression, a person's position in society, and more.[196] Understanding "women" or "men" as a unitary collectivity, therefore, ultimately does a disservice to the diverse voices and experiences of the group,[197] while also allowing certain forms of feminist discourse to drown out other feminist understandings of gender.[198]

At the same time, however, discourse about gendered harm extends beyond the feminist legal project, and many legal interpretations today draw from non-feminist and anti-feminist

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[189] *Id.* at 34.
[190] For example, Rana Jaleel describes the contributions, for better or for worse, of certain feminists in the 1990s. RANA M. JALEEL, THE WORK OF RAPE 49–80 (2021).
[191] Elisabeth Prügl & J. Ann Tickner, *Feminist international relations: some research agendas for a world in transition*, 1 EUROPEAN JOURNAL OF POLITICS AND GENDER 75, 79–85 (2018).
[192] GAYATRI CHAKRAVORTY SPIVAK, CAN THE SUBALTERN SPEAK? REFLECTIONS ON THE HISTORY OF AN IDEA 32 (Rosalind C. Morris & Gayatri Chakravorty Spivak eds., 2010).
[193] *E.g.,* HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 19 (2000).
[194] *See generally* Emi Koyama, *The Transfeminist Manifesto*, *in* CATCHING A WAVE: RECLAIMING FEMINISM FOR THE 21ST CENTURY 244 (Rory Dicker & Alison Piepmeier eds., 2003). (comparing transfeminist theory to other feminist conceptions of gender and oppression).
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[196] Ruth Page, *Gender*, *in* The Cambridge Companion to Narrative 189, 190–191 (David Herman ed., 2007).
[197] SPIVAK, *supra* note 192 at 32.
[198] Janet Halley's work on governance feminism is of course tremendously relevant here. Janet Halley, *Varieties of Governance Feminism*, *in* GOVERNANCE FEMINISM: AN INTRODUCTION ix, 25–35 (Janet Halley et al. eds., 2018).

political beliefs when adjudicating claims of sexualized violence.[199] As I have written elsewhere, laws about prison rape[200] and human trafficking[201] rely upon particular gendered views of the world in which sexual violence against cisgender women is a scourge which must be eliminated at all costs, while similar harms to men and queer individuals are tolerated or even encouraged. In the most radical cases, this can include extremist views wherein sexual and gender minorities are constructed as pedophilic rapists or the provision of gender-affirming medical care is criminalized as child abuse and mutilation.[202] My analysis in this article does not focus on these more reactionary articulations of gendered harm, largely because they have not been influential in international law spaces. However, my underlying argument – that allegations of sexual violence are subjected to a narrative process of interpretation which generates the crimes and identities of the actors involved – would be beneficial to scholars studying discourse about sexual crime in other legal settings.

I also share and extend the arguments made by many critical legal scholars who assert that the application and practice of law is inherently political, biased in favor of/against individuals for a whole host of reasons. My argument here is not just that prosecutors and judges need to be aware of such biases,[203] but rather need to be aware that their very discursive articulations of identity and crime are responsible for producing (and reproducing) those ideas that they simply seek to adjudicate. In other words, interpretations about victimhood are not neutral, but are rather informed by political beliefs about global hierarchies and the appropriate

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

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

202 This article was written at a particularly brutal period in American criminal law when multiple state legislatures have passed or attempted to pass laws criminalizing care for transgender individuals or enforcing other forms of heterosexual/cisgender ideology. *See, e.g.,* Simona Martin, Elizabeth S. Sandberg & Daniel E. Shumer, *Criminalization of Gender-Affirming Care — Interfering with Essential Treatment for Transgender Children and Adolescents*, 385 N ENGL J MED 579, 579–580 (2021). (discussing Arkansas' ban on gender-affirming treatment); David W. Chen, *Transgender Athletes Face Bans from Girls' Sports in 10 U.S. States*, N.Y. TIMES (May 24, 2022), https://www.nytimes.com/article/transgender-athlete-ban.html (discussing bans on transgender athletes); Hannah Schoenbaum, *Republican States Aim to Restrict Transgender Health Care in First Bills of 2023*, PBS NEWSHOUR (Jan. 7, 2023), https://www.pbs.org/newshour/politics/republican-states-aim-to-restrict-transgender-health-care-in-first-bills-of-2023 (discussing further restrictions on transgender healthcare).

203 For an argument like this, *see* Machiko Kanetake, *Blind Spots in International Law*, 31 LEIDEN JOURNAL OF INTERNATIONAL LAW 209, 217–218 (2018).

behavior of different genders, and these beliefs participate in the construction of these concepts as social realities through the practice of law.[204]

A non-insignificant body of literature has also attempted to understand the factors (time, money, lawyers, social responses) which could result in a particular problem being recognized as a legal harm and obtain a remedy.[205] This article complicates much of this writing (often characterized as "naming, blaming, and claiming")[206] for two reasons. First, my study demonstrates how crime constitutes (and is simultaneously constituted by) the identities of the actors involved. Second, this is an instance where the potential victims of a crime have no voice and are reliant upon legal actors to go and find them, rendering them and their experiences wholly dependent upon the interpretations of other individuals. This builds upon what has been written in other fields about identities and groups which cannot speak.

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

Such an understanding – of advocating for justice based on identity categories while simultaneously working to weaken the power of those categories – is not foreign to critical legal studies.[207] Notably, some legal theorists working with gender have sought to lean into this uncomfortable paradox, being "permanently troubled by identity categories, consider[ing] them to be invariable stumbling-blocks, and understand[ing] them, even promot[ing] them, as sites of

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[204] *See* MEGAN H. MACKENZIE, FEMALE SOLDIERS IN SIERRA LEONE: SEX, SECURITY, AND POST-CONFLICT DEVELOPMENT 49 (2012).
[205] *See* Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 ANNU. REV. LAW. SOC. SCI. 105, 106 (2014).
[206] William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOCIETY REVIEW 631 (1980).
[207] ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY xvii (2004). ("[E]verything is, in a sense, politics. We can acknowledge this truth without giving up on ambitious explanations of social and historical experience. We can rebel against the worlds we have built. We can interrupt our rebellions, and settle down for a while in one of these worlds. We can explain what has happened and what might happen, giving due weight to the reality of constraints on the transformative will, without either diminishing our explanatory ambition or surrendering to the illusions of false necessity.")

necessary trouble."[208] The desire to destabilize political categories is limited by the reality that "[f]ull acknowledgment of all people's differences threatens to overwhelm us…. Cognitively, we need simplifying categories."[209] Transgender legal theorists in particular are aware that advocating for small identity-based changes (such as the right to change one's legal sex) inherently also reproduces a system in which legal sex is a necessary and cogent concept (a reality which ultimately goes against the long-term interests of queer people).[210] The solution, therefore,

> lies in ensuring that the many, often conflicting, narratives of transgender [or other] identity that now appear in social and legal arenas continue to circulate and proliferate. Rather than trying to make sense of all these contradictory accounts of sex, gender, and the relationship between them, rather than trying to develop the "one perfect theory" to unify them within the context of the larger transgender rights imaginary, we should, as a movement, be celebrating the incoherencies between them even as we continue to pursue rights claims by invoking particular constructions of gender definition."[211]

In other words, while advocating for better responses to genocide, for an end to sexual violence in war and in peace, or for a more just world in general, legal actors must be constantly reflexive, open to new ideas, and willing to see the political realities of the law.[212] Instead of interpreting violence to cisgender men or queer people as a contrast or foil to violence against cisgender women, thus putting the different groups in competition with one another,[213] we should be seeking to holistically understand the needs of the community as a whole *and* individual needs. Such an understanding would resist the imposition of an "absolute despot duality that says we are able to be only one or the other," instead seeking to meet victims where they are, in all their complexity.[214] Especially in a situation like genocide, where so many have

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[208] Judith Butler, *Imitation and Gender Insubordination*, *in* Inside/Out: Lesbian Theories, Gay Theories 11, 14 (Diana Fuss ed., 1991).
[209] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 233–234 (1990).
[210] Paisley Currah, *The Transgender Rights Imaginary*, *in* Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations 245, 245 (Martha Albertson Fineman, Jack E. Jackson, & Adam P. Romero eds., 2009).
[211] *Id.* at 256.
[212] JOSÉ ESTEBAN MUÑOZ, CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY 1 (2009). ("Queerness is not yet here. Queerness is an ideality. Put another way, we are not yet queer. We may never touch queerness, but we can feel it as the warm illumination of a horizon imbued with potentiality…. The here and now is a prison house. We must strive, in the face of the here and now's totalizing rendering of reality, to think and feel a *then and there*.").
[213] Currah, *supra* note 210 at 245.
[214] GLORIA ANZALDUA, BORDERLANDS/LA FRONTERA: THE NEW MESTIZA 19 (1987).

lost so much, the legal system should never contribute to further isolating people because of their identity.