Expanding the Gender of Genocidal Sexual Violence: Towards the Inclusion of Men, Transgender Women, and People Outside the Binary

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Abstract

This Comment expands upon legal and academic understandings of sexual violence as an act of genocide, arguing that men, transgender women, and intersex/non-binary/third-gender individuals can also experience genocidal forms of sexual violence. I demonstrate how international law about genocidal sexual violence has almost entirely focused on the bodies and reproductive capacities of cisgender women, obscuring how and why other individuals can be targeted during episodes of genocide. I then discuss how genocidal sexual violence against different genders can be understood, challenging international criminal law practitioners to adopt a more inclusive outlook on gender and victimhood in future genocide investigations and prosecutions.

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Introduction

In August 2019, the United Nations International Fact-Finding Mission for Myanmar (FFM) released a report about the use of sexual violence against the Rohingya ethnic group.[1] The report detailed how Myanmar's military had used sexual violence against three categories of people—cisgender women, men, and transgender women—and concluded that the violence amounted to war crimes, crimes against humanity, and acts of genocide.[2] However, the FFM only labeled the sexual violence committed against cisgender Rohingya women as "genocide," instead classifying the sexual violence against men and transgender women as "crimes against humanity."[3] A similar distinction was made the following month in a different FFM report,[4] as well as by lawyers for The Gambia who brought suit against Myanmar before the International Court of Justice (ICJ) in November 2019.[5]

1. Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, U.N. Doc. A/HRC/42/CRP.4 (Aug. 22, 2019) [hereinafter FFM Sexual Violence Report].

2. *Id.* at 3. The report actually labels cisgender women as "women." The report also groups together "women and girls" and "men and boys." For clarity and concision, I have chosen to use these three categories instead. Additionally, as I discuss below, "cisgender" refers to people who identify with the gender they were assigned at birth. *See infra* note 19 and accompanying text.

3. *Id.* at 40, 44, 58.

4. Human Rights Council, *Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/42/CRP.5 (Sep. 16, 2019).

5. David Eichert, *Concerns About the Non-Inclusion of Sexual Violence Against Men and Boys in The Gambia v. Myanmar*, Opinio Juris (Mar. 4, 2020), http://opiniojuris.

Why is there such a distinction between "genocidal" sexual violence against cisgender women and non-genocidal sexual violence against everyone else? In part, this distinction resulted from decades of international jurisprudence about genocide and sexual violence that overwhelmingly focused on cisgender female victims.[6] In particular, the FFM report relied upon caselaw from the International Criminal Tribunal for Rwanda (ICTR), which did not convict anyone for genocidal sex crimes against men or non-binary victims.[7] As such, even though the crimes against Rohingya men and transgender women occurred in the context of genocide and were functionally identical to the crimes against cisgender women, the FFM nevertheless chose to categorize them differently.[8]

This belief that genocidal sexual violence (GSV) mainly affects cisgender women is certainly not uncommon; indeed, for the past three decades, international courts have almost entirely restricted their analysis of GSV to crimes against cisgender women. Similarly, legal academics writing about GSV,[9] as well as those working on the issue of "gendercide" (mainly the targeted murder of men and boys during genocide),[10] have also largely ignored how other victims can experience

org/2020/03/04/concerns-about-the-non-inclusion-of-sexual-violence-against-men-and-boys-in-the-gambia-v-myanmar [https://perma.cc/Q973-9AAF].

6. *See infra* notes 36–128 and accompanying text. While this Comment mainly focuses on legal questions about genocide and sexual violence, there are likely other reasons why the FFM report made a distinction between cisgender women and other people. For example, based on personal correspondence with an aid worker, it appears that the FFM only interviewed a limited number of men and transgender women for their report (seemingly as an afterthought), focusing on cisgender women for the bulk of their investigation about sexual violence. Additionally, in Cox's Bazaar (the main refugee camp in Bangladesh for Rohingya refugees) identification cards only allowed for "male" and "female" gender distinctions. This resulted in many *hijra* (the "transgender" women in this report) not being sure which box to check, likely making it harder for the FFM to identify and interview these victims. Personal conversation with an aid worker.

7. FFM Sexual Violence Report, *supra* note 1, at ¶¶ 40, 45; *infra* notes 48–74 and accompanying text.

8. *See* FFM Sexual Violence Report, *supra* note 1, at ¶¶ 40, 45.

9. *E.g.*, Chile Eboe-Osuji, International Law and Sexual Violence in Armed Conflicts 159–77 (2012); Catharine A. MacKinnon, Are Women Human? And Other International Dialogues 229–33 (2006); Christopher W. Mullins, *'We Are Going to Rape You and Taste Tutsi Women': Rape During the 1994 Rwandan Genocide*, 49 Brit. J. Criminology 719, 730–33 (2009); Christoph Schiessl, *An Element of Genocide: Rape, Total War, and International Law in the Twentieth Century*, 4 J. Genocide Res. 197, 197–200 (2002).

10. *E.g.*, Adam Jones, Gender Inclusive: Essays on Violence, Men, and Feminist International Relations 165–95 (2008); David Buchanan, *Gendercide and Human Rights*, 4 J. Genocide Res. 95, 98–100 (2002). While many articles about gendercide have ignored the topic of GSV against men entirely, in recent years scholars working on the topic of gendercide have slowly begun to discuss it. *E.g.*, Adam Jones, *Masculinities and Vulnerabilities in the Rwandan and Congolese Genocides*, *in* Genocide and Gender in the Twentieth

sexual violence during genocide. This omission of certain kinds of sexual violence from historical and legal understandings of genocide is a serious blind spot in international criminal law that has practical implications for what kinds of narratives emerge from genocidal conflict and which victims are heard by international courts.[11]

In this Comment, I seek to challenge this narrow legal classification and expand understandings of GSV to include acts against (1) cisgender & transgender men, (2) transgender women, and (3) intersex/non-binary/third-gender individuals. While it is absolutely true that genocidaires frequently attack the bodies and reproductive capacities of cisgender women, there are other forms of GSV that should not be discounted or ignored when assessing whether genocide has taken place.[12] As such, future criminal prosecutions should take an expansive view of gender and GSV by seeking to describe more fully how sexual assault, mutilation, enslavement, and humiliation are used to destroy and terrorize targeted communities.

I make my argument in three Parts. First, I discuss the historical treatment of sexual violence as a form of genocide, demonstrating how international law and academic commentaries on genocide have developed to predominately frame GSV as a crime that only affects cisgender women. Second, I discuss the ways in which sexual violence against men, transgender women, and intersex/non-binary/third-gender individuals may qualify as genocide, drawing upon examples from genocides in the twentieth and twenty-first centuries.[13] Third, I conclude by challenging the field of international law to adopt a much broader understanding of sexual violence and gender by encouraging investigative teams and prosecutors to pay attention to the experiences of individuals who have yet to be included in genocide trials.

Century: A Comparative Study 62, 69–71 (Amy E. Randall ed., 2015).

11. Take, for example, the quantitative study of "rape incidence" in Rwanda conducted by Bijleveld et al., in which the authors synonymize "the prevalence of rape" with "the number of women raped," excluding other victims of sexual violence. Catrien Bijleveld, Aafke Morssinkhof & Alette Smeulers, *Counting the Countless: Rape Victimization During the Rwandan Genocide*, 19 Int'l Crim. Just. Rev. 208, 214 (2009).

12. *See* Patricia Viseur Sellers, *(Re)Considering Gender Jurisprudence*, *in* The Oxford Handbook of Gender and Conflict 211, 213 (Fionnuala Ní Aoláin et al. eds., 2018).

13. In this Comment, I mostly focus on the *actus reus* elements of genocide, sidestepping more nuanced but equally important legal questions like modes of liability, debates about the meaning of what it means to destroy a group "as such," and proof of intent. Future articles should consider how these questions apply to the challenges I put forward in Part II and the conclusion of this Comment. *See also* Anne-Marie de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR 60–79 (2005) (discussing these additional legal questions in the context of GSV).

A. A Few Notes on Terminology

Before beginning, it is important to clarify—and problematize—a few terms about sex and gender that I use in this Comment. "Sex" refers to the general biological classification of bodies as male, female, or intersex, based on factors such as genitals, hormones, and chromosomes.[14] "Intersex" is an umbrella term referring to people whose sex characteristics are neither entirely male nor female, describing between 0.05 percent and 1.7 percent of the world's population.[15] While many people incorrectly view sex as an immutable, biologically-determined characteristic, binary understandings of sex are socially constructed.[16] As Dr. Anne Fausto-Sterling explains:

> Our bodies are too complex to provide clear-cut answers about sexual difference. The more we look for a simple physical basis for 'sex,' the more it becomes clear that 'sex' is not a pure physical category. What bodily signals and functions we define as male or female come already entangled in our ideas about gender.[17]

"Gender" refers to ideas about the power relations between and the social roles played by people who identify as male, female, non-binary, or some other third-gender classification.[18] People who identify with the gender they are assigned at birth are often called "cisgender."[19] "Transgender" is not a universally-recognized concept but is

14. Giovanna Gilleri, *Gendered Human Rights and Medical Sexing Interventions upon Intersex Children: A Preliminary Enquiry*, *in* Asian Y.B. Hum. Rts. & Humanitarian L. 79, 81 (Javaid Rehmanet al. eds., 2019). *But see generally* Jessica Knouse, *Intersexuality and the Social Construction of Anatomical Sex*, 12 Cardozo J.L. & Gender 135 (2005) (arguing that the sex classifications male, female, and intersex fail to accurately predict a person's biological state or describe the biological diversity of human beings).

15. Gilleri, *supra* note 14, at 81.

16. *See* Myra J. Hird, *Intersexuality, Transsexualism and the 'Sex'/'Gender' Binary*, 1 Feminist Theory 347, 353–54 (2000).

17. Anne Fausto-Sterling, Sexing the Body: Gender Politics and the Construction of Sexuality 4 (1st ed. 2000).

18. Providing an undisputed definition for "gender" has stumped generations of "gender experts," and I make no attempt to establish a one-size-fits-all definition here. *See also* Natalie Wynn, *Archives: What Is Gender?*, ContraPoints, *https://www.contrapoints.com/transcripts/archives/what-is-gender* (last visited Dec. 27, 2020) [https://perma.cc/6VAQ-B4NF] ("Now a more sophisticated radical feminist like Catherine MacKinnon might argue that the essential thing is not anatomy but a certain kind of power dynamic, womanhood being defined by sexual submission and objectification. Whereas a queer feminist like Judith Butler might want to place more emphasis on the performative nature of gender, and on the possibility of 'queering' practices like drag to reveal its contingent and imitative nature. And a transgender feminist will more likely want to define womanhood in terms of a psychological state, perhaps a proprioceptive sense of belonging in a woman's body. So, which of these definitions are correct? Well, all of them are, in a way. We should adopt the definition that makes the most sense in a given context.").

19. B. Aultman, *Cisgender*, 1 Transgender Stud. Q. 61, 61–62 (2014).

increasingly understood to refer to people whose gender differs from the sex that they were assigned at birth.[20] This can include transgender men and women who fully transition or want to fully transition from one gender to another.[21] Non-binary and third-gender persons are also frequently classified as transgender even though they do not identify as men or women, instead identifying with some alternative idea of gender.[22] Some, but not all, intersex people identify as transgender, non-binary, and/or third-gender.[23]

Many of the broad gender classifications used throughout this Comment—notably transgender, non-binary, and third-gender—have a distinctly Western origin and may not be universally understood in non-Western contexts.[24] In some regions, communities have long recognized identities that fall outside the gender binary, including the hijra of South Asia,[25] the fa'afafine of Samoa,[26] indigenous North Ameri-

20. *See* David Valentine, Imagining Transgender: An Ethnography of a Category 105–125 (2007); Brian Kritz, *The Global Transgender Population and the International Criminal Court*, 17 Yale Hum. Rts. & Dev. L.J. 1, 6–10 (2014). *See also* B Camminga, Transgender Refugees and the Imagined South Africa: Bodies Over Borders and Borders Over Bodies 5–23 (2019) (discussing how "transgender" as a label has been used in the South African context).

21. Sam Rowlands & Jean-Jacques Amy, *Preserving the Reproductive Potential of Transgender and Intersex People*, 23 Eur. J. Contraception & Reprod. Health Care 58 (2018).

22. B. Lee Aultman, *Nonbinary Trans Identities*, *in* The Oxford Encyclopedia of LGBT Politics and Policy (Don Haider-Markel ed., 2019). *See also* Rob Cover, Emergent Identities: New Sexualities, Genders and Relationships in a Digital Era 1–14 (2019) (discussing even newer notions of gender and sexuality that have emerged on digital platforms in the 21st century).

23. Surya Monro, *Non-binary and Genderqueer: An Overview of the Field*, 20 Int'l J. Transgenderism 126, 129 (2019).

24. Additionally, the term "third-gender" is not ideal for describing how gender functions in societies where there are traditionally more than three genders, such as in South Sulawesi, Indonesia where some believe there are five genders. Sharyn Graham, *It's Like One of Those Puzzles: Conceptualising Gender Among Bugis*, 13 J. Gender Stud. 107, 114 (2004); Titiek Suliyati, *Bissu: Keistimewaan Gender dalam Tradisi Bugis*, 2 Endogami: Jurnal Ilmiah Kajian Antropologi 52 (2018).

25. Adnan Hossain, *The Paradox of Recognition: Hijra, Third Gender and Sexual Rights in Bangladesh*, 19 Culture, Health & Sexuality 1418, 1419 (2017). *But see* Gayatri Reddy, With Respect to Sex: Negotiating Hijra Identity in South India 223–25 (2005) (complicating understandings of hijra as "the third sex").

26. Penelope Schoeffel, *Representing Fa'afafine: Sex, Socialization, and Gender Identity in Samoa*, *in* Gender on the Edge: Transgender, Gay, and Other Pacific Islanders 73, 87 (Niko Besnier & Kalissa Alexeyeff eds., 2014). Many other Pacific Islander communities have similar third-gender or transgender social categories. *See* Kalissa Alexeyeff & Niko Besnier, *Gender on the Edge: Identities, Politics, Transformations*, *in* Gender on the Edge: Transgender, Gay, and Other Pacific Islanders 1, 5–8 (Kalissa Alexeyeff & Niko Besnier eds., 2014).

cans who identify as Two-Spirit,[27] and the burrnesha/sworn virgins of Albania.[28] In this Comment, I use the umbrella terms "non-binary" and "third-gender" to refer to these groups in the abstract, but future academics and lawyers working in a specific cultural context should be attentive to how local people and communities label people outside the male-female binary.[29]

Finally, throughout this Comment, I use categories like "men" and "people outside the binary" to refer to different groups of victims that could and should be recognized by international courts. However, the use of these categories should not be understood as a suggestion that such identities are concrete or distinct; rather, ideas about gender and sexuality differ widely across parts of the world and even between individuals in the same community.[30] Additionally, when talking about sexual violence, categories often blur together and overlap. For example, transgender women or non-binary people may be misunderstood by perpetrators as effeminate men or vice versa.[31] For lack of better language, I have chosen to use the broad terms described above to talk about global patterns of sexual violence, but localized understandings of gender and identity are often much more complex than the labels used here.

I. The Origins of Genocidal Sexual Violence

As mentioned at the beginning of this Comment, international caselaw about genocide and sexual violence has overwhelmingly focused on crimes committed against cisgender women. This Part details how the concept of GSV has developed in international law,

27. Kai Pyle, *Naming and Claiming: Recovering Ojibwe and Plains Cree Two-Spirit Language*, 5 TSQ: Transgender Stud. Q. 574, 576–77 (2018).

28. Jeta (Jetim) Luboteni, *A Heavy Word: Discourses on Albanian Sworn Virgins*, 3 Feminist Critique: E. Eur. J. Feminist & Queer Stud. 65, 77 (2020); Armela Xhaho, *Sworn Virgins, Male and Female Berdaches: A Comparative Approach to the So-Called 'Third Gender' People*, 1 Gender Questions 112, 112–14 (2013).

29. To further complicate things, the increasing globalization of Western queer identities has influenced how gender and sexuality are understood in non-Western contexts, with some individuals taking inspiration from both traditional and modern ideas of identity. *See, e.g.*, Peter A. Jackson, *Global Queering and Global Queer Theory: Thai [Trans]genders and [Homo]sexualities in World History*, 49 Autrepart 15, 20–21 (2009).

30. *See* Dianne Otto, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, *in* International Law and Its Others 318, 319 (Anne Orford ed., 2006); Ashley Tellis and Sruti Bala, *Introduction: The Global Careers of Queerness*, *in* The Global Trajectories of Queerness: Re-thinking Same-Sex Politics in the Global South 13, 16 (Ashley Tellis & Sruti Bala eds., 2015).

31. *See* Zeynep Pinar Erdem, *"They Treated Us in Monstrous Ways": Sexual Violence Against Men, Boys, and Transgender Women in the Syrian Conflict* 9 (2020), https://www.hrw.org/sites/default/files/media_2020/08/syria0720_web.pdf [https://perma.cc/R9QB-HQCH].

examining how courts have repeatedly dismissed or underemphasized GSV against cisgender men while completely ignoring the use of GSV against transgender individuals and people outside the binary. I begin with a broad discussion of GSV in international law before 1990 and then discuss GSV in the Rwandan and Bosnian contexts. I then examine how GSV has been prosecuted by other courts in the 21st century as well as how most academic legal writing on the topic understands GSV.

A. GSV in History and Law Before 1990

Sexual violence has been a common feature of genocidal military campaigns throughout human existence. For example, sexual violence was a horrific reality during the genocidal colonization of the Americas, Africa, Asia, and Oceania, destroying indigenous communities and subjugating survivors through terror and violence.[32] The use of sexual violence was also recorded during many genocides before the 20th century, including the Qing genocide of the Zunghar people in the 1700s, the Japanese colonization of the Ainu, and attempts to exterminate Mormons in the pre–Civil War United States.[33] The Ottoman genocide of the Armenians, Assyrians, and other Christians in the early 1900s also featured significant sexual violence, with genital dismemberment being particularly common in some places.[34] Later, during

32. Roger W. Smith, *Genocide and the Politics of Rape: Historical and Psychological Perspectives*, *in* Genocide Matters: Ongoing Issues and Emerging Perspectives 82, 83 (Joyce Apsel & Ernesto Verdeja eds., 2013). There are many historical accounts of how sexual violence was used by Europeans during colonization, but for a nonexhaustive selection, *see, e.g.*, David E. Stannard, American Holocaust: The Conquest of the New World 84–86 (1992); Mohamed Adhikari, *Europe's First Settler Colonial Incursion into Africa: The Genocide of Aboriginal Canary Islanders*, 49 Afr. Hist. Rev. 1, 20–22 (2017); Benjamin Madley, *Patterns of Frontier Genocide 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia*, 6 J. Genocide Res. 167, 170–89 (2004); Asafa Jalata, *The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians*, 3 SAGE Open 1, 8–9 (2013); Sally J. Torpy, *Native American Women and Coerced Sterilization: On the Trail of Tears in the 1970s*, 24 Am. Indian Culture & Res. J. 1, 1–13 (2000).

33. Susan Brownmiller, Against Our Will: Men, Women, and Rape 124–26 (2nd ed. 1993); Peter C. Perdue, China Marches West: The Qing Conquest of Central Eurasia 283–86 (2005); Tristan R. Grunow et al., *Hokkaidō 150: Settler Colonialism and Indigeneity in Modern Japan and Beyond*, 51 Critical Asian Stud. 597, 609–12 (2019); Spencer W. McBride, *When Joseph Smith Met Martin Van Buren: Mormonism and the Politics of Religious Liberty in Nineteenth-Century America*, 85 Church Hist. 150, 152 (2016).

34. Matthias Bjørnlund, *'A Fate Worse Than Dying': Sexual Violence During the Armenian Genocide*, *in* Brutality and Desire: War and Sexuality in Europe's Twentieth Century 16, 24–32 (Dagmar Herzog ed., 2009); Anthonie Holslag, *Exposed Bodies: A Conceptual Approach to Sexual Violence During the Armenian Genocide*, *in* Genocide and Gender in the Twentieth Century: A Comparative Study 87, 100 (Amy E. Randall ed., 2015); Hannibal Travis, *'Native Christians Massacred': The Ottoman Genocide of the Assyrians During World War I*, 1 Genocide Stud. & Prevention 327, 344 (2006).

World War II, sexual violence was commonplace in Nazi extermination camps, ghettos, and execution fields, being inflicted upon Jews, homosexual men, disabled people, and other political and ethnic minorities to brutal effect.[35]

Despite the prevalence of GSV throughout human history, international law before 1945 was largely silent about the use of sexual violence during armed conflict. While the Lieber Code (drafted in 1863 during the American Civil War) included a prohibition on rape, later international agreements based on the Lieber Code (notably the Brussels Declaration of 1874 and the Hague Conventions of 1899 and 1907) replaced this prohibition with vague language outlawing the violation of "family rights."[36] Sexual violence was also not specifically prohibited by the pre-1949 Geneva Conventions[37] or the London Charter, which created the International Military Tribunal for Nuremberg.[38]

35. MacKinnon, *supra*, note 9 at 217–18; David Eichert, *"Homosexualization" Revisited: An Audience-Focused Theorization of Wartime Male Sexual Violence*, 21 Int'l Feminist J. Pol. 409, 423–26 (2019); Regina Mühlhäuser, *Understanding Sexual Violence During the Holocaust: A Reconsideration of Research and Sources*, German Hist., July 1, 2020, at 1, 21 (2020); Zoë Waxman, *An Exceptional Genocide? Sexual Violence in the Holocaust*, *in* Genocide and Gender in the Twentieth Century: A Comparative Study 107, 109–113 (Amy E. Randall ed., 2015).

36. Tuba Inal, Looting and Rape in Wartime: Law and Change in International Relations 61–66 (2013).

37. *E.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377; Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846. Of course, the prohibition of sexual violence found in the 1949 revisions to the Geneva Conventions is also flawed, only specifying that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." 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. Such problematic language, in addition to excluding sexual violence against men and other genders, also connects a woman's right to bodily autonomy to harmful ideas of honor and morality. Inal, *supra* note 36, at 92–93. The 1977 protocols to the Geneva Conventions only partially resolved this issue, with Protocol I stating that in international armed conflicts, "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault." Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 76(1), Jun. 8, 1977, 1125 U.N.T.S. 3. Only Protocol II, which applies to non-international armed conflicts, prohibits sexual violence against male civilians, and neither Protocol prohibits sexual violence against individuals outside of the gender binary. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(2)(e), Jun. 8, 1977, 1125 U.N.T.S. 609. *See also* de Brouwer, *supra* note 13, at 175–23 (discussing sexual violence as a violation of international humanitarian law); Inal, *supra* note 36, at 92–132 (discussing the political factors which influenced how sexual violence was addressed in the 1949 and 1977 revisions of the Geneva Conventions).

38. Donja de Ruiter, Sexual Offenses in International Criminal Law: Cases

In 1948, the United Nations (UN) General Assembly unanimously adopted the text of The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[39] The Genocide Convention, which entered into force in 1951 and has now been ratified by a majority of UN member states, identified two main elements of the crime of genocide.[40] First, there is a *mens rea* element requiring that a perpetrator "commit[] [an act] with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[41] The Genocide Convention then lists five *acti rei* which qualify as genocidal acts:

> Killing members of the group;
> Causing serious bodily or mental harm to members of the group;
> Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> Imposing measures intended to prevent births within the group; and
> Forcibly transferring children of the group to another group.[42]

Sexual violence is not explicitly named in the Genocide Convention, and the connection between sexual violence and genocide was not widely understood or acknowledged until the 1990s.[43]

and Documents 28 (2011). However, the International Military Tribunal for the Far East and later post–World War Two tribunals did eventually prosecute lower-level German and Japanese military leaders for rape as a war crime. Siobhán K. Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 Duke L.J. 91, 104–05 (1996); Dan Plesch, Susana Sácouto & Chante Lasco, *The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today*, 25 Crim. L. F. 349, 352–54 (2014); Schiessl, *supra* note 9, at 204–05.

39. Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B. U. Int'l L.J. 1, 58 (1985).

40. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&lang=en [https://perma.cc/HJ5M-BJML].

41. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 102 Stat. 3045 (1988), 78 U.N.T.S. 277 [hereinafter Genocide Convention]. *See also* Dustin A. Lewis, *Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law*, 27 Wis. Int'l L.J. 1, 32–33 (2009) (discussing the *mens rea* element of the Genocide Convention in greater detail).

42. Genocide Convention, *supra* note 41 at arts. II(a)–(e). While the Rome Statute of the International Criminal Court uses identical language to define the crime of genocide, the ICC's Elements of Crimes does note that rape and sexual violence can qualify as genocide by causing "serious bodily or mental harm." Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 3; International Criminal Court, Elements of Crimes 2 (2011). Of course, while they are not considered in this Comment, some countries have their own definitions of genocide that are more expansive than the Genocide Convention or allow for a changing/evolving understanding of the realities of genocide. *See*, *e.g.*, Umut Özsu, *Genocide as Fact and Form*, 22 J. Genocide Res. 62, 67 (2020) (discussing Canada's 2000 Crimes Against Humanity and War Crimes Act).

43. *See* Elisa von Joeden-Forgey, *Gender and the Future of Genocide Studies and Prevention*, 7 Genocide Stud. & Prevention 89, 91–92 (2012). This is not to say that Raphaël Lemkin, who coined the term "genocide," did not conceive of sexual violence as a component

Among the first groups to draw a connection between genocide and sexual violence was the Civil Rights Congress, a Black activist organization in the United States that published a report entitled *We Charge Genocide* in 1951.[44] The report, which was addressed to the UN General Assembly and included horrific details about police violence and the extrajudicial killings of African Americans, alleged that the United States was systematically engaged in genocidal violence against the Black community.[45] Notably, the Civil Rights Congress included several allegations of rape in the report's list of crimes that violated Article II(b) of the Genocide Convention, arguing that the Black women who had been raped by white men had experienced "serious bodily and mental harm" amounting to genocide.[46] While the report was suppressed by the United States government and dismissed by world leaders at the time, it is notable—among other reasons—for perhaps being the first document to assert a clear connection between genocide and sexual violence.[47]

B. GSV at the ICTR

At the international level, the connection between sexual violence and genocide only began to develop during the 1990s and 2000s from caselaw at the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY).[48] In both Rwanda and the former Yugoslavia, sexual violence was a common tool of genocidaires, with systematic sexual violence against cisgender women being widely documented by journalists and survivors.[49] Feminist activism around the emerging

of genocide. To the contrary, Lemkin recognized how forced impregnation and the prevention of procreation were essential to the Nazi campaign of genocide. Douglas Irvin-Erickson, *Sixty Years of Failing to Prosecute Sexual Crimes: From Raphaël Lemkin at Nuremberg to Lubanga at the International Criminal Court*, *in* A Gendered Lens for Genocide Prevention 83, 87–92 (Mary Michele Connellan & Christiane Fröhlich eds., 2018).

44. Civil Rights Congress, We Charge Genocide: The Historic Petition to the United Nations for Relief from a Crime of The United States Government Against the Negro People (2nd ed. 1970).

45. *Id.*; Benjamin Meiches, *The Charge of Genocide: Racial Hierarchy, Political Discourse, and the Evolution of International Institutions*, 13 Int'l Pol. Soc. 20, 23 (2019).

46. Civil Rights Congress, *supra* note 44, at 59, 77, 81–84, 87, 101.

47. Meiches, *supra* note 45, at 23.

48. *See* Kirsten Campbell, *The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia*, 1 Intl'l J. Transitional Just. 411, 412 (2007).

49. *See* Beverly Allen, Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia 65–78 (1996); de Brouwer, *supra* note 13, at 9–19; Llezlie L. Green, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 Colum. Hum. Rts. L. Rev. 733, 750–55 (2002).

idea of "rape as genocide" brought sexual violence to the attention of prosecutors and judges,[50] resulting in several notable judgments which began to clarify and solidify international understandings of genocidal sexual violence.[51]

The key ruling about GSV emerged from the ICTR's *Akayesu* judgment.[52] Jean-Paul Akayesu was mayor of a Rwandan commune at the beginning of the genocide and encouraged Hutu men to rape and murder Tutsi women.[53] Akayesu was eventually arrested and put on trial before the ICTR, where he was charged with genocide.[54] However, these initial charges did not include evidence of rape or GSV.[55] In response, feminist activists pushed Judge Navanethem Pillay—then the only female judge at the ICTR—to invite prosecutors to investigate sexual crimes committed by or in the presence of Akayesu.[56] The indictment was subsequently amended to include allegations that the accused was responsible for the genocidal rape of cisgender Tutsi women, for which Akayesu was convicted in September 1998.[57]

The judgment in *Akayesu* was a watershed moment for international feminist activism, defining the crime of rape for the first time in international law and declaring that acts of sexual violence could constitute genocide if "they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such."[58] In particular, the ICTR judges declared that sexual violence could "certainly constitute infliction of serious bodily and mental harm" under Article

50. Natalie Nenadic, *Genocide and Sexual Atrocities: Hannah Arendt's "Eichmann in Jerusalem" and Karadžić in New York*, 39 Phil. Topics 117, 135 (2011).

51. However, the ICTR's record on prosecuting GSV was not perfect, and at times the focus on sexual violence was opposed by members of the prosecution team. Additionally, while 52 individuals were charged by the ICTR for sexual violence crimes, only 12 were actually convicted of those crimes. *See* Rosemary Grey, Prosecuting sexual and gender-based crimes at the International Criminal Court: practice, progress and potential 84–85 (Larissa van den Herik & Jean d'Aspremont eds., 2019).

52. Prosecutor v. Akayesu (*Akayesu*), ICTR-96-4-T, Judgment (Sept. 2, 1998).

53. de Brouwer, *supra* note 13, at 48–49.

54. Akayesu, *supra* note 52, ¶ 6.

55. Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 Mich. J. Int'l L. 1, 15–16 (2008); Akila Radhakrishnan & Sareta Ashraph, *The Akayesu Judgment at 20: Looking Back, Pushing Forward*, IntLawGrrls Blog (Sept. 2, 2018), https://ilg2.org/2018/09/02/the-akayesu-judgment-at-20-looking-back-pushing-forward [https://perma.cc/3JRZ-QPDV].

56. *See* Halley, *supra*, note 55, at 16.

57. *Id.* at 16–17.

58. Akayesu, *supra* note 52, ¶ 731; 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).

II(b) of the Genocide Convention.[59] The case also set a precedent for future ICTR genocide cases, establishing 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."[60]

The judges in *Akayesu* also made several notes about gender in the context of GSV that have been frequently overlooked in later discussions about genocide and sexual violence. First, the ICTR underscored the fact that forced pregnancy is not the sole goal of genocidal rape. Instead, the Trial Chamber cited multiple instances where Tutsi women were raped or sexually humiliated immediately before being killed, meaning that rape for the purpose of creating suffering is sufficient for a finding of genocide.[61] In addition, while *Akayesu* only dealt with sexual crimes committed against cisgender women, the ICTR was careful to note that sexual violence affected male victims as well, noting 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."[62]

A number of later cases at the ICTR featured evidence of GSV being used against cisgender women and reinforced the idea that sexual violence could be an element of genocide.[63] In *Musema*, for example, the ICTR Trial Chamber found that the accused was guilty of genocide for, among other crimes, committing sexual violence and ordering troops to commit sexual violence.[64] In one episode in particular, Alfred Musema, a former factory director turned genocidaire, connected sexual violence to the broad context of genocide, declaring during one rape, "The pride of the Tutsis will end today."[65] Similarly, in *Muhimana*, the ICTR heard evidence of sexual humiliation in the context of genocide,

59. Akayesu, *supra* note 52, ¶ 731.

60. *Id.*

61. *Id.* ¶¶ 731, 733. The Trial Chamber also stated that GSV could include "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages," as well as mental harm where "the person raped refuses subsequently to procreate." *Id.* ¶¶ 507–08.

62. *Id.* ¶ 731 (emphasis added).

63. However, several findings of GSV were later overturned by the ICTR Appeals Chamber for various reasons. Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda*, *in* Human Rights Advocacy Stories 193, 220 (Deena Hurwitz & Douglas Ford eds., 2009). For brevity's sake, I do not discuss these complex Appeals Chamber judgments; rather, the evidence discussed in this Subpart is more illustrative of how GSV was envisioned by prosecutors and judges at the ICTR.

64. Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶¶ 933–36 (Int'l Crim. Trib. for Rwanda Jan. 27, 2000).

65. *See id.* ¶¶ 933–34.

with one witness testifying that the accused told his assembled troops that he would "show [them] what a Tutsi girl looks like," forcing two Tutsi women to walk around naked with their "legs apart" before troops beat them to death.[66] In *Karemera et al.*, the Trial Chamber held that the rape of Tutsi women and girls caused serious bodily and mental harm to both the victims as well as their families and communities, reaffirming the genocidal nature of sexual violence in Rwanda at the time.[67]

Evidence presented at the ICTR also demonstrated that sexual violence did not need to be fatal or result in permanent infertility to be genocidal in nature. In *Kayishema & Ruzindana*, the ICTR Trial Chamber affirmed the decision in *Akayesu* and held that the Genocide Convention's prohibition on "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" applied to rape and other "methods of destruction which do not immediately lead to the death of members of the group."[68] Similarly, in *Gacumbitsi*, the accused was convicted for inciting genocide by driving around his commune with a megaphone encouraging Hutus to rape Tutsi women and girls.[69] In that case, the ICTR Trial Chamber held that for purposes of the Genocide Convention, "[s]erious bodily harm does not necessarily mean that the harm is irremediable" and that "serious mental harm can be construed as some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim."[70]

While the ICTR was key to the development of jurisprudence about GSV, there were still several flaws in how the prosecution of GSV was handled. For one, prosecutors made several decisions to charge sexual violence as a crime against humanity or war crime rather than genocide, leading Akila Radhakrishnan and Sareta Ashraph to argue:

> Decades later, the analysis and reporting of genocide continues to revolve around an understanding of genocide as a crime committed through organized mass killings. Killing remains *the* privileged genocidal act, and consequently the examination of the risk and commission of genocide has largely, and unhelpfully, revolved around the numbers killed. *Akayesu* notwithstanding, the majority of genocide

66. Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶¶ 18–19 (Int'l Crim. Trib. for Rwanda Apr. 28, 2005).

67. Prosecutor v. Karemera , Case No. ICTR-98-44-T, Judgment and Sentence, ¶¶ 1667–71 (Int'l Crim. Trib. for Rwanda Feb. 2, 2012).

68. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶¶ 108–16 (Int'l Crim. Trib. for Rwanda May 21, 1999).

69. Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶¶ 200–01, 257–90 (Int'l Crim. Trib. for Rwanda June 17, 2004).

70. *Id.* ¶ 291.

> convictions in both the ICTR and ICTY have been based on instances of mass executions, founded upon strategies geared towards achieving the immediate physical destruction of [. . .] the protected group.[71]

ICTR judges never ruled that sexual violence against men could be genocidal, despite ample evidence to the contrary.[72] For example, in *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.[73] 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.[74]

C. GSV at the ICTY and ICJ

At the ICTY, judges rarely acknowledged the connection between genocide and sexual violence despite widespread evidence that many forms of sexual violence had been used during the conflict in Bosnia.[75] As Drs. Elliot, Kivlahan, and Rahhal explain:

> In the *Mladic* 2,500+ page Judgment, whose scope spans the length of the Bosnian conflict, not a single heading refers to any form of sexual violence. All CRSV [conflict-related sexual violence] is hidden as an un-headed sub-category of an underlying act 'cruel and inhumane treatment', and it is characterized as persecution as a crime against humanity. It is covered in one paragraph, less than half a page. Several specific incidents of CRSV against women are mentioned, and some generic sentences which could relate to men or women as victims. Male sexual violence is not explicitly mentioned in these legal findings. In contrast, the discussion of forced labour has a heading and covers 20 paragraphs over seven pages. Sexual violence is not

71. Radhakrishnan and Ashraph, *supra* note 55; *see also* Van Schaack, *supra* note 63, at 220–26 (discussing other cases in which the ICTR Prosecution chose not to charge the accused with sexual violence or with sexual violence as an act of genocide).

72. Valerie Oosterveld, *Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal*, 107 J. Int'l L. & Int'l Rels. 107, 110 (2014).

73. *Compare* Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶¶ 418, 427–44 (Int'l Crim. Trib. for Rwanda Apr. 28, 2005) (discussing evidence of the accused engaging in such behavior), *with id.* ¶¶ 487–586 (failing to address such behavior in the court's legal findings).

74. Prosecutor v. Bagosora, ICTR-98-41-T, Judgment and Sentence, ¶¶ 976, 1908 (Int'l Crim. Trib. for Rwanda Dec. 18, 2008).

75. Laurel Baig, Michelle Jarvis, Elena Martin Salgado & Giulia Pinzauti, *Contextualizing Sexual Violence: Selection of Crimes*, *in* Prosecuting Conflict-Related Sexual Violence at the ICTY 172, 210–11 (Serge Brammertz & Michelle Jarvis eds., 2016).

> mentioned explicitly as serious bodily or mental harm as an *actus reus* of genocide.[76]

This framing of sexual violence as non-genocidal is not for lack of evidence; to the contrary, several cases at the ICTY featured clear evidence of sexual violence—including acts against cisgender men—that could have been considered genocidal in nature:

> For example, in the ICTY's *Simić* case, a victim was beaten in the crotch and told 'Muslims should not propagate.' Another was kicked in the genital area [. . .] In *Mucić*, the ICTY Trial Chamber [heard evidence of] the placing of a lit fuse around the genitals of a male detainee [. . .] In a recent example, the ICTY Trial Chamber, in *Stanišić & Župljanin*, considered sexual violence directed against Muslim men, including sexual humiliation; the stomping of genitals; forced nudity; forced rape (including forced penetration by a broom handle) and other sexual acts between two pairs of fathers and sons and one pair of cousins; and penile amputation (then forcing other prisoners to ingest the penis).[77]

Only a few cases at the ICTY addressed the use of GSV in the former Yugoslavia.[78] The most notable of these was *Krstić*, in which the accused, a commander in the Bosnian Serb Army, was convicted of genocide for overseeing the execution of more than seven thousand men and boys in Srebrenica.[79] The Trial Chamber also found the accused responsible for sexual violence that had previously been committed as part of an "ethnic cleansing" campaign in Potočari.[80] While "ethnic cleansing" is not a crime under international law and the violence at Potočari was not ruled to be genocide, the ICTY Trial Chamber nevertheless announced that there were "obvious similarities between a genocidal policy and the policy commonly known as 'ethnic

76. Ingrid Elliott, Coleen Kivlahan, & Yahya Rahhal, *Bridging the Gap Between the Reality of Male Sexual Violence and Access to Justice and Accountability*, 18 J. Int'l Crim. Just. 469, 487 (2020).

77. Oosterveld, *supra* note 72, at 113–14.

78. Of course, genocide prosecutions for crimes committed in Bosnia continue at the War Crimes Chamber in Bosnia and Herzegovina. For more context about how the War Crimes Chamber has addressed crimes discussed in this Comment, *see* Amrita Kapur & Kelli Muddell, When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts 21 (2016) ("Another example is the hybrid War Crimes Chamber in the Court of Bosnia and Herzegovina, which has adjudicated 214 cases related to the conflict of the early 1990s. Of these cases, 16 mention sexual violence against men in the indictment or judgment. Though the chamber has convicted acts of sexual violence against men, none were recognized as sexual violence per se.").

79. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 644–45 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

80. *Id.* ¶¶ 612, 617–18.

cleansing.'"[81] As such, the ICTY drew a connection in *Krstić* between sexual violence and the intent to commit ethnic cleansing, although not going all the way to convict Krstić of GSV.[82]

In all, the ICTY did not convict anyone for GSV. Part of this is due to the fact that several accused war criminals charged with GSV died before their trials could be concluded (for example, Slobodan Milošević and Milan Kovačević).[83] In a number of other cases (for example, *Krajišnik*, *Stakić, Karadžić*), the accused were charged with committing acts of GSV only to ultimately be found not guilty due to an inability to prove specific genocidal intent.[84] Despite these rulings, however, the evidence presented by the prosecution demonstrated how rape, mutilation, and sexual humiliation were used to horrific effect against women *and* men during the conflict in Bosnia.[85] Moreover, in a number of cases (for example, *Stakić, Furundžija*), the ICTY reaffirmed the caselaw coming out of the ICTR stating that sexual violence could potentially be genocidal, even if the harm inflicted was not permanent or irreversible.[86]

The ICJ was also asked to determine if sexual violence could constitute an act of genocide in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case.[87] In

81. *Id.* ¶ 562.

82. *See* William A. Schabas, *"Ethnic Cleansing" and Genocide: Similarities and Distinctions*, 3 Eur. Y.B. Minority Issues 109, 110 (2003) (detailing how the ICTY Prosecutor was long hesitant to charge "ethnic cleansing" as genocide).

83. *See* Prosecutor v. Kovačević, Case No. IT-97-24-I, Amended Indictment, ¶¶ 27–29 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 28, 1999); Prosecutor v. Milošević, Case No. IT-02-54-T, Amended Indictment, ¶ 32 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2002).

84. Prosecutor v. Krajišnik, Case No. IT-00-39-I, Amended Indictment, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 21, 2000); Prosecutor v. Krajišnik, Case No. IT-00-39-I, Judgment, ¶ 1125 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006); Prosecutor v. Stakić, Case No. IT-97-24, Indictment, ¶¶ 21–25 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 13, 1997); Prosecutor v. Stakić, Case No. IT-97-24, Judgment, ¶¶ 553–61 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003); Prosecutor v. Karadžić, Case No. IT-95-5/18, Public Redacted Version of Judgment Issued on 24 March 2016, ¶¶ 2580–82, 2626 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 14, 2016).

85. *See, e.g.*, *Karadžić*, Case No. IT-95-5/18-T, ¶¶ 2501–06. In a number of these cases, the ICTY Trial Chamber announced that the acts of sexual violence met the *actus reus* requirement of genocide but ultimately failed to conclusively prove that the accused intended the crimes to destroy the targeted group(s). Baig et al., *supra* note 75, at 213–14.

86. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 516 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 172 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

87. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 298–300 (Feb. 26) [hereinafter Application of the Convention].

that case, Bosnia and Herzegovina alleged, in part, that the systematic use of sexual violence had violated Article II (b), (d), and (e) of the Genocide Convention by causing serious bodily and mental harm, imposing measures to prevent births, and forcibly transferring children to another group.[88] Importantly, Bosnia and Herzegovina argued that sexual violence against both female *and* male prisoners demonstrated the genocidal intent of the Serbian perpetrators.[89] Strangely, the ICJ ruled that the accounts of sexual violence presented by Bosnia and Herzegovina did not qualify as genocide, questioning whether perpetrators had the requisite genocidal intent and even disputing evidence of rape camps and genital mutilation.[90] Despite this underwhelming ruling, the ICJ did affirm that sexual violence *could* potentially constitute an act of genocide, citing *Akayesu*, *Stakić*, and multiple UN resolutions about the use of GSV in the former Yugoslavia.[91]

D. GSV in Other International Contexts

Outside of the Rwandan and Bosnian contexts, the twenty-first century has seen few international cases dealing with GSV. This

88. *Id.* ¶¶ 298–319, 355–67. The inclusion of Article II(e) in Bosnia and Herzegovina's allegations is interesting, since the genocidal act of "forcibly transferring children to another group" is not often understood to be sexual in nature. Bosnia and Herzegovina's argument was that "children born as a result of . . . 'forced pregnancies' would not be considered to be part of the protected group," meaning "that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs." *Id.* ¶ 362. The ICJ disputed this interpretation of the facts, stating that the evidence presented to the ICJ did not establish the existence of any policy of forced pregnancy. *Id.* ¶ 367.

89. *Id.* ¶¶ 307, 355–57.

90. *Id.* ¶¶ 319, 355–61, 367; *see also* Anthony Marino, Bosnia v. Serbia *and the Status of Rape as Genocide in International Law*, 27 B.U. Int'l L.J. 205, 208 (2009) ("Unfortunately, the Court did not address the issue of rape and sexual violence in any systematic way, and in the end, left the legal status of 'rape as genocide' arguments more convoluted than before. In doing so, the Court disregarded or denied the existence of readily available evidence (in many cases, evidence from sources on which the Court relied heavily elsewhere in its decision) and rested on a questionable reading of the Convention, confounding specific intent with an act's success in achieving that intent.").

91. Application of the Convention, *supra* note 87, ¶¶ 300–03. Seven years later the ICJ revisited the idea of genocidal sexual violence in *Croatia v. Serbia*. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3 (Feb. 3, 2015). In the final judgment for the case, the ICJ further narrowed the circumstances in which GSV could be alleged but affirmed that GSV was a theoretical possibility. For more context, *see* Giulia Pecorella, *Rape and Sexual Violence in the ICJ's Judgment in* Croatia v. Serbia, 28 Leiden J. Int'l L. 945, 948–51 (2015); *see also* Melanie O'Brien, *Rohingya Symposium: The Rohingya Cases before International Courts and the Crime of Genocide*, Opinio Juris (Aug. 25, 2020), https://opiniojuris.org/2020/08/25/rohingya-symposium-the-rohingya-cases-before-international-courts-and-the-crime-of-genocide [https://perma.cc/DP97-MK72] (discussing the ICJ's questionable reading of the Genocide Convention regarding sexual violence).

Subpart briefly discusses how GSV has been addressed by the United Nations Security Council, the International Criminal Court (ICC), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Iraqi High Tribunal (IHT), the Guatemalan Court for High Risk Crimes, and the Truth and Reconciliation Commission of Canada. This Subpart then concludes with a longer discussion about the aforementioned FFM report on sexual violence against the Rohingya and its relation to the ongoing genocide case before the ICJ.[92]

Several UN Security Council Resolutions have discussed GSV.[93] Resolution 1820 noted that "rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide" and correctly identified the many ways in which sexual violence is used against cisgender women and children during armed conflict.[94] However, sexual violence against men or people outside the gender binary is left entirely unmentioned.[95] Five years later, the Security Council issued Resolution 2106, reaffirming that sexual violence could be an act of genocide and briefly mentioning sexual violence against men—albeit in the same phrase as victims who are "secondarily traumatized as forced witnesses of sexual violence."[96] Finally in 2019, Resolution 2467 reaffirmed the idea that sexual violence could be a feature of genocide and gave significantly more space to male victims by recognizing that "men and boys are also targets of sexual violence in conflict and post-conflict settings, including in the context of detention settings and those associated with armed groups."[97]

92. To facilitate the readability of this Comment, I have excluded several notable transitional justice processes from this Subpart (e.g. the War Crimes Chamber in the Courts of Bosnia-Herzegovina, the *gacaca* courts in Rwanda, countries using universal jurisdiction). These courts could be interesting sites of further analysis for considering the topics discussed in this Comment.

93. This paragraph is, of course, a narrow discussion of a much broader but slowly-emerging trend of conflict-related sexual violence against men being discussed at the UN. *See* Heleen Touquet & Ellen Gorris, *Out of the Shadows? The Inclusion of Men and Boys in Conceptualisations of Wartime Sexual Violence*, 24 Reprod. Health Matters 36, 37–41 (2016).

94. S.C. Res. 1820, ¶ 4 (June 19, 2008).

95. Resolution 1888 similarly discussed sexual violence against women and encouraged states to prosecute genocide and other international crimes. S.C. Res. 1888, at 2 (Sept. 30, 2009).

96. S.C. Res. 2106, at 1–2 (June 24, 2013); *see also* Chris Dolan, *Victims Who Are Men*, *in* The Oxford Handbook of Gender and Conflict 86, 90–91 (Fionnuala Ní Aoláin et al. eds., 2018) (lending further context to the language used in Resolution 2106).

97. S.C. Res. 2467, ¶ 32 (Apr. 23, 2019); *see also* Zeynep Pinar Erdem, *Men Can Experience Sexual Violence in War Too*, Hum. Rts. Watch (May 3, 2019, 4:57 PM), https://www.hrw.org/news/2019/05/03/men-can-experience-sexual-violence-war-too [https://perma.cc/JE5A-DCW9] (discussing Resolution 2467 and related UN recognition of conflict-related

Despite these improvements, no mention is made of victims who do not correspond to the gender binary.

At the ICC, only one person, former Sudanese president Omar al-Bashir, has been charged with the crime of genocide. In the arrest warrant for al-Bashir, the ICC Prosecutor stated that the accused had ordered the rape of "thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups" as part of the genocide in Darfur.[98] There was also one allegation in Annex A to the warrant that seven men had been abducted, forced to strip naked, and flogged while soldiers said, "[Y]ou are black slaves and this is our country."[99] As of September 2020, Al Bashir has yet to be transferred to the ICC, and it is unclear if the Prosecutor will include additional evidence of sexual violence in future allegations.[100]

In Case 002 of the ECCC, four former leaders of the Khmer Rouge were charged with genocide for systematic campaigns of murder against the Cham and Vietnamese minorities in Cambodia.[101] Additionally, all four were charged with "rape" and "rape in the context of forced marriage" as a crime against humanity.[102] This distinction is due to the fact that the current legal definition of genocide only applies to violence against "national, ethnical, racial or religious group[s]."[103]

sexual violence against men).

98. Prosecutor v. Al Bashir, ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, at 6 (July 12, 2010).

99. Prosecutor v. Al Bashir, ICC-02/05-157-AnxA, Public Redacted Version of the Prosecutor's Application Under Article 58, ¶ 150 (Jul. 14, 2008).

100. *See* Grey, *supra* note 51, at 183–85.

101. Specifically, three of the accused (Nuon Chea, Ieng Sary, and Khieu Samphan) were charged with genocide against the Cham and Vietnamese communities in Cambodia; the fourth person (Ieng Thirith) was only charged with genocide against the Vietnamese in Cambodia. Extraordinary Chambers in the Courts of Cambodia Sept. 15, 2010, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶¶ 1545–46 [hereinafter Case 002 Closing Order]. There is additional nuance in the charges that I have excluded for brevity's sake, including the fact that one of the four (Ieng Thirith) was not charged with ordering the genocide, only with planning, instigating, aiding, and abetting the genocide. *Id.* at ¶ 1556. Ultimately, only two of the accused survived long enough to see the end of the genocide trial. Rosemary Grey, *Seen and Unseen: Sexual and Gender-Based Crimes in the Khmer Rouge Tribunal's Case 002/02 Judgment*, 25 Australian J. Hum. Rts. 466, 467–68 (2019).

102. Case 002 Closing Order, *supra* note 101, ¶¶ 1545–46, 1613. While it is unclear if the cases will be dismissed or not, the accused in Cases 003 and 004 were also charged with nonsexual forms of genocide, as well as rape and forced marriage as rape as crimes against humanity. Extraordinary Chambers in the Courts of Cambodia Nov. 28, 2018, Case File No. 003/07-09-2009-ECCC-OCIJ, Closing Order, at 256, 262; Extraordinary Chambers in the Courts of Cambodia Jun. 29, 2019, Case File No. 004/07-09-2009-ECCC-OCIJ, Closing Order, at 475–83.

103. *See* Geneva Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277; Sareta Ashraph, Glob. Just. Ctr., Beyond Killing: Gender, Genocide, & Obligations Under International Law 10–11 (2018).

Because much of the sexual violence committed by the Khmer Rouge took place against the majority Cambodian population, the ECCC prosecutors were unable to prosecute sexual violence as genocide.[104] Despite this, Case 002 was notable because of victim testimony about the Khmer Rouge's policy of forcing men and women—or, in at least one case, a transgender woman and a cisgender woman—to marry and consummate those marriages under threat of execution.[105]

Following the invasion of Iraq in 2003, the United States and its partners set up the controversial Iraqi High Tribunal to prosecute serious crimes committed between 1968 and 2003.[106] One trial, the *Al Anfal* case, focused on genocidal violence committed against the Kurds in Iraq,[107] for which five men were convicted of genocide.[108] While much of the case focused on the use of chemical weapons against Kurdish villages, two men (Ali Hassan al-Majid and Sultan Hashim Ahmad) were also convicted of genocide, in part, based on the rape of women that occurred during the genocide.[109] Ali Hassan al-Majid was also convicted in part for what seems to be sexual torture after one witness testified, "I went out of the hall to see three individuals hanged . . . their sexual organs were tied to gas bottles."[110]

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104. *See* Stéphanie Giry, *The Genocide That Wasn't*, N.Y. Rev. (Aug. 25, 2014, 12:24 PM), https://www.nybooks.com/daily/2014/08/25/khmer-rouge-genocide-wasnt [https://perma.cc/PMF7-R8QW]; *but see* Maria Elander, *In Spite: Testifying to Sexual and Gender-Based Violence during the Khmer Rouge Period*, in Queering International Law: Possibilities, Alliances, Complicities, Risks 110, 113–20 (Dianne Otto ed., 2018) (discussing flaws in the investigation of sexual violence by ECCC prosecutors and others).

105. Grey, *supra* note 101, at 469–471. Also, prior to the ECCC, in 1979 the Revolutionary People's Tribunal tried two Khmer Rouge leaders (Pol Pot and Ieng Sary) *in absentia* for committing genocide. *See generally* John Quigley, *Introduction*, *in* Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary 1 (Howard J. De Nike, John Quigley & Kenneth J. Robinson eds., 2000). Among other things, witnesses at the trial testified that sexual violence had been committed by the Khmer Rouge regime. Howard J. De Nike, *Reflections of a Legal Anthropologist on the Trial of Pol Pot and Ieng Sary, in* Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary, *supra*, at 19, 26–27.

106. *See* Katherine Ranharter & Gareth Stansfield, *Acknowledging the Suffering Caused by State-Mandated Sexual Violence and Crimes: An Assessment of the Iraqi High Tribunal*, 52 Middle E. Stud. 27, 28–29 (2016). The IHT was also plagued with fair trial issues. Jennifer Trahan, *Remarks Regarding the Iraqi High Tribunal's Anfal Trial: Speech Delivered at International Law Weekend*, 15 ILSA J. Int'l & Comp. L. 587, 596–601 (2009).

107. Iraqi High Trib., Special Verdict of June 24, 2007, Case No. l/CSecond/2006, https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Iraq/Anfal_verdict.pdf [hereinafter Al Anfal Case].

108. Jennifer Trahan, *A Critical Guide to the Iraqi High Tribunal's Anfal Judgement: Genocide Against the Kurds*, 30 Mich. J. Int'l L. 308, 307 (2009).

109. Al Anfal Case, *supra* note 107, at 503, 647.

110. *Id.* at 504.

In 2013, Efrain Ríos Montt—the former military ruler of Guatemala—was convicted of genocide and crimes against humanity for the massacres of Maya Ixil communities in 1982 and 1983.[111] While sexual violence was only one form of evidence used to demonstrate Ríos Montt's genocidal intent, several cisgender women testified to being raped or seeing female family members raped by soldiers, with the Guatemalan Court for High Risk Crimes ruling that genocidal rape was "part of the systematic and intentional plan to destroy the Ixil ethnic group by exercising violence on women's bodies as a way to destroy the social fabric and thereby ensure the destruction of the Ixil population."[112]

In 2015, the Truth and Reconciliation Commission of Canada issued its final report on the treatment of indigenous people throughout Canadian history.[113] The report labeled this violence as "cultural genocide," stating that the Canadian government had long been engaged in the "destruction of those structures and practices that allow the group to continue as a group."[114] Among the abuses detailed in the report was the forced enrollment of indigenous children in residential boarding schools where they were often sexually abused with little to no official recourse, sometimes to the knowledge of supervisors in the Canadian government.[115]

To conclude this Subpart, I want to revisit how GSV against the Rohingya was described and addressed by the FFM. As discussed at the beginning of this Comment, in 2019, the FFM released a report about

111. *See* Claudia Martin & Susana SáCouto, *Access to Justice for Victims of Conflict-related Sexual Violence: Lessons Learned from the Sepur Zarco Case*, 18 J. Int'l Crim. Just. 243, 253 (2020).

112. *See id.* at 243–254 (quoting Open Soc'y Just. Initiative, Judging a Dictator: The Trial of Guatemala's Ríos Montt 14 (2013)).

113. Truth & Reconciliation Comm'n of Can., Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (2015). The Australian Human Rights Commission drew a similar conclusion when it declared that Australian state policies regarding the Aboriginal and Torres Strait Islander indigenous communities constituted genocide, although that report does not discuss sexual violence to the same extent as the Canadian report. Austl. Hum. Rts. Comm'n, Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families 139–42, 190 (1997).

114. Truth & Reconciliation Comm'n of Can., *supra* note 113, at 1; *see also* Elisa Novic, The Concept of Cultural Genocide: An International Law Perspective 1–9, 41–46 (2016) (discussing GSV in the Canadian context and assessing how "cultural genocide" fits in with legal understandings of the Genocide Convention).

115. Truth & Reconciliation Comm'n of Can., *supra* note 113, at 105–10. Notably, the final report included testimonies from female *and* male survivors of sexual abuse. *Id.* at 107, 220.

the use of sexual violence against the Rohingya by Myanmar's military (the Tatmadaw) as part of Myanmar's "clearance operations."[116] The FFM described in gruesome detail how the Tatmadaw had sexually assaulted cisgender women and girls, frequently subjecting victims to gang rape or raping women until they died from loss of blood.[117] The report also described how some Rohingya women were executed by the Tatmadaw after being raped, while other women were forced to flee to neighboring Bangladesh despite their injuries and lack of medical care.[118] Additionally, the report noted how members of the Rohingya community were forced to watch these crimes, leaving "an indelible mark on the Rohingya social fabric" and causing "immeasurable mental harm."[119] Based on this information, the FFM appropriately concluded that the systematic use of sexual violence against cisgender women and girls:

> indicated the Tatmadaw's genocidal intent to destroy the Rohingya people, including by means of killing female members of the Rohingya community, causing Rohingya women and girls serious bodily or mental harm, deliberately inflicting on the Rohingya women and girls conditions of life calculated to bring about the destruction of the Rohingya in whole or in part, and imposing measures that prevented births within the group. This conclusion is based on the Mission's analysis of the widespread and systematic killing of women and girls, the systematic selection of women and girls of reproductive ages for rape, attacks on pregnant women and on babies, the mutilation and other injuries to their reproductive organs, the physical branding of their bodies by bite marks on their cheeks, neck, breast and thigh, and so severely injuring victims that they may be unable to have sexual intercourse with their husbands or to conceive and leaving them concerned that they would no longer be able to have children.[120]

The FFM report also detailed how sexual violence had been used against Rohingya men and transgender women but did not label it as "genocide." However, all of the acts described by the report were functionally identical to the GSV used against cisgender women. For example, the FFM described how military forces attacked men by committing acts of "rape and gang rape, genital mutilation, forced nudity

116. FFM Sexual Violence Report, *supra* note 1, ¶¶ 3–6. The report also documented how sexual violence against other minority groups in Myanmar's Rakhine, Kachin, and Shan states likely qualified as crimes against humanity and war crimes, although the FFM stopped short of labeling that violence as "genocide." *Id.* ¶¶ 100–48, 172–79.

117. *Id.* ¶¶ 69–99.

118. *Id.* ¶¶ 75, 97.

119. *Id.* ¶¶ 193–94.

120. *Id.* ¶¶ 96.

and other forms of sexual violence, sometimes leading to death."[121] Several witness accounts describe how Rohingya men were subjected to severe genital beatings which could have affected their reproductive capacity; other witnesses testified that Rohingya men were raped and then strangled, or humiliated when military forces urinated on them or forced them to publicly strip naked.[122] The report classified these acts as crimes against humanity and violations of a number of international treaties, including the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights, but not the Genocide Convention.[123]

Similarly, the FFM interviewed five transgender women who had been victims of systematic sexual violence during the "clearance operations" against the Rohingya.[124] In addition to being sexually humiliated by officers, these women reported being anally and orally gang raped by officers—with one woman "left bleeding from her penis and anus" after the attack. One of these transgender victims was only 15 years old at the time of the attack.[125] The report concluded by labeling these acts as crimes against humanity and as violations of the International Covenant on Economic, Social and Cultural Rights, but not the Genocide Convention.[126]

Currently, accusations of genocide against the Rohingya have reached the ICJ thanks to an important submission by The Gambia, which has accused Myanmar of violating the Genocide Convention.[127]

121. *Id.* ¶¶ 154.

122. *Id.* ¶¶ 159–67. These accounts have been supplemented by nongovernmental organizations (NGOs) and civil society working with Rohingya refugees, including one report from the Women's Refugee Commission that found that Rohingya men were subjected to many forms of GSV, including "burning, mutilation, and electroshock of the genitals; castration and penis amputation; penile- and object-anal rape, including with sticks and metal rods; penile-oral rape; forced sex and sexual interactions with family members and other people; forced witnessing of sexual violence against female family and community members; forced nudity; and sexual humiliation." Sarah Chynoweth, "It's Happening to Our Men as Well": Sexual Violence Against Rohingya Men and Boys 18 (2018).

123. FFM Sexual Violence Report, *supra* note 1, ¶¶ 168–69.

124. *Id.* ¶¶ 180–88. The FFM uses the label "transgender women" here to refer to the victims, but the report likely refers to *hijra* members of the Rohingya community. Personal correspondence with an NGO representative previously stationed at Cox's Bazaar. The use of the term "transgender" to refer to hijra is disputed. Max Bearak, *Why Terms Like 'Transgender' Don't Work for India's 'Third-Gender' Communities*, Wash. Post (Apr. 23, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/04/23/why-terms-like-transgender-dont-work-for-indias-third-gender-communities [https://perma.cc/TM8S-9Q24].

125. FFM Sexual Violence Report, *supra* note 1, ¶ 182–87.

126. *Id.* ¶ 188.

127. 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, ¶ 111 (Nov. 11, 2019). The ICC and the Independent Investigative Mechanism

In their initial submission to the ICJ, lawyers for The Gambia essentially replicated the FFM's conclusions about sexual violence, alleging that Myanmar's use of sexual violence against women and girls—but not men and boys—was proof that a genocide had occurred.[128] It is unclear if The Gambia will amend its initial submission to include other allegations of GSV against the Rohingya.

E. Academic Understandings of GSV

Finally, the concept of GSV has gradually entered into academic discussions of genocide thanks to the work of feminist lawyers and intellectuals, who have detailed and debated the horrific role that sexual violence against cisgender women plays during the process of genocide. While this work is largely silent on the use of GSV against men, transgender women, and people outside the binary,[129] academic writing on GSV nevertheless provides important insights into the many ways sexual violence can violate the Genocide Convention.

First, academics have described how some cisgender women are killed or rendered infertile when sexually assaulted during a genocide.[130] This is perhaps the clearest way in which sexual violence contributes to the crime of genocide: by removing individuals from the gene pool and

for Myanmar are also conducting their own investigations into violence against the Rohingya, and a universal jurisdiction case is ongoing in Argentina. Priya Pillai, *Rohingya Symposium: Concluding Comments—"And Miles to Go . . . "*, Opinio Juris (Aug. 28, 2020), https://opiniojuris.org/2020/08/28/rohingya-symposium-concluding-comments-and-miles-to-go [https://perma.cc/4HWQ-GWEY].

128. Eichert, *supra* note 5.

129. There are a handful of academic articles which address the use of GSV against men. Notably, Claire Bradford di Caro devotes an entire article to the subject, and Ferrales et al. focus on gender-based violence and genocide in the context of Darfur. Claire Bradford Di Caro, *Call It What It Is: Genocide Through Male Rape and Sexual Violence in the Former Yugoslavia and Rwanda*, 30 Duke J. Comp. & Int'l L. 57 (2019); Gabrielle Ferrales, Hollie Nyseth Brehm & Suzy Mcelrath, *Gender-Based Violence Against Men and Boys in Darfur: The Gender-Genocide Nexus*, 30 Gender & Soc. 565 (2016). The topic is also addressed on a smaller scale by a few other academics. *See, e.g.*, Élise Féron, Wartime Sexual Violence against Men: Masculinities and Power in Conflict Zones 27–57 (2018); Usta Kaitesi, Genocidal Gender and Sexual Violence: The Legacy of the ICTR, Rwanda's Ordinary Courts and Gacaca Courts 86–121 (2014); Henri Myrttinen, *Languages of Castration—Male Genital Mutilation in Conflict and Its Embedded Messages*, *in* Sexual Violence Against Men in Global Politics 71, 78 (Marysia Zalewski et al. eds., 2018); Olivera Simić, *Wartime Rape and Its Shunned Victims*, *in* Genocide and Gender in the Twentieth Century: A Comparative Survey 237, 238–40 (Amy E. Randall ed., 2015); Lewis, *supra* note 41, at 27–33. Kritz also considers how genocide prohibitions apply to transgender and intersex people in his article about the International Criminal Court. *See generally* Kritz, *supra* note 20.

130. *E.g.*, Binaifer Nowrojee & Hum. Rts. Watch, Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath 35–36 (1996).

thus permanently restricting the ability of that group to reproduce.[131] Death from GSV is not always immediate, sometimes occurring days or weeks later for women who find themselves seriously injured, homeless, and/or unable to obtain medical treatment.[132] Sexual violence can also kill if the victims are infected with HIV or another sexually transmitted disease and are unable to obtain proper medical treatment, as was the case for some women in Rwanda.[133]

In other instances, genocidaires may attempt to impregnate cisgender women.[134] In patrilineal cultures where children are believed to belong to their father's ethnic/racial/religious group, forced impregnation physically and symbolically expands the perpetrator's group while limiting the resources available to the victim's group.[135] Forced impregnation also prevents a woman from becoming pregnant with a partner of her choosing and can even result in her death due to difficulties associated with being pregnant in a warzone.[136] Children born of genocidal rape and their mothers may also assimilate into the perpetrator's group for protection and survival, furthering the genocidal goal of the perpetrators by effectively removing members of the target group from their communities.[137] The practice of forced pregnancy was especially common in Bosnia, where some women were held in rape camps for weeks, only being released when it was too late for them to obtain a safe abortion.[138]

While many academics have argued that forced pregnancy can qualify as an act of genocide,[139] some have pushed back on this inter-

131. Allison Ruby Reid-Cunningham, *Rape as a Weapon of Genocide*, 3 Genocide Stud. & Prevention 279, 285 (2008).

132. de Brouwer, *supra* note 13, at 50.

133. Reid-Cunningham, *supra* note 131.

134. Robyn Charli Carpenter, *Forced Maternity, Children's Rights and the Genocide Convention: A Theoretical Analysis*, 2 J. Genocide Res. 213, 222–27 (2000); *see also* Kathleen A. Cavanaugh, *Forced Impregnation and Rape as a Means of Genocide*, 8 New Eng. J. Int'l & Comp. L. 285, 288 (2002) (discussing one instance where a Kosovar girl was forced to strip by members of a Serbian paramilitary group but then sent away when they realized that she was menstruating).

135. *See* Jonathan M. H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 Mich. J. Race & L. 503, 512–13 (2003).

136. Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 Am. J. Int'l L. 778, 793–94 (2005).

137. Claudia Card, *The Paradox of Genocidal Rape Aimed at Enforced Pregnancy*, 46 S.J. Phil. 176, 188 (2008).

138. de Brouwer, *supra* note 13, at 9.

139. *See, e.g.*, Fisher, *supra* note 38, at 93.

pretation, claiming that it oversimplifies GSV.[140] For example, as Allen points out in her analysis of the Bosnian genocide:

> Enforced pregnancy as a method of genocide makes sense only if you are ignorant about genetics. No baby born from such a crime will be only Serb. It will receive half its genetic material from its mother. Moreover, it will be raised within the mother's culture—if her culture survives anywhere, that is. The Serb policy of genocidal rape aimed at pregnancy offers the specter that making more babies with a people equals killing that people off. This illogic is possible only because the policy's authors erase all identity characteristics of the mother other than that as a sexual container.[141]

In other instances, genocidaires may attempt to prevent cisgender women from becoming pregnant.[142] As the ICTR states in *Akayesu*, this could include "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages."[143] Additionally, mental harm which traumatizes women and blocks them from engaging in consensual sexual activity could also qualify as an act of genocide.[144] Examples of the prevention of pregnancy were common in Nazi Germany where Jews and other minority groups were separated into gender-segregated concentration camps and subjected to gruesome sexualized medical experiments meant to sterilize individuals without

140. *See, e.g.*, Robyn Carpenter, *Surfacing Children: Limitations of Genocidal Rape Discourse*, 22 Hum. Rts. Q. 428, 443–45 (2000). The debates about genocide and forced pregnancy in Bosnia were complex, and this Comment makes no attempt to adequately summarize the many nuanced arguments made by feminist legal scholars on this point.

141. Allen, *supra* note 49, at 87; *see also* Engle, *supra* note 136, at 807 ("In the overdetermination of the children as Serbian, feminists refused to see any possibilities for women impregnated by Serbian men or for Islamic communities to refuse the genetic and religious assumptions about the children that were expressed by at least some of the Serbian rapists. In fact, feminist advocates often reinforced and perpetuated such assumptions, turning a blind eye to the history of the region, which demonstrates that such a result is not inevitable. Not only were children of mixed marriages abundant before the war, but during and after the war there is evidence that even religious leaders encouraged women to raise the children as Muslim."). Of course, not all communities share the same patrilineal beliefs about a child's group identity. For example, some children born to Yazidi mothers who were raped by ISIS/Da'esh fighters have been rejected by their communities because Yazidi custom usually requires that both parents be Yazidi for the child to be considered part of the community. Louisa Loveluck & Mustafa Salim, *Yazidi Women Raped as ISIS Slaves Face Brutal Homecoming Choice: Give Up Their Child or Stay Away*, Wash. Post (July 30, 2019), https://www.washingtonpost.com/world/middle_east/yazidi-women-raped-as-isis-slaves-face-brutal-homecoming-choice-give-up-their-child-or-stay-away/2019/07/30/f753c1be-a490-11e9-b7b4-95e30869bd15_story.html [https://perma.cc/UQ4U-KC48].

142. *See* Helen Fein, *Genocide and Gender: The Uses of Women and Group Destiny*, 1 J. Genocide Rsch. 43, 52 (1999).

143. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 507 (Sept. 2, 1998).

144. *Id.* ¶ 508; *see, e.g.*, Card, *supra* note 137, at 185.

necessarily killing them.[145] Similarly, current genocidal policies in China's Xinjiang province seek to limit the reproductive capacity of cisgender Uighur women, with Uighur women reportedly being implanted with contraceptive devices, being forced to take birth control or undergo abortions, and, in some cases, being forced to sleep in the same bed as male party loyalists.[146]

Regarding cultures in which a woman's chastity and fidelity are given high social importance, some feminist scholars have argued that GSV against cisgender women can lower rates of reproduction because "it makes survivors damaged goods in a patriarchal system that defines women as man's possession and virgin woman as his most valuable asset."[147] In other words, in some situations "[u]nmarried women who have been raped are typically no longer looked upon as potential wives—the rape has destroyed their marital desirability," thus contributing to "the elimination of a population physically and socially."[148] Similar outcomes can occur for cisgender women who have been

145. Mühlhäuser, *supra* note 35, at 21. *See also Horst Schumann*, Auschwitz-Birkenau State Museum, http://auschwitz.org/en/history/medical-experiments/horst-schumann ("Jewish men and women prisoners [were] subjected to sterilization experiments consisting of the exposure of the women's ovaries and the men's testicles to x-rays. The x-rays left them with severe radiation burns on the abdomen, groin, and buttocks, and suppurating lesions that resisted healing. Complications led to numerous deaths . . . After the passage of several weeks, some . . . male and female experimental subjects had their testicles or ovaries removed surgically (unilaterally or bilaterally) for laboratory examination and in order to obtain histological samples.") [https://perma.cc/2EUT-YASL].

146. Chris Baynes, *Muslim Women "Forced to Share Beds" with Male Chinese Officials After Husbands Detained in Internment Camps*, Indep. (Nov. 5, 2019), https://www.independent.co.uk/news/world/asia/muslim-china-uighur-forced-share-beds-male-officials-detention-camps-a9185861.html [https://perma.cc/DV8Y-8PPR]; Amie Ferris-Rotman et al., *China Accused of Genocide Over Forced Abortions of Uighur Muslim Women as Escapees Reveal Widespread Sexual Torture*, Indep. (Oct. 6, 2019), https://www.independent.co.uk/news/world/asia/china-uighur-muslim-women-abortions-sexual-abuse-genocide-a9144721.html [https://perma.cc/HZ4K-WZDQ]; Azeem Ibrahim, *China Must Answer for Cultural Genocide in Court*, Foreign Pol'y (Dec. 3, 2019), https://foreignpolicy.com/2019/12/03/uighurs-xinjiang-china-cultural-genocide-international-criminal-court [https://perma.cc/Z6E2-2DZA]. Uighur children have also been separated from their parents and forced to stay in state-run orphanages, further reinforcing the genocidal nature of China's policies. Lindsay Maizland, *China's Repression of Uighurs in Xinjiang*, Council on Foreign Rels. (June 30, 2020), cfr.org/backgrounder/chinas-repression-uighurs-xinjiang [https://perma.cc/6P5W-MMKA].

147. Allen, *supra* note 49, at 96. Of course, not all individuals or communities reject women who have experienced sexual violence. *See* Joshua Kaiser & John Hagan, *Gendered Genocide: The Socially Destructive Process of Genocidal Rape, Killing, and Displacement in Darfur*, 49 L. & Soc. Rev. 69, 100–01 (2015).

148. Mullins, *supra* note 9, at 722.

impregnated by genocidaires or forced into sexual slavery and subsequently rejected by members of their community.[149]

Of course, as Catharine Mackinnon explains: "Destruction [. . .] is more than killing."[150] GSV also causes powerful symbolic harm to a community or group, "perform[ing], and in so doing enact[ing], the destruction of the target peoples."[151] This symbolic harm works by "tarnish[ing] the reputation and memory of a people before killing them off—ensuring that not only are the final experiences of the population horrible by nature, but the way in which they are remembered by others is also fixed on those end moments."[152] GSV thus allows genocidaires to position themselves as more powerful than their victims, sending a message that the victims' group is unworthy of protection and continued existence.[153] Symbolic destruction through sexual violence is common during genocides; as Elisa von Joeden-Forgey explains:

> [O]ne finds in all genocides a shared set of tortures involving generative symbols and institutions (reproductive organs, infants and small children, and the bonds that promote family coherence). In many cases, these symbols can be destroyed in ways that do not require the wholesale physical killing of all members of a group. In fact . . . the norm is rather the sex-selective killing of specific members of a group combined with a host of strategies aimed at destroying the group's ability to survive into the future.[154]

Even where victims are not killed as a result of their abuse, sexual violence can still cause serious harm to individuals and their communities, destroying the relationships that tie groups together and making it harder for the group to remain cohesive in the future.[155] This humiliation can take many forms, such as men who have reported feeling emasculated for the rape of "their" women,[156] or women who feel

149. *See, e.g.*, Amy E. Randall, *Introduction: Gendering Genocide Studies*, *in* Genocide and Gender in the Twentieth Century: A Comparative Survey 1, 2–3 (Amy E. Randall ed., 2015); Card, *supra* note 137, at 184.

150. MacKinnon, *supra* note 9, at 223–24.

151. *Id.* at 231.

152. Mullins, *supra* note 9, at 731–32.

153. Elisa von Joeden-Forgey, *Gender and Genocide*, *in* The Oxford Handbook of Genocide Studies 61, 76–77 (Donald Bloxham & A. Dirk Moses eds., 2010).

154. *Id.* at 62.

155. *See* Kaiser & Hagan, *supra* note 147, at 102.

156. Schiessl, *supra* note 9, at 198. This explanation is, of course, somewhat problematic in the way that it risks relegating women's bodies to nothing more than the property of men, while simultaneously ignoring how men can also be targeted with GSV. R. Charli Carpenter, *Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations*, 37 Sec. Dialogue 83, 96–97 (2006) ("[T]he emphasis [in literature about sexual violence] has understandably been on redefining sexual violence as a crime against a woman's bodily integrity in contradistinction to a traditional construction of rape as a violation

obliged to hide their rape-induced pregnancy from other members of their community.[157] Other forms of symbolic harm include crimes in Rwanda where dead bodies were sexually violated and left on public display,[158] as well as examples from Bosnia of genocidaires forcing male and female family members to engage in public sexual acts.[159]

Of course, not all feminist academics agree with the framing of sexual violence as genocidal.[160] For example, some have questioned whether defining rape as an act targeting a group—rather than as a violation of an individual's sexual and bodily autonomy—might diminish the violence experienced by female victims and fail to produce substantial restorative justice.[161] Others have raised concerns that emphasis on genocidal rape obscures how sexual violence is a common occurrence for women on both sides of a conflict and throughout the world, including during times of peace.[162] A few academics have also worried that a focus on genocidal rape would characterize all women as "victims" or focus too much on the biological role of women as mothers, obscuring how some women take an active role in committing violence.[163] Finally, some have argued that not all rape during a genocide is in fact genocidal; rather, while some sexual violence can be strategic or

against men's property rights").

157. Cavanaugh, *supra* note 134, at 287.

158. MacKinnon, *supra* note 9, at 231.

159. Carpenter, *supra* note 156, at 95.

160. Feminist academics have also actively been engaged in debates about the value of framing sexual violence as a war crime or a crime against humanity. *See generally* Nicola Henry, *The Fixation on Wartime Rape: Feminist Critique and International Criminal Law*, 23 Soc. & Legal Stud. 93 (2014) (discussing several points of contention amongst feminist academics studying wartime sexual violence and international law); Sara Meger, *The Fetishization of Sexual Violence in International Security*, 60 Int'l Stud. Q. 149 (2016) (articulating the rhetorical role that wartime sexual violence occupies in current international political discourse).

161. Daniela Nadj, International Criminal Law and Sexual Violence against Women: The Interpretation of Gender in the Contemporary International Criminal Trial 73 (2018); Katherine M. Franke, *Gendered Subjects of Transitional Justice*, 15 Colum. J. Gender & L. 813, 818–23 (2006).

162. Doris E. Buss, *Rethinking 'Rape as a Weapon of War,'* 17 Feminist Legal Stud. 145, 159–60 (2009); Rhonda Copelon, *Surfacing Gender: Conceptualizing Crimes Against Women in Time of War*, *in* The Women and War Reader 63, 63–65 (Lois Ann Lorentzen & Jennifer Turpin eds., 1998). *See also* Engle, *supra* note 136, at 785–97 (discussing disagreements among feminist academics in the 1990s about how rape should be understood in relation to genocide).

163. Chiseche Salome Mibenge, Sex and International Tribunals: The Erasure of Gender from the War Narrative 70 (2013); Miranda Alison, *Wartime Sexual Violence: Women's Human Rights and Questions of Masculinity*, 33 Rev. Int'l Stud. 75, 89 (2007); Engle, *supra* note 136 at 796–97.

symbolic, in other cases rape may simply be opportunistic or motivated by an individual's personal desires.[164]

II. Expanding the Concept of GSV

As demonstrated above, the investigation and prosecution of GSV has almost entirely focused on how sexual violence against cisgender women can qualify as an act of genocide. While GSV is absolutely used to horrific effect against cisgender women, this dominant narrative in international legal understandings of GSV ignores how cisgender and transgender men, transgender women, and intersex/non-binary/third-gender people can experience sexual violence during periods of genocide.[165] This Part focuses on how GSV has been used against people of other genders, offering both historical and speculative examples to expand current conceptions of how sexual violence can be used during a genocide.

A. Contextualizing Cisgender Male Victims

While international prohibitions on sexual violence now generally use gender-neutral language,[166] the stereotypical view of "men as perpetrators, women as victims" predominates in international criminal law.[167] Although sexual violence against cisgender men has not been entirely ignored by international criminal law, it has nevertheless "remained vulnerable to being poorly investigated, and left off indictments, even in an era of increased attention to sexual violence against women and girls."[168] International organizations and nongovernmental organizations often discount or downplay evidence of sexual violence committed against cisgender men, leading to political narratives that

164. *See* Paul Kirby, *How is Rape a Weapon of War?: Feminist International Relations, Modes of Critical Explanation and the Study of Wartime Sexual Violence*, 19 Eur. J. Int'l Rel. 797, 806–07 (2013). This explanation has also been contentiously used by international tribunals like the ICTR to claim that acts of sexual violence during a genocide might lack genocidal intent. *See* Baig et al., *supra* note 75, at 211–12.

165. Viseur Sellers, *supra* note 12, at 213.

166. Touquet and Gorris, *supra* note 93, at 42.

167. Vasuki Nesiah, *Gender and Forms of Conflict: The Moral Hazards of Dating the Security Council*, *in* The Oxford Handbook of Gender and Conflict 288, 294 (Fionnuala Ní Aoláin et al. eds., 2018); Dubravka Žarkov, *The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in Croatian Media*, *in* Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence 69, 72 (Caroline O.N. Moser & Fiona C. Clark eds., 2001). *See also* Rana Jaleel, *Weapons of Sex, Weapons of War: Feminisms, Ethnic Conflict and the Rise of Rape and Sexual Violence in Public International Law During the 1990s*, 27 Cultural Stud. 115, 118–21 (2013) (discussing how feminist international law activists framed wartime rape and sexual violence as a crime committed by men against women).

168. Grey, *supra* note 51, at 93.

are only partially reflective of the true scope of violence.[169] Additionally, male survivors of sexual violence are frequently confronted with gendered norms about victimhood which impede access to legal and medical help, including ideas that men are naturally aggressive, that men who experience anal penetration are homosexual, and that sexual violence is only motivated by sexual desire so male perpetrators only attack women.[170]

However, even the limited data about sexual violence in conflict reveals just how widespread the sexual victimization of cisgender men can be. In Rwanda, for example, cisgender men and boys were forced to penetrate women and animals, sexually mutilated, and even raped by men and women before being executed.[171] More recently, one focus group study of Rohingya men found that "one-third personally knew a Rohingya man or boy who had directly experienced conflict-related sexual violence in Myanmar."[172] Academic studies of sexual violence in non-genocidal situations similarly confirm that, in some conflicts, thousands of cisgender men experience sexual violence in one form or another.[173] While international criminal law is slowly recognizing that cisgender men also experience sexual violence,[174] their experiences nevertheless remain underrecognized by many in the field.

169. Thomas Charman, *Sexual Violence or Torture? The Framing of Sexual Violence Against Men in Armed Conflict in Amnesty International and Human Rights Watch Reports*, *in* Sexual Violence Against Men in Global Politics 198, 198–99 (Marysia Zalewski et al. eds., 2018).

170. Sara Ferro Ribeiro & Danaé van der Straten Ponthoz, International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice o on the Documentation of Sexual Violence as a Crime or Violation of International Law, 265–66 (2nd ed. 2017), https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf.

171. Nicole Hogg & Mark Drumbl, *Women as Perpetrators: Agency and Authority in Genocidal Rwanda*, *in* Genocide and Gender in the Twentieth Century: A Comparative Survey 189, 191 (Amy E. Randall ed., 2015); Anne-Marie de Brouwer, *Listening to Male Victims of Sexual Violence: Faustin Kayihura*, Impact Now (Jan. 31, 2018), https://impact-now.org/listening-to-male-victims-of-sexual-violence-faustin-kayihura [https://perma.cc/Y9GL-RR66].

172. Chynoweth, *supra* note 122, at 8.

173. *See, e.g.*, Michele Leiby, *Uncovering Men's Narratives of Conflict-Related Sexual Violence*, *in* Sexual Violence Against Men in Global Politics 137, 139 (Marysia Zalewski et al. eds., 2018) (presenting a study in which 29 percent of individuals reporting sexual violence to the Peruvian Truth and Reconciliation Commission were men); Ferro Ribeiro & van der Straten Ponthoz, *supra* note 170, at 267 (citing studies from the Democratic Republic of Congo and Liberia in which between 23 and 32 percent of men experienced sexual violence).

174. For example, in 2019 the ICC convicted Bosco Ntaganda for (among other crimes) committing sexual violence against both men and women. Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment, ¶ 1199 (Jul. 8, 2019), icc-cpi.int/CourtRecords/CR2019_03568.

In academic and legal discussions of sexual violence that do include male victims, authors often unnecessarily compare rates of sexual violence against men and women.[175] While it is absolutely true that cisgender women likely experience the majority of sexual violence in any given conflict, the overwhelming focus on female victims also results in little attention being paid to other victims, meaning that less data is gathered about men and people of other genders, which in turn leads to flawed conclusions about the relative rates of sexual victimization.[176] Additionally, it is entirely possible—and *necessary*—to talk about sexual violence against one group of people without comparing it to sexual violence against another group. A more effective view of sexual violence in armed conflict would therefore consider how all acts of sexual violence are interconnected. As Lara Stemple argues:

> Instead of belonging to any one constituency, the phenomenon of rape is instead part of a larger whole, related, of course, to the exercise of domination, the violation of bodily integrity, and the subjugation of its victims. And, yes, rape is almost always about gender, which is not to say it is always about women.[177]

PDF.

175. *See, e.g.*, Ellen J. Kennedy, *Women and Genocide: Ending Impunity for Sexual Violence*, *in* 67 Soc. Indicators Rsch. Ser., Alleviating World Suffering: The Challenge of Negative Quality of Life 319, 320 (Ronald E. Anderson ed., 2017). *See also* Paul Kirby, *Homo Interruptus*, *in* Sexual Violence Against Men in Global Politics 122, 122 (Marysia Zalewski et al. eds., 2018) (recounting an experience where the author gave a presentation about sexual violence that was misunderstood as diminishing the experience of women by emphasizing the victimhood of men).

176. Oosterveld, *supra* note 72, at 108–09. *See also* Chris Dolan, *Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence*, 96 Int'l Rev. Red Cross 485, 494–495 (2014) ("While the existing statistics on sexual violence tend to confirm that in a global aggregate there are more *reported* cases of sexual violence against women than against men, to deduce from this that in every specific situation women and girls are the primary targets is problematic. Not only is it generally acknowledged that sexual violence against women and girls is underreported, it is also widely believed that reporting is frequently even more difficult for men and boys than for women and girls. Any statistics on sexual violence, therefore, should be treated with caution . . . The manner in which this assumed majority status of female victims becomes both the beginning of an extensive exploration of that victimhood and the end of any analysis of the impacts on and needs of the assumed minority of victims is extraordinary: no serious social scientist, no donor and no committed humanitarian should allow so much action to be premised on such shaky empirical foundations. At best, a first-past-the-post electoral system, in which those who get the largest number of votes get all the power, has been applied to the allocation of humanitarian aid such that those who are believed to be the largest percentage of victims get all the assistance. At worst, the allocation has been rigged, with ballot papers for male victims removed from the count.").

177. Lara Stemple, *Human Rights, Sex, and Gender: Limits in Theory and Practice*, 31 Pace L. Rev. 824, 825 (2011).

Rather than comparing relative rates of violence, by "stacking male bodies and male suffering up against female bodies and female suffering,"[178] international criminal law should adopt a gender-expansive understanding of GSV and conflict-related sexual violence, focusing on "the concentric circles of suffering caused by the relational nature of genocidal violence."[179] Such an approach would allow for a much deeper and more accurate understanding of how gender inequality, violence, and race/ethnicity/religion are all interconnected during periods of armed conflict and genocide.[180]

B. Contextualizing Transgender Victims and Victims Outside the Binary

While cisgender men are rarely discussed in work about GSV, transgender, intersex, non-binary, and third-gender people are virtually never discussed.[181] For example, while transgender women often live in and engage with the world as women, international law has frequently ignored their experiences or excluded them from the classification of "women," focusing only on cisgender women and their reproductive abilities.[182] International law and political discourse is also frequently hostile to inclusive concepts of gender, reproducing cissexist and heteronormative ideas that can altogether exclude transgender men as well as non-binary and third-gender victims from being recognized.[183]

178. Terrell Carver, Molly Cochran, & Judith Squires, *Gendering Jones: Feminisms, IRs, Masculinities*, 24 Rev. Intl'l Stud. 283, 296 (1998).

179. Von Joeden-Forgey, *supra* note 153, at 79. *See also* Philipp Schulz, *Towards Inclusive Gender in Transitional Justice: Gaps, Blind-Spots and Opportunities*, 14 J. Intervention & Statebuilding 691, 696 (2020) ("Interrogating armed conflicts through a masculinities lens and paying attention to men's gendered lived realities must not be misappropriated towards diverting attention away from women's experiences and feminist approaches . . . . Rather, studies of men's roles and experiences in (post-)conflict contexts must maintain a holistic and relational focus and must complement examinations of gendered experiences more broadly. To ultimately understand and address the complexities of gender and violence during and after conflict, it is important to emphasize that men's, women's and non-binary identities' experiences cannot exist but in relation to each other.").

180. *See* Dianne Otto, *Transnational Homo-Assemblages: Reading 'Gender' in Counter-terrorism Discourses*, 4 Jindal Global L. Rev. 79, 92–94 (2013).

181. This is partially due to international law's heteronormative and cissexist approach to sex and gender. *See* Henri Myrttinen, *Men, Masculinities and Genocide*, *in* A Gendered Lens for Genocide Prevention 27, 31–32 (Mary Michele Connellan & Christiane Fröhlich eds., 2018).

182. Dolan, *supra* note 176, at 491. *See also* Mibenge, *supra* note 163, at 70 (discussing how international criminal law often stereotypes women as mothers and reproductive agents rather than complete human beings).

183. The most obvious example of international law's reproduction of conservative gender norms is found in the Rome Statute, which restricts gender to "the two sexes, male and female, within the context of society." Rome Statute of the Int'l Criminal Court art.

Because virtually all academic and legal analysis about GSV has thus far remained within a strict male/female binary, it is perhaps unsurprising, but no less troubling, that international legal understandings of GSV have been blind to the full range of gender and sex identities that exist during armed conflict.[184]

These omissions are particularly grievous given the fact that transgender people and people outside the binary may be at *greater* risk for sexual violence than cisgender people because of their gender nonconforming status.[185] Violence is often directed at transgender people and people outside the binary as punishment for their perceived violations of gender norms and social rules.[186] Moreover, even if genocidaires do not specifically seek out transgender individuals, a transgender person's gender nonconformity can still put them at a higher risk for GSV than cisgender people of the same community.[187] Notably, a person's gender nonconformity may make them a target, whereas cisgender or gender-conforming individuals may avoid scrutiny and blend into a crowd or refugee caravan.[188] Gender nonconforming people also frequently lack identification cards or passports that correctly identify their gender identity, further putting them at risk of additional scrutiny by officials at checkpoints and roadblocks.[189]

Additionally, people outside the binary may be targeted specifically because the extermination of gender nonconformity is itself viewed by perpetrators as a key motivation of genocide. For example, during the genocidal colonization of California, Spanish officials attempted to exterminate every third-gender indigenous person, viewing the Native American acceptance of third-gender identities as perverse and unacceptable.[190] Other indigenous people in North America faced similar

7, ¶ 3, Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002). While efforts to reform this definition are certainly laudable, there is little in the Rome Statute or other international criminal law treaties that would prevent courts from prosecuting cases of sexual violence committed against people outside the binary, since it is the act of sexual violence itself which is criminalized, regardless of the victim's gender.

184. *See* Gilleri, *supra* note 14, at 85–89.

185. Chynoweth, *supra* note 122, at 35.

186. *Id.*; Erdem, *supra* note 31, at 1.

187. *See* Susan Stryker, *Biopolitics*, 1 Transgender Stud. Q. 38, 40 (2014).

188. *See* Laurie Marhoefer, *Transgender Identities and the Police in Nazi Germany*, YouTube (May 2, 2019), https://youtube.com/-NhJVtMGONk (describing how transgender individuals were at higher risk of strict punishments in Nazi Germany because of their transgender status).

189. *See* Lauren Wilcox, *Practising Gender, Queering Theory*, 43 Rev. Int'l Stud. 789, 801–02 (2017).

190. Deborah A. Miranda, *Extermination of the* Joyas*: Gendercide in Spanish California*, 16 GLQ: J. Lesbian & Gay Stud. 253, 256–260 (2010) ("Now that the Spaniards had

violence as colonizers sought to exterminate third-gender people as part of a larger genocidal project against Native American language, culture, and religious practices.[191] As such, future international law practitioners and academics should be attentive to instances where "the elimination of gender minorities" is a goal for genocidaires.[192]

C. Expanding the Gender of GSV: Some Examples

As noted above, international law allows for evidence of GSV against individuals of any gender to be brought before international courts, but prosecutors and investigative teams need to make an effort to search for and include all victims in criminal indictments. To assist in that task, in this Part, I provide a nonexhaustive list of how GSV can result in (1) death, (2) forced pregnancy, (3) the prevention of pregnancy, (4) serious bodily and mental harm, and (5) symbolic group

made it clear that to tolerate, harbor, or associate with the third gender meant death, and that nothing could stand against their dogs of war, the indigenous community knew that demonstrations of acquiescence to this force were essential for the survival of the remaining community—and both the community and the Spaniards knew exactly which people were marked for execution.").

191. Pyle, *supra* note 27, at 576.

192. Of course, any article about queer bodies and genocide would be incomplete without a discussion of whether anti-LGBTQIA+ violence qualifies as genocidal. The simple answer, unfortunately, is that the Genocide Convention limits the crime of genocide to violence affecting a "national, ethnical, racial or religious group," effectively excluding communities of people who are targeted solely because of their sexual orientation or gender identity. Kritz, *supra* note 20, at 19. While debate continues about which other groups should be added to the legal definition of genocide, some LGBTQIA+ advocacy groups have nevertheless categorized patterns of violence against sexual or gender minorities as "genocide." William A. Schabas, Genocide in International Law: The Crime of Crimes 150–71 (2nd ed. 2009). These advocacy campaigns highlight important similarities between genocide and violence against queer bodies, sometimes drawing attention to the fact that gay men and other queer people were sent to Nazi concentration camps to be executed with the same brutality as members of other minorities. While this conversation will continue, it is worth noting that queer, intersex, and transgender bodies are, in almost every country in the world, subjected to policies which could easily be categorized as acts of genocide (e.g., taking children away from transgender parents, the outsized impact of police brutality on transgender people, forced sterilization both as infants and adults, and attempts to restrict access to housing, employment, legal protection, and medical care). Jeremy D. Kidd & Tarynn M. Witten, *Transgender and Transsexual Identities: The Next Strange Fruit—Hate Crimes, Violence and Genocide Against the Global Trans-Communities*, 6 J. Hate Stud. 31, 49–53 (2008); Rowlands & Amy, *supra* note 21, at 58–60. Given this near-universal repression of queer bodies across most countries in the world, expending the energy to amend the Genocide Convention may not be the most effective use of political activism. *See* Sayak Valencia, *Necropolitics, Postmortem/Transmortem Politics, and Transfeminisms in the Sexual Economies of Death*, 6 TSQ: Transgender Stud. Q. 180, 182–84 (2019). *See also* Matthew Waites, *Genocide and Global Queer Politics*, 20 J. Genocide Rsch. 44, 65–67 (2018) (discussing further complications with the idea that anti-LGBTQIA+ policies should be classified as genocide).

destruction for men, transgender women, and intersex/non-binary/third-gender victims in situations of genocide.

1. Causing Death With GSV

In some cases, men, transgender women, and intersex/non-binary/third-gender individuals can be killed due to sexual violence, removing them from the gene pool and thus furthering the genocidal goals of their assailants.[193] For example, penetrative rape can result in bleeding from holes in the intestines and bladder which can become infected and result in death.[194] Genital mutilation (including forced circumcision and castration) can also result in death,[195] as can untreated sexually-transmitted diseases.[196] Often, these forms of sexual violence take place alongside sexual violence against cisgender women; for example, Kaitesi describes one example of GSV against a Rwandan boy:

> A particularly painful case concerns a seven-year-old boy who was made to have sexual intercourse with his mother as a means of infecting him with HIV/AIDS. Several Interahamwe had been raping his mother until they stopped, believing that the last to rape her was HIV/AIDS positive. As they forced the boy, they were heard to boast that he was going to die alongside his mother and that they were incapable of helping each other since both had been infected. The victims were informed that a slow and painful death was what they deserved.[197]

2. GSV and Forced Pregnancy

While there are no available reports of transgender men being forcefully impregnated during a genocide, such an outcome remains a theoretical possibility that should not be discounted by future prosecutors and academics. While taking regular injections of testosterone can often prevent unintended pregnancy, transgender men and other non-binary people with wombs nevertheless remain at risk of becoming pregnant.[198] Situations of armed conflict may also limit a person's

193. *See, e.g.*, Lori Poloni-Staudinger & Candice D. Ortbals, Terrorism and Violent Conflict 19 (2013) (discussing how men were raped and killed during the violence in the former Yugoslavia).

194. Sarah K. Chynoweth, Julie Freccero & Heleen Touquet, *Sexual Violence Against Men and Boys in Conflict and Forced Displacement: Implications for the Health Sector*, 25 Reprod. Health Matters 90, 92 (2017).

195. Ferrales, Brehm, & Mcelrath, *supra* note 129, at 576.

196. Bradford Di Caro, *supra* note 129, at 81.

197. Kaitesi, *supra* note 129, at 89.

198. Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 Obstetric Med. 4, 5 (2016). Additionally, not all transgender men medically transition through hormone replacement therapy. German Lopez, *Myth #5: All Trans People Medically Transition*, Vox (Nov. 14, 2018), https://www.vox.com/identities/2016/5/13/17938114/transgender-people-transitioning-surgery-medical [https://perma.cc/TU9R-MREX].

access to regular hormone treatments, increasing the risk of pregnancy.[199] In addition to the physical and emotional trauma of forced pregnancy experienced by cisgender survivors of rape, transgender men, and non-binary people with wombs may also suffer harmful gender dysphoria due to forced pregnancy, further causing serious harm in violation of Article II(b) of the Genocide Convention.[200]

3. GSV and the Prevention of Pregnancy

In other situations, sexual violence may be genocidal when it prevents individuals from sexually reproducing. The most obvious way this occurs is through genital beatings and mutilations, which can sterilize a person and thus remove them from the gene pool. These practices have been common in many genocides, from the use of castration in Rwanda to the genital beatings used against Rohingya men and transgender women in Myanmar. Blunt force to the genitals was also common during the conflict in Bosnia, with many male survivors reporting that genocidaires were using such violence to render Muslim men infertile.[201]

Other forms of medical procedures and experimentation, such as vasectomy, tubal ligation, hysterectomy, and chemical castration, can also result in the genocidal prevention of pregnancy, as evidenced by the experiments conducted on Jewish men and boys during the Holocaust.[202] Some transgender and intersex individuals also require special medical assistance to procreate, so withholding reproductive services or destroying genetic material that has been set aside for the purpose of procreation can be genocidal by preventing individuals from reproducing.[203]

Men, transgender women, and people outside the binary can also be stopped from sexually reproducing when they are separated into

199. *See Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, UNHCR Emergency Handbook https://emergency.unhcr.org/entry/43701/lesbian-gay-bisexual-transgender-and-intersex-lgbti-persons [https://perma.cc/2BRL-F3V8].

200. *See* Obedin-Maliver & Makadon, *supra* note 198, at 6.; Gayle Rubin, *Of Catamites and Kings: Reflections on Butch, Gender, and Boundaries, in* The transgender Studies Reader 471, 474 (Susan Stryker & Stephen Whittle eds., 2006).

201. Eric Stener Carlson, *The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals*, 46 Brit. J. Criminology 16, 19 (2006).

202. Susan Benedict & Jane M. Georges, *Nurses and the Sterilization Experiments of Auschwitz: A Postmodernist Perspective*, 13 Nursing Inquiry 277, 279–284 (2006); William J. Spurlin, *Queering Holocaust Studies: New Frameworks for Understanding Nazi Homophobia and the Politics of Sexuality Under National Socialism*, *in* A Companion to the Holocaust 75, 84 (Simone Gigliotti & Hilary Earl eds., 2020).

203. *See* C. A. Jones, L. Reiter & E. Greenblatt, *Fertility Preservation in Transgender Patients*, 17 Int'l J. Transgenderism 76, 76–77 (2016).

segregated concentration camps, forced into sexual slavery, or kept in isolated detention facilities.[204] A similar genocidal effect could be achieved when individuals are forced to marry someone from another group, are forcibly impregnated by a member of another group, or are otherwise prevented from creating a family with a member of their own group.[205]

Finally, sexual violence often causes severe physical and psychological harm to men, transgender women, and people outside the binary,[206] sometimes dissuading survivors from marrying or engaging in consensual sexual intercourse later in life.[207] In other instances, survivors may feel like they are unworthy of the gendered responsibilities associated with creating a family and thus choose to avoid sexual intercourse.[208] In these ways, GSV can have a very real limiting factor on the sexual reproduction of a group by causing severe mental harm.

4. GSV and Serious Bodily or Mental Harm

As established in *Akayesu* and elsewhere, acts of sexual violence do not need to permanently prevent a person from sexually procreating to be genocidal; rather, simply causing serious bodily or mental harm to a person can be sufficient for a finding of genocide. Serious harm in violation of the Genocide Convention can thus be caused in a number of ways: rape (oral or anal) or gang rape; forced sexual contact with family members, fellow detainees, animals, or objects; genital beatings, burning, electrocution, or mutilation; forced circumcision or castration; tying heavy objects to genitals; sexual humiliation involving forced nudity, urine, or feces; forced public masturbation, and so on.[209] Threats of sexual violence and wondering "how far things may

204. *See* Kaitesi, *supra* note 129, at 179; Mühlhäuser, *supra* note 35, at 21.

205. *See, e.g.*, Kasumi Nakagawa, Gender-Based Violence Against Sexual Minorities During the Khmer Rouge Regime 43–51 (2015) (describing testimony about forced marriages during the Khmer Rouge period from transgender survivors).

206. Ligia Kiss et al., *Male and LGBT Survivors of Sexual Violence in Conflict Situations: A Realist Review of Health Interventions in Low- and Middle-Income Countries*, 14 Conflict & Health 1, 8–10 (2020) ("Symptoms of poor mental health among male survivors of sexual violence include poor emotional regulation and anger, alcohol and drug abuse, impaired memory and concentration, depression, anxiety, hopelessness, low self-esteem, difficulty relating to others or engaging in intimate relationships, self-mutilation, suicidal behaviour, sleep disturbances and cognitive impairment.").

207. Harriet Gray, Maria Stern, & Chris Dolan, *Torture and Sexual Violence in War and Conflict: The Unmaking and Remaking of Subjects of Violence*, 46 Rev. Int'l Stud. 197, 211 (2020).

208. *Id.* at 210.

209. *See* Ferro Ribeiro & van der Straten Ponthoz, *supra* note 170, at 270; Carpenter, *supra* note 156, at 96; *see, e.g.*, Kaitesi, *supra* note 129, at 86–90.

go" can also cause serious mental harm, especially for victims who are held in captivity for long periods of time.[210] All of these forms of sexual violence undisputedly cause mental harm to victims, and several can also cause tremendous physical harm. Any of these acts, when committed with the requisite genocidal intent, could qualify as genocide under Article II(b) of the Genocide Convention.

Additionally, cisgender men (and others) are often victimized through the phenomenon of "forced witnessing," when victims are forced to watch members of their family or community experience sexual violence.[211] For example, one Rohingya man reported:

> I was tied up by the military and my wife was beaten and raped. They tied me to a tree outside my home, and two military men raped my wife and took my one-year-old baby. My wife lost some of her teeth from the beating and has trouble eating. My wife freed me after the military left.[212]

Similarly, during the ICTR's *Bagosora* case, one witness recounted that genocidaires cut the Achilles tendons of certain men "so that they couldn't walk, but they would have to watch what was happening" as their wives and other female members of their community were raped and sexually mutilated.[213] Forced witnessing furthers the objective of genocide by causing extreme anguish and humiliation to both the direct victim as well as forced observers, weaponizing ideas of gendered responsibility—for example, the responsibility to protect women,

210. Hernán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 Int'l Rev. Red Cross 591, 605–606 (2007) ("Aware as they often are that sexual abuse occurs during detention and interrogation, [sexual] innuendo (during arrest for example) may make [individuals] in custody wonder 'how far things may go'. They may become increasingly frightened to the point of becoming traumatized, fearing that 'the worst' may happen, even though 'nothing' may have actually been done to them. For this reason the traumatic effect of any sexual abuse, including 'mere sexual innuendo,' should never be underestimated, even if actual rape is not the issue").

211. *See* Chynoweth, *supra* note 122, at 18. Of course, women and girls are also sometimes forced to watch their male and non-binary family members be subjected to GSV. *Id.* at 29. Kaitesi describes one example of this from Rwanda:

> The case of a 50-year old married man stripped naked and forced to have sexual intercourse with dead animals in front of his wife, children and neighbours was disheartening. In his presence, and that of their children, his wife was also sexually abused by two of his abusers. At the same time, he was verbally abused and mocked to prove his manhood before his family. All their five children died, but he and his wife survived. Even though they live in the same house it seems that living as a family had died too. The stigma and shame of witnessing each other's abuse haunts them to this day.

Kaitesi, *supra* note 129, at 89.

212. Chynoweth, *supra* note 122, at 19.

213. Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgment and Sentence, ¶ 976 (Dec. 18, 2008).

social obligations related to marital fidelity, and so on—to cause psychological harm and destroy interpersonal relationships.[214] Such acts of violence have yet to be truly examined by international tribunals hearing accusations of genocide; as Goldstein explains:

> Men, too, are injured by the sexual assault of women for reasons untainted by offensive, antiquated notions of chastity and ownership. To watch helplessly as someone you love is tortured may be as bad or worse than being tortured yourself, and international law should be able to reach and punish such harms.[215]

In all its forms, sexual violence is a particularly harmful form of genocidal violence because it can destroy a person's sense of place in the world, "unmaking" and "undoing" ideas of subjectivity while simultaneously forcing new identities and positionalities onto victims.[216] Many survivors of sexual violence feel a deep sense of disgrace or shame because of their experience, with some cisgender men reporting that sexual violence had "robbed them" of their subject position and social status as men.[217] Similarly, for some cisgender men, the penis and other genitalia are important for their self-identity as men, with some viewing the virile and unharmed penis as symbolic of their political and social capital.[218] Relatedly, for some transgender people, sexual violence can aggravate or exploit feelings of gender dysphoria.[219] Such violence, especially when coupled with transphobic, homophobic, or dehumanizing insults, can result in severe physical and emotional harm in violation of the Genocide Convention.[220] This ability to exploit inti-

214. Chynoweth, *supra* note 122, at 29. Another example of forced witnessing comes from the Mozambique, where men were forced to be "mattresses" upon which soldiers would rape their wives. Hebah Farrag, *Engendering Forced Migration: Victimization, Masculinity and the Forgotten Voice*, *in* 2 Surfacing 1, 12 (Yasemin Ozer & Iman Azzi eds., 2009).

215. Anne Tierney Goldstein, Recognizing Forced Impregnation as a War Crime Under International Law 22 (1993).

216. Gray, Stern, & Dolan, *supra* note 207, at 202.

217. *Id.* at 209–10. Of course, it is important not to conceptualize sexual victimhood as static or monolithic; rather, gender roles are fluid and can adapt to situations of peace and armed conflict. Heleen Touquet & Philipp Schulz, *Navigating Vulnerabilities and Masculinities: How Gendered Contexts Shape the Agency of Male Sexual Violence Survivors*, Security Dialogue 1, 4 (2020).

218. Janine Natalya Clark, *The Vulnerability of the Penis: Sexual Violence Against Men in Conflict and Security Frames*, 22 Men & Masculinities 778, 780–81 (2019); Žarkov, *supra* note 167.

219. Rylan J. Testa, Laura M. Sciacca, Florence Wang, Michael L. Hendricks, Peter Goldblum, Judith Bradford, & Bruce Bongar, *Effects of Violence on Transgender People*, 43 Pro. Psych.: Rsch. & Prac. 452, 458 (2012).

220. *Id.*; Chantal M. Wiepjes, Martin den Heijer, Marijke A. Bremmer, Nienke M. Nota, Christel de Blok, Brand. J. G. Coumou, & Thomas D. Steensma, *Trends in Suicide Death Risk in Transgender People: Results from the Amsterdam Cohort of Gender Dysphoria*

mate concepts of identity and physical integrity is exactly why sexual violence is an attractive technique of punishment for many perpetrators, especially given its ability to make legible the ideas and power dynamics that motivate genocidal violence.[221] As such, prosecutors and investigators should be more diligent when considering how ideas of power, gender, and sexuality inform the intent of perpetrators who commit acts of GSV.[222]

5. GSV and Symbolic Destruction

Finally, GSV against men, transgender women, and intersex/non-binary/third-gender people can contribute towards the symbolic destruction of targeted communities and families. This is due in part to the fact that the sexual violation of a person's body via rape, castration, sexual humiliation, or other forms of genital mutilation can send a symbolic message about the new social order envisioned by genocidaires.[223] Forced witnessing, forced sexual intercourse between family members, and the genital mutilation of dead bodies all similarly contribute towards the symbolic destruction, discrediting, and disenfranchisement of a community, even if the sexual violence in itself does not prevent the group from sexually reproducing.[224] Notably, sexual violence, perhaps even more than other forms of humiliating violence, allows genocidaires to exploit local ideas of gender, sexuality, and power as they seek to destroy a community in all its forms.[225]

Of course, the five categories in this Part are not binding or concrete in any way, especially because sexual violence can be both pragmatic (removing individuals from the gene pool) and symbolic (destroying communities and causing serious harm). As Holslag explains, "genocide is not only a physical form of warfare or the destruction of a specific group; rather, it is the destruction of an *identity* in *all its forms*. That is why genocide includes a wide variety

Study (1972–2017), 141 Acta Psychiatrica Scandinavica 486, 490 (2020).

221. Elaine Scarry, The Body in Pain: The Making and Unmaking of the World 27 (1985).

222. *See* Koen Slootmaeckers, *Nationalism as Competing Masculinities: Homophobia as a Technology of Othering for Hetero- and Homonationalism*, 48 Theory & Soc'y 239, 243–45, 254–55 (2019); von Joeden-Forgey, *supra* note 43, at 91; *see also* Jane Ward, Not Gay: Sex Between Straight White Men 159–76 (2015) (discussing how norms of sexuality and gender intersect with and challenge military ideas of belonging and power).

223. Mibenge, *supra* note 163, at 80.

224. Carpenter, *supra* note 156, at 95–96; Holslag, *supra* note 34, at 100; *see* Dolan, *supra* note 96, at 94.

225. *See* Eichert, *supra* note 35, at 415.

of violence—some physical and some symbolic."[226] This duality of violence has been observed in many situations of genocide. For example, in some Bosnian detention camps, Muslim women were forced to undress in front of Muslim men, and any man who had an erection could have his penis cut off.[227] Such violence both (1) prevented pregnancy and caused death, while (2) simultaneously traumatizing survivors and destroying normal ties between members of the community.

Conclusion: Towards an Expansive Understanding of GSV

In this Comment, I have discussed the concept of genocidal sexual violence, demonstrating how international lawyers and academics have overwhelmingly focused on the use of GSV against cisgender women. This focus is understandable, given the fact that genocidaires frequently target cisgender women with sexual violence.[228] However, men, transgender women, and people outside the binary also experience sexual violence during periods of genocide, and these crimes are rarely labeled as "genocidal." As shown by my analysis of the FFM Sexual Violence Report, nearly identical acts of sexual violence—for instance, gang rape or genital mutilation—can be labeled as "genocidal" for cisgender women and "non-genocidal" for other people. Such an omission discounts the suffering of victims and needlessly weakens attempts to identify, prevent, and punish the crime of genocide.[229]

Lawyers currently working on issues of genocide and sexual violence—including the lawyers working for The Gambia in the ongoing case against Myanmar at the ICJ—should revisit evidence to check that acts of GSV have not been overlooked. Similarly, future lawyers and academics should be attentive to how GSV is used against victims of all genders. As shown throughout this Comment, no act of sexual violence is an isolated incident. Rather, acts of sexual violence against women,

226. Holslag, *supra* note 34, at 94.

227. Bradford Di Caro, *supra* note 129, at 80.

228. For a good analysis of how women have traditionally been included in discussions of genocide, *see* James Snow, *Mothers and Monsters: Women, Gender, and Genocide*, *in* A Gendered Lens for Genocide Prevention 49, 54–74 (Mary Michele Connellan & Christiane Fröhlich eds., 2018).

229. For a discussion of how excluding victims can weaken a case about GSV, *see* Eva Buzo, *Characterisation of Sexual Violence as a Women's Issue in the Rohingya Crisis: A Response to David Eichert*, Opinio Juris (June 16, 2020), http://opiniojuris.org/2020/06/18/characterisation-of-sexual-violence-as-a-womens-issue-in-the-rohingya-crisis-a-response-to-david-eichert [https://perma.cc/W2L4-52NW] (pointing out that male Rohingya often speak Burmese better than Rohingya women, meaning that male victims may have communicated with their attackers or be more able to provide specific details about perpetrators' motivations and identities).

men, children, and people outside the binary are all interconnected and informed by the same corrosive attitudes towards sex, gender, and destruction.[230] Given international law's important role as a key discursive space for negotiating norms of war and sexual violence, it is vital not to exclude certain victims simply because of their gender.[231]

This Comment has largely focused on how sexual violence against people of all genders can qualify as an act of genocide under the Genocide Convention. However, additional research is necessary to understand how related legal concepts—including high standards for inferring specific genocidal intent and linking sexual violence to senior officials' overall genocidal strategies—would apply to prosecutions of GSV against men, transgender women, and intersex/non-binary/third-gender people. Similarly, while this Comment demonstrates that investigations into non-genocidal sexual violence can and should consider how transgender, intersex, non-binary, and third-gender people are affected, further research is absolutely essential to better respond to these individuals' needs and represent their experiences in transitional justice processes.[232]

In addition to being fair for victims, recognizing how GSV is used against people of all genders will also help move international law away from its heteronormative and cissexist origins.[233] As Otto explains:

> Queer lives, relegated by law to the realms of criminality and perversity, offer lenses that make it possible to surface deeper legal narratives, exposing the reliance of the order of international law on disciplinary tropes of sexuality and gender and offering new intelligences that can inform emancipatory strategies of all varieties.[234]

230. *See* Marysia Zalewski, *Provocations in Debates About Sexual Violence Against Men*, *in* Sexual Violence Against Men in Global Politics 25, 35 (Marysia Zalewski et al. eds., 2018). Similarly, many of the anecdotes in this Comment show that women are often present when people of other genders are sexually assaulted, and vice versa.

231. *See* Dolan, *supra* note 96, at 96–97. Excluding certain victims also has real-world ramifications for survivors who benefit from reparations. Philipp Schulz, *Examining Male Wartime Rape Survivors' Perspectives on Justice in Northern Uganda*, 29 Soc. & Legal Stud. 19, 21 (2020).

232. *See also* Laura J. Shepherd & Laura Sjoberg, *Trans- Bodies in/of War(s): Cisprivilege and Contemporary Security Strategy*, 101 Feminist Rev. 5, 11–13 (2012) (discussing the absence of people who are not cisgender from studies of war and security).

233. *See* Kathryn McNeilly, *Sex/Gender is Fluid, What Now for Feminism and International Human Rights Law? A Call to Queer the Foundations*, *in* Research Handbook on Feminist Engagement with International Law 430, 441 (Susan Harris Rimmer & Kate Ogg eds., 2019) (discussing how the heteronormative origins of international law continue to inform its practice today).

234. Otto, *supra* note 180, at 82.

Instead of continuing the pattern of summarily excluding transgender, intersex, non-binary, and third-gender people, lawyers and academics should be attentive to their unique perspectives and decenter views of sexual violence and victimhood from the ineffective and parochial traditions of international law.[235] Instead of (re)producing the predominant narrative of conflict-related sexual violence, that of the "rapeable [. . .] sexed woman of legal discourse,"[236] international courts and transitional justice processes should break from narrow conceptions of harm and move towards a more expansive view of gender. At the end of the day, international law can offer relatively little to survivors of genocide who have lost so much, but, at the very least, we should offer them the recognition they deserve.

235. *See* Jamie J. Hagen, *Queering Women, Peace and Security*, 92 Int'l Affairs 313, 324–327 (2016).

236. Nadj, *supra* note 161, at 72.