Strathmore University

Law School

JUSTICE FOR THE YAZIDI WOMAN: PROSECUTING FORCED CONTRACEPTION AT THE INTERNATIONAL CRIMINAL COURT

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

By

MARIAM HIBA MALIK

101257

Prepared under the supervision of

Mr. Allan Mukuki

Word Count: 17,355

JANUARY 2021

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

I would like to extend my deepest gratitude to my supervisor Mr. Allan Mukuki whose insightful guidance, immense support and continuous patience have been invaluable throughout this arduous process. Thank you.

I also wish to express my sincerest appreciation to my family for their prayers and unwavering support and encouragement throughout this process: Rubeena Dar, Abed Malik, Janan Malik and Luqmaan Dar. Lastly, I would like to thank Ms. Emmah Senge for her monumental role in inspiring, supporting and encouraging me to pursue this research.

DECLARATION

I, MARIAM HIBA MALIK do hereby declare that this dissertation is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: Friday 29 January 2021

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Mr. Allan Mukuki

ABSTRACT

It has been over six years since Da'esh attacked the Yazidi community in Iraq, yet reproductive harms such as forced contraception inflicted on Yazidi women remain unaddressed and unpunished. Da'esh has used forced contraception as a method to ensure the continued rape and sexual enslavement of Yazidi women and girls. This dissertation investigates whether forced contraception can be prosecuted at the ICC under the Rome Statute, in line with its three objectives: to examine whether ICL's historical treatment of SGBV demonstrates "gender-bias" flaws in the ICL framework; to assess whether forced contraception can be sufficiently addressed within the current ICL framework and lastly, to evaluate the effects of criminalising forced contraception by making it a specific crime under the Rome Statute.

Through conducting secondary research, this dissertation establishes that the ICL framework and its instruments cannot sufficiently address specific reproductive harms such as forced contraception, which is a further indication of glaring gender-bias flaws within the ICL framework. It recommends that to rectify this, amendments must be made to the Rome Statute to include forced contraception as a specific crime. Furthermore, concerted efforts from international organisations and advocacy groups are essential in lobbying members of the Rome Statute to institute domestic legislation against forced contraception. Lastly, it is recommended that a second policy paper focused specifically on gender and reproductive harms be drafted and issued by the OTP, whereby emerging issues with enduring ramifications such as forced contraception are addressed.

TABLE OF ABBREVIATIONS, CASES, AND LEGAL INSTRUMENTS

LIST OF ABBREVIATIONS

Da'esh	*Islamic State of Syria and the Levant* (ISIS/ISIL)
DRC	*Democratic Republic of Congo*
ICC	*International Criminal Court*
ICL	*International Criminal Law*
ICTR	*International Criminal Tribunal for Rwanda*
ICTY	*International Criminal Tribunal for the Former Yugoslavia*
ICTY Statute	*Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*
IHL	*International Humanitarian Law*
IMT	*International Military Tribunals*
Lubanga	*Thomas Lubanga Dyilo*
NIAC	*Non-International Armed Conflict*
OTP	*Office of the Prosecutor*
Rome Statute	*Rome Statute of the International Criminal Court*
SGBV	*Sexual and Gender Based Violence*
Tokyo Tribunal	*International Military Tribunal for the Far East*
UNSC	*United Nations Security Council*
VAW	*Violence Against Women*

LIST OF CASES

CONSTITUTIONAL COURT OF COLOMBIA

Helena, contra la Unidad de Atención y Reparación Integral a las Víctimas, Decisión del Tribunal Constitucional de Colombia, (2019).

INTERNATIONAL CRIMINAL COURT

The Prosecutor v Bosco Ntaganda, Trial Chamber VI, ICC, 8 July 2019.

The Prosecutor v Dominic Ongwen, Pre-Trial Chamber II, ICC, 23 March 2016.

The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, ICC, 23 January 2012.

The Prosecutor v Thomas Lubanga Dyilo, Trial Chamber I, ICC, 5 April 2012.

The Prosecutor v Jean-Pierre Bemba Gombo, Trial Chamber II, ICC, 21 March 2016.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The Prosecutor v Jean-Paul Akayesu, Trial Chamber I, ICTR, 2 September 1998.

The Prosecutor v Gacumbitsi, Trial Chamber II, 17 June 2004.

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The Prosecutor v Dusko Tadic, Trial Chamber, ICTY, 10 August 1995.

The Prosecutor v Momir Nikolic, Trial Chamber I, ICTY, 2 February 2003.

The Prosecutor v Todorvic, Trial Chamber I, ICTY, 31 July 2001.

The Prosecutor v Furundzija, Appeals Chamber, ICTY, 21 July 2000.

The Prosecutor v Zejnil Delalic, Trial Chamber II, ICTY, 16 November 1998,

The Prosecutor v Zlatko Aleksovski, Appeals Chamber, ICTY, 24 March 2000.

The Prosecutor v Gagovic, Indictment, ICTY, 1998.

The Prosecutor v Krstic, Trial Chamber, ICTY, 2 August 2001.

The Prosecutor v Kunarac et al., Trial Chamber, ICTY, 31 October 2001.

INTERNATIONAL MILITARY TRIBUNALS

The International Military Tribunal for the Far East, The Tokyo Judgment, 29 April 1946-12 November 1948.

Trial of the Major War Criminals Before the International Military Tribunal, 14 November 1945- 1 October 1946.

LIST OF LEGAL INSTRUMENTS

Allied Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

Charter of the International Military Tribunal, annexed to the London Agreement, 8 UNTS 279, 8 August 1945

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, 10 December 1984.

Elements of Crimes, The Rome Statute of the International Criminal Court, 2011.

Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9.

Statute of the International Tribunal for Rwanda, United Nations Security Council Resolution 955, Annex, 8 November 1994.

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/RES/827 (1993)

UNITED NATIONS RESOLUTIONS

UNGA, *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. A/48/49, 23 February 1994.

UNSC S/RES/2379, 2017, *Creation of an Investigative Team, headed by a Special Adviser, to support domestic efforts to hold Da'esh accountable for War Crimes, Crimes Against Humanity and Genocide.*

UNSC, S/RES/827 (1993) *International Criminal Tribunal for the former Yugoslavia (ICTY).*

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND

"Women's lives and their bodies have been the unacknowledged casualties of war for far too long."[1]

War and atrocities are intricately linked, whereby sexual and reproductive violence against women and girls is particularly rampant in armed conflicts, committed both opportunistically and strategically.[2] Historically, women have been deemed as rightful "spoils of war" and rape as an inevitable consequence of armed conflict.[3] Several forms of sexual and reproductive violence are employed as calculated weapons of warfare, constituting strategic methods used to terrorise, demoralise, and annihilate the families and communities of victims.[4]

The most recent and unpunished perpetrators who inflict reproductive violence by explicitly targeting women's reproductive capacities and using "rape as a weapon of war" is Da'esh.[5] Among the most heinous crimes Da'esh has perpetrated is the sexual enslavement of Yazidi

[1] Press Release, Amnesty International, *Women's Lives and Bodies-Unrecognized Casualties of War*, 8 December 2004.

[2] Askin K, 'Treatment of sexual violence in armed conflicts: A historical perspective and the way forward' in Brouwer A, Ku C, Romkens R and Herrik L (eds) *Sexual violence as an international crime: Interdisciplinary approaches*, 1ed, Intersentia Publishing Ltd, Cambridge, 2013, 19.

[3] Bensouda, F, 'Gender and sexual violence under the Rome statute' in Decaux E, Dieng A and Sow M (eds), *From human rights to international criminal law*, Brill Publishers, 2007, 401.

[4] Askin K, 'Treatment of sexual violence in armed conflicts: A historical perspective and the way forward', 19.

[5] The group is also commonly referred to as ISIS/ISIL, however for purposes of this study the Author shall solely refer to the group as Da'esh. See also Khan Z, 'Call it Da'esh not ISIS(or ISIL), CNN, 7 October 2016 -< https://edition.cnn.com/2016/10/05/opinions/Daesh-not-isil-or-islamic-state-khan/index.html>- on 8 February 2020.

women and girls. [6] The sexual enslavement of these Yazidi women is severe, not only due to Da'esh's advanced organisation and institutionalisation of the sex slave trade, but also because it is the epitome of "chattel" slavery in the conventional sense of the word.[7] The systematic rape of Yazidi women and girls has become a core practice and key theological tenet of Da'esh since the group announced it was reinstituting the practice of slavery in 2014.[8] From the time Da'esh invaded Iraq in 2014, they have sexually enslaved at least six thousand Yazidi women, majority of whom remain trapped.[9]

The extensive range of sexual and reproductive violence inflicted against women and girls in armed conflict was further underscored in a report on the enforcement of birth control by Da'esh. It stated that they forced Yazidi women and girls-who they detained as sex slaves-to take birth control pills, in order to prevent them from becoming pregnant, thereby ensuring continued abuse. [10] From the standpoint of international law, this confronts prevailing perceptions of the methods used to specifically target women and girls as well as how their reproductive capabilities are overtly exploited as tools of conflict.[11] The salient issues which arose from this report were: how could these acts of forced contraception be prosecuted? Which charges could be brought against an individual should they ever face trial before the

[6] Press Release, *Fight Against Sexual Violence in Conflict Reaches "New Juncture", Security Council Told*, 15 April 2015, -< https://www.un.org/press/en/2015/sc11862.doc.htm>- on 18 March 2020.
[7] El-Masri S, 'Prosecuting ISIS for the sexual slavery of the Yazidi women and girls' 22 *The International Journal of Human Rights* 8, 2018, 1047.
[8] Callimachi R, *ISIS Enshrines a Theology of Rape*, New York Times, 13 August 2015 at-< http://www.nytimes. com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html? _r=0>- on 10 February 2020.
[9] "They came to destroy: ISIS crimes against the Yazidis", Human Rights Council, A/HRC/32/CRP.2, 15 June 2016 Report, para. 69.
[10] "They came to destroy: ISIS crimes against the Yazidis", Human Rights Council, A/HRC/32/CRP.2, 15 June 2016 Report, para. 69. *See also* Callimachi R, 'To maintain supply of sex slaves, ISIS pushes birth control', New York Times, 12 March 2016, at -< https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html> on 18 February 2020.
[11] Duggan C, Bailey C and Guillerot J, 'Reparations for sexual and reproductive violence: prospects for achieving gender justice in Guatemala and Peru', 2 *International Journal of Transitional Justice* 2, 2008, 194.

International Criminal Court (ICC)? Does international criminal law (ICL), in its current form, possess the instruments to address such overt reproductive violence?

In attempting to resolve these difficulties, it is critical to first distinguish sexual violence in armed conflict from reproductive violence, owing to its explicit assault on the reproductive capabilities of women.[12] It is also critical to stress that all modes of sexual violence may have grave, enduring ramifications on a person's reproductive health, and can therefore also be categorised as reproductive violence.[13] This distinction between sexual and reproductive violence is therefore an subjective, nevertheless it must be made to examine the ability of ICL as it stands to expressly address reproductive violence such as forced contraception.

1.1 STATEMENT OF THE PROBLEM

Forced contraception has been used by Da'esh as a method to enable rape against Yazidi women and girls.[14] Reproductive violence is not expressly criminalised in the Rome Statute of the International Criminal Court (Rome Statute) outside of enforced sterilisation and forced pregnancy, as either a war crime or crime against humanity.[15] This has been interpreted to mean the "deprivation of a person's biological reproductive capacity without their genuine consent."[16] At first glance, this may encompass the act of forcing contraception on Yazidi women and girls. However, a footnote in the ICC Elements of the Crimes stipulates that enforced sterilisation "is not intended to include birth-control measures which

[12] Grey R, 'The ICC's first 'forced pregnancy' case in historical perspective', 15 *Journal of International Criminal Justice* 5, 2017, 905.
[13] Grey R, 'The ICC's first 'forced pregnancy', 905.
[14] "They came to destroy: ISIS crimes against the Yazidis", Human Rights Council, A/HRC/32/CRP.2, 15 June 2016 Report, para. 69 and 146.
[15] *Rome Statute of the International Criminal Court*, (1998) (hereinafter referred to as 'Rome Statute').
[16] Grey R, 'The ICC's first 'forced pregnancy', 906.

have a non-permanent effect in practice."[17] This therefore appears to prevent charging forced contraception as enforced sterilisation.

Forced contraception might possibly be regarded as part of contextual considerations for the crime of rape as a crime against humanity or a war crime. However, this could conceivably restrict the indicative nature of the charges, and perhaps deleteriously influence any prospects of expressly mending that harm throughout the reparations process. Not having a specific crime of forced contraception on its own therefore appears highlight the currently flawed ICL structures which appear to be unfit to respond to such novel emerging issues that specifically affect women.

This study investigates whether forced contraception can be prosecuted under the Rome Statute as it currently stands, or whether it needs be specifically criminalised in an attempt to address it as an emerging issue within the framework of ICL.

1.2 STATEMENT OF AIMS AND OBJECTIVES

The **Aim** of this study is to determine whether forced contraception perpetrated during armed conflicts can be included as a specific crime in the Rome Statute, by critiquing the Rome Statute and the ICL framework as it currently stands.

The **Objectives** of this study are to:

i. Examine whether ICL's historical treatment of SGBV demonstrates "gender-bias" flaws in the ICL framework.
ii. Assess whether forced contraception can be sufficiently addressed within the current ICL framework.

[17] Footnote 19, Article 7 (1)(g)-5, *Elements of Crimes, Rome Statute* (1998).

iii. Evaluate the effects of criminalising forced contraception by making it a specific crime under the Rome Statute.

1.3 RESEARCH QUESTIONS

This study shall answer the following questions:

i. To what extent does ICL's historical treatment of SGBV demonstrate "gender-bias" flaws in the ICL framework?

ii. Is forced contraception sufficiently addressed within the current ICL framework?

iii. What are the effects of criminalising forced contraception by making it a specific crime under the Rome Statute?

1.4 HYPOTHESES

This study shall test the following hypotheses:

i. That ICL's historical treatment of SGBV demonstrates "gender-bias" flaws in the ICL framework.

ii. That forced contraception cannot be sufficiently addressed within the current ICL framework.

iii. That the benefits of criminalising forced contraception under the Rome Statute outweigh the challenges to doing so.

1.5 JUSTIFICATION

This research question is crucial as it can serve as a steppingstone to potentially attaining justice for the many Yazidi women who have been subjected to horrific reproductive violence. While academic research on Da'esh continues to develop since the group's initial

appearance on the global political arena in 2014[18], none of the analysis thus far has focused on the particular reproductive harms manifested in conduct such as forced contraception suffered by Yazidi women. This study therefore intends to bridge this gap in the existing literature by exploring forced contraception in light of the Da'esh Yazidi conflict. Conclusions drawn from this research can also act as a guide to jurists and policy makers globally, in surfacing reproductive violence within the international sphere.

1.6 THEORETICAL FRAMEWORK

This study shall adopt a theoretical framework in order to investigate the nature of forced contraception within armed conflicts, and to determine whether not having forced contraception as a specific crime in the Rome Statute demonstrates "gender-bias" flaws in the ICL framework. The chosen theoretical framework is the "Feminist Legal Theory", whose leading proponents are Martha Fineman, Catharine Mackinnon, Anne Scales and Mary Joe Frug, amongst others.

Linda Gordon observes that feminism is "an analysis of women's subordination for the purpose of figuring out how to change it."[19] From this definition, Martha Fineman goes on to define feminist legal theory as it being premised on the conviction that the law has been played a critical role in the historical relegation of women.[20]

[18] For example, see Al-Dayel N, Mumford A and Bales K, 'Not dead yet: The establishment and regulation of slavery by the Islamic state', *Studies in Conflict and Terrorism*, 2020; McCants W, *The ISIS apocalypse: The history, strategy, and doomsday vision of the Islamic state*, St Martin's Press, New York, 2015; Weiss M and Hassan H, *ISIS: Inside the army of terror*, Regan Arts, New York, 2016 and Stern J and Berger J, *ISIS: The state of terror*, Harper Collins Publishers, New York, 2016.

[19] Gordon L, 'The struggle for reproductive freedom: Three stages of feminism', in Eisenstein (ed) *Capitalist patriarchy and the case for socialist feminism,* Monthly Review Press, New York,1979, 107.

[20] Fineman M, 'Feminist legal theory', 13 *American University Journal of Gender, Social Policy & the Law* 1, 2005, 13.

Feminist legal theory has two primary objectives. First, it strives to illuminate the methods in which the law has contributed to the general subordinate status of women. Second, it aims to transform women's subordinate status in society through amendments to the law and the laws' attitudes toward gender.[21]

Feminist legal theory primarily arose as a criticism of North American law that was generated to spur positive change to the ways in which society regarded women, as well as to transform the way judges applied the law to maintain the historical subjugation of women in society. Feminists working in this field therefore perceived the law as subjugating women to an inferior societal status than men on the basis of gender assumptions, with judges relying on these assumptions when rendering their judgments.[22]

The movement began and gained momentum in the 1960s and 1970s with the aim of attaining equality for women by confronting laws which created divisions on the basis of sex.[23] Upon its emergence and despite the increase in the growth of the field, it still faces barriers to acceptance.[24]

Catharine MacKinnon, a trailblazer in the study of feminist legal theory was instrumental in reshaping the law of sexual harassment, with the aim of aiding workers in avoiding unwanted sexual advances and belittlement in the workplace.[25] MacKinnon was also the

[21] Scales A, *Legal feminism: Activism, lawyering and legal theory,* New York University Press, New York, 2006.

[22] Levit N, Minow M and Verchick R, *Feminist legal theory: a primer,* 2ed, New York University Press, New York, 2016, x.

[23] Menkel-Meadow C, 'Feminist legal theory, critical legal studies, and legal education or "the fem-crits go to law school"' 38 *Journal of Legal Education* 1,1988, 62. *See also* Minda G, 'Feminist legal theory' in Minda G (ed) *Postmodern legal movements: law and jurisprudence at century's end*, New York University Press, New York, 1995, 128.

[24] Levit N *et al*, *Feminist legal theory: a primer,* 2ed, New York University Press, New York, 2016, x.

[25] MacKinnon C, *Sexual harassment of working women*, Yale University Press, London, 1979.

first to introduce the dominance theory, which concentrates on the power relations between men and women.[26] The theory, also known as radical feminism, contends that the inequalities women face as sex discrimination in the political, economic and domestic spheres are a consequence of male domination patterns. MacKinnon further postulates that women are subordinated, and men are privileged, and that most social institutions support this male privilege.[27]The theory also contends that the legal system propagates disparities between women and men by using the male perspective to enact laws about women, constructing the view that women are sex objects and inferior, dependent beings.[28]

Today, feminist legal theorists broaden the scope of their work past apparent discrimination, by utilising an array of methods to understand and tackle how the law influences gender inequality.[29] Feminist efforts in the field of ICL have worked to address several issues related to sexual violence.[30] There has been a recent surge in feminist criticism of the ICTY and ICTR's methods in addressing sexual violence as constructing an order of offences that lowered the status of sexual offences, belittling the global perceptions of survivors' anguish and offenders' guilt.[31] This was primarily based on the fact that the Tribunals treated the issues of violence against women (VAW) as intricately related to determinations on the

[26] Levit N *et al, Feminist legal theory: a primer*, 20.
[27] MacKinnon C, 'Feminism, marxism, method and the state: toward feminist jurisprudence', 8 *Journal of Women in Culture and Society* 4, 1983, 635.
[28] Levit N *et al, Feminist legal theory: a primer,* 21.
[29] Levit N *et al, Feminist legal theory: a primer*, xi.
[30] D'Aoust M, 'Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case', 17 *International Criminal Law Review* 1, 2017, 211.
[31] D'Aoust M, 'Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case', 213.

ethnic dimensions of the conflicts,[32] or dependent on the idea of torture,[33] consequently removing the inherently harmful nature of gender-based violence.

Despite reproductive violence historically being excluded from ICL and the jurisprudence of the ICC, the *Dominic Ongwen*[34] case was a major contribution in illuminating particular gender-based harms that have long been invisible in ICL, specifically regarding the recognition of forced pregnancy as a crime on its own.[35] Furthermore, the *Ongwen* case was also the first to explicitly recognise the reproductive autonomy of individual women and girls.[36] This can be seen as a substantial step in addressing certain(not all) manifestations of reproductive violence.

The *Ntaganda*[37] case can also be lauded as a major step in addressing gender-based harms, as the ICC convicted the defendant Bosco Ntaganda of rape and sexual slavery, both as war crimes and crimes against humanity. This represented the first international conviction of sexual slavery.

Furthermore, sexual crimes have gradually been moved up the "hierarchy of international crimes"[38], going from invisibility to visibility in armed conflict, then to international crimes as elements of crimes against humanity and war crimes.[39]Moreover, a greater threshold in circumstances of coercion is necessitated for the defence of consent for rape allegations.

[32] Buss D, 'The curious visibility of wartime rape: Gender and ethnicity in international criminal law', 25 *Windsor Yearbook on Access to Justice* 3, 2007, 4.
[33] Copelon R, 'Gender crimes as war crimes: integrating crimes against women into international criminal law', 46 *McGill Law Journal* 217, 2000, para. 32.
[34] *The Prosecutor v Dominic Ongwen,* Pre-Trial Chamber II, ICC, 23 March 2016.
[35] De Vos D, 'Prosecuting sexual and gender-based violence at the international criminal court',400.
[36] Grey R, 'The ICC's first 'forced pregnancy' case in historical perspective', 909.
[37] *The Prosecutor v Bosco Ntaganda,* Trial Chamber VI, ICC, 8 July 2019.
[38] See generally, Danner A, 'Constructing a hierarchy of international crimes in international law sentencing', 87 *Virginia Law Review* 3, 2001, 491.
[39] Halley J, 'Rape in Berlin: Reconsidering the criminalization of rape in the law of international armed conflict', 9 *Melbourne Journal of International Law* 1, 2008, 111.

This serves to mitigate the evidentiary requirements for rape victims during armed conflicts.[40] These developments, according to D'Aoust, increase the likelihood of sexual crimes being tackled at the international level.[41]

A divide can be made between two schools in the feminist approach to international criminal law.[42] The enforcement school contends that there is a need for efficacious application of "already-existing norms", whereas the revision school argues for a reform of norms it considers problematic *per se*. The enforcement school tends to prevail, inhibiting the potentially positive impacts of the revision school's insights.[43]

This study shall primarily rely on the revision school of feminist legal theorists' approach to ICL, in order to investigate the nature of forced contraception within armed conflicts and to determine whether not having forced contraception as a specific crime in the Rome Statute demonstrates the "gender-bias" flaws within the ICL framework.

1.7 LITERATURE REVIEW

1.7.1 SGBV and Reproductive Violence in Armed Conflict

Fatou Bensouda asserts that during armed conflicts, sexual and gender-based crimes have always been perpetrated. She notes that targets of gender crimes generally, and within armed conflicts are "overwhelmingly female", and that the victims of specific crimes such as forced

[40] Halley J, 'Rape in Berlin: Reconsidering the criminalization of rape in the law of international armed conflict',117.
[41] D'Aoust M, 'Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case', 213.
[42] Oosterveld V, 'Feminist debates on civilian women and international humanitarian law', 27 *Windsor Yearbook on Access to Justice*, 2009, 385.
[43] D'Aoust M, 'Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case', 215.

impregnation and forced abortion, are solely women and girls.[44] Despite this, gendered and reproductive violence has been historically excluded from ICL.[45]

Similarly, Rosemary Grey states that reproductive violence, distinguished from the related concern of sexual violence, is yet to be truly 'surfaced' in ICL. Again, this kind of violence has existed as a longstanding facet of war and is repugnant to the values safeguarded by ICL.[46]The lack of attention specifically toward reproductive violence and its gendered elements reinforces Louise Chappell's' trailblazing position, that ICL has been gendered through the "gender capture" of men as "rule makers", and through "gender bias" which greatly impacted legal proceedings within courts, and the law itself.[47] Chappell further posits that "the predominant path of the ICC's early years has been toward gender misrecognition and ongoing gender status subordination."[48]

Scholars such as Dieneke De Vos have also observed that reproductive violence and sexual violence often overlap.[49] However, as Grey notes, it is not always the case that sexual violence correlated with reproductive violence. A prime example of this is forced nudity, which is a type of sexual violence that has no direct effect on reproductive health or autonomy. However, reproductive violence does not always comprise of an act of a sexual nature or bearing on the victim's sexual identity. This can be illustrated through the acts of

[44] Bensouda, F, 'Gender and sexual violence under the Rome statute', 401.
[45] Aoláin F, 'Gendered harms and their interface with international criminal law', 16 *International Feminist Journal of Politics* 4, 2014, 624.
[46] Grey R, 'The ICC's first 'forced pregnancy' case in historical perspective', 905.
[47] Chappell L, 'Conflicting institutions and the search for gender justice at the international criminal court', 67 *Political Research Quarterly* 2, 2014, 185-192.
[48] Chappell L, *The politics of gender justice at the international criminal court: Legacies and legitimacy*, 1ed, Oxford University Press, Oxford, 2016, 103.
[49] De Vos D, 'Prosecuting sexual and gender-based violence at the international criminal court' in Shepherd L (ed), *Handbook on gender and violence,* Edward Elgar Publishing, 2019, 400.

forced abortions or forced contraception. Grey therefore opines that is theoretically feasible and realistically beneficial to differentiate between sexual violence and reproductive violence, as it permits a more nuanced exploration of patterns of impunity for gender-based violence under ICL.[50]

According to both De Vos and Jakob Tanner, the Nazi eugenics dogma is one of the most well-known illustrations of reproductive violence during conflict. Throughout the Nazi regime, between 70,000 and 350,000 individuals were forcibly sterilised to bar them having children thereby "ensuring the purity" of the Aryan race.[51] De Vos classifies such instances as 'negative' targeting, as it explicitly deprived people of their biological reproductive capacity.[52]

Salzman also examines instances of reproduction being explicitly exploited as a tool of conflict, which can be seen as "positive targeting." A prime example of this is the notorious "rape camps" in the former Yugoslavia, where women's reproductive capabilities were expressly attacked and utilised as an instrument of ethnic cleansing.[53]

A further example of the exploitation of reproduction during armed conflict is in Colombia, where the FARC[54] as well as numerous other guerrilla groups allegedly enforced mandatory family planning policies on their combatants. These policies also included forced

[50] Grey R, 'The ICC's first 'forced pregnancy' case in historical perspective', 909.
[51] De Vos D, 'Prosecuting sexual and gender-based violence at the international criminal court', 401. See also Tanner J, 'Eugenics before 1945', 10 *Journal of Modern European History* 4, 2012, 458.
[52] De Vos D, 'Prosecuting sexual and gender-based violence at the international criminal court', 401.
[53] Salzman T, 'Rape camps as a means of ethnic cleansing: religious, cultural, and ethical responses to rape victims in the former Yugoslavia', 20 *Human Rights Quarterly* 2, 1998, 349.
[54] The FARC are the Revolutionary Armed Forces of Colombia- People's Army, one of the prominent guerrilla groups during the Colombian civil conflict. See also *Encyclopaedia Britannica*, "FARC" at -< https://www.britannica.com/topic/FARC>- on 18 February 2020.

contraception. Women within the FARC ranks were compelled to abort their pregnancies "so as not to lose her as a fighter."[55] However, in these cases, Sanin and Franco contend that the alleged methods forced contraception were aimed at strengthening and supporting women's combatant roles.[56]

As Brouwer, Ku, Romkens and Herrik keenly observe, the pervasive existence of sexual abuse and reproductive violence, even during times of peace, reveals just how deeply entrenched the sense of entitlement to women's bodies and their sexuality is in numerous societies globally.[57] The actions of Da'esh fighters are a classic example of this, as they have committed war crimes and crimes against humanity against Yazidi women and girls including rape, sexual violence, sexual slavery, torture, cruel treatment, and outrages upon personal liberty.[58] Rape and sexual slavery are frequent methods of warfare, but the use of forced contraception in order to prevent pregnancy and thereby ensure continued sexual violence is a new manifestation of sexual and reproductive violence.[59]

1.7.2 Forced Contraception in Armed Conflict: An Emerging Issue

Of the few scholars that have actually tackled the new manifestation of sexual and reproductive violence that is forced contraception, Christie Edwards advances that forced

[55] David P, 'Colombian guerrilla movement FARC denies alleged forced abortion', Latin Post, 4 January 2016, at -<https://www.latinpost.com/articles/106021/20160104/colombian-guerrilla-movement-farc-denies-alleged-forced-abortion.htm> on 18 February 2020.

[56] Sanin F and Franco F, 'Organising women for combat: the experience of FARC in the Colombian war', *Journal of Agrarian Change*, 2017, 772.

[57] Brouwer A, Ku C, Romkens R and Herrik L, 'Interdisciplinary approaches to recognizing, investigating and prosecuting sexual violence as an international crime' in Brouwer A, Ku C, Romkens R and Herrik L (eds) *Sexual violence as an international crime: Interdisciplinary approaches*, 1ed, Intersentia Publishing Ltd, Cambridge, 2013, 4.

[58] The U.N. Independent International Commission of Inquiry on Syria concluded that Da'esh committed war crimes and crimes against humanity on November 14, 2014. *See also* "They came to destroy: ISIS crimes against the Yazidis", Human Rights Council, A/HRC/32/CRP.2, 15 June 2016 Report, para. 171-172.

[59] Edwards C, 'Forced contraception as a means of torture' in Centre for Human Rights and Humanitarian Law: Anti-Torture Initiative, *Gender perspectives on torture: Law and practice*, 139.

contraception can and should be viewed as a means of torture, concluding that forced contraception meets the elements of torture. Of note here was the first element constituting torture: "the intentional infliction of severe mental or physical pain or suffering by the perpetrator",[60] as this was directly related to forced contraception. Edwards argues that the severe mental suffering experienced by Yazidi women resulting from their abuse is evident, as the forced use of oral and injectable contraception caused severe physical pain and suffering to Yazidi women.[61] These tactics allowed Da'esh fighters to continuously rape their victims by preventing or eliminating pregnancies, as well as by enabling them to sell, trade, or gift their victims to other fighters with assurances that the women and girls were not pregnant.[62]

Edwards also examines what accountability mechanisms may exist for Da'esh perpetrators, under the regimes of ICL, International Human Rights Law, International Humanitarian Law (IHL) as well as domestic law. She critically notes that accountability mechanisms are rather limited under these regimes. She does, however, conclude on an encouraging note, stating that the overwhelming evidence against the perpetrators will hopefully facilitate any future domestic prosecution or in the event of a referral to the ICC or other international justice mechanism. [63]

[60] Article 1(1), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, 10 December 1984.
[61] Edwards C, 'Forced contraception as a means of torture', 146.
[62] "They came to destroy: ISIS crimes against the Yazidis", Human Rights Council, A/HRC/32/CRP.2, 15 June 2016 Report, para. 69.
[63] Edwards C, 'Forced contraception as a means of torture', 159.

Despite the expanding jurisprudence emanating from the ICC and international criminal tribunals on the prosecution of sexual and reproductive violence and sexual and gender-based crimes,[64] forced contraception has seldom been mentioned.

However, the *Akayesu* case was one of the few cases which mentioned forced contraception, where it was viewed as a measure intended to prevent birth. Here, the Chamber stated that:

> "Measures intended to prevent births within the group include rape; sexual mutilation; the practice of sterilisation; **forced birth control;** separation of the sexes; prohibition of marriages; impregnation of a woman to deprive group identity; and mental trauma resulting in a reluctance to procreate."[65]

Other than forced contraception being considered as a measure intended to prevent birth, there was no mention or allusion to the harmful nature of such a form of reproductive violence.

The discussed literature has demonstrated that although prosecuting sexual and gender-based violence has been widely explored in legal texts globally as well as in international criminal jurisprudence, the same cannot be said for new manifestations of it such as forced contraception. This study therefore fills a clear gap on legal research and writing surrounding reproductive violence, forced contraception and the prosecution of sexual and gender-based crimes within the current ICL framework.

1.8 RESEARCH DESIGN AND METHODOLOGY

The primary research methodology that has been relied on is secondary research. This study has therefore relied on the works of scholars in the field of ICL and women and gender

[64] See also *The Prosecutor* v. *Jean-Pierre Bemba Gombo*, Trial Chamber II Judgment of 21 March 2016, ICC; *The Prosecutor v Dominic Ongwen,* Pre-Trial Chamber II, ICC, 23 March 2016.
[65] *The Prosecutor v Jean-Paul Akayesu,* Trial Chamber I, ICTR, 2 September 1998, para. 507-508.

studies in seeking to answer the research questions and achieve the research's aim and objectives. These works are, *inter alia*, books, journal articles, caselaw and legislation. UN Human Rights Reports and credible newspapers have also been made use of. A wide range of materials have been utilised, allowing for forced contraception to be captured widely and deeply.

1.9 LIMITATIONS

There have been two critical limitations to this study. The first, is the current lack of prior research material on the specific topic of forced contraception within armed conflicts- including anecdotal evidence as well as scholarly work. This is because forced contraception is a relatively new manifestation of sexual and reproductive violence. Therefore, in comparison to other forms and manifestations of sexual and reproductive violence, only a marginal amount of legal research has been conducted specifically on forced contraception in armed conflicts.

The second limitation was the limited access to certain books or journal articles that were essential in bolstering this study's research. This limited access was due to the fact that not all material was readily available online, as well as the fact that even if it was, access to the material was restricted.

1.10 OUTLINE OF THE DISSERTATION AND ITS FLOW

This dissertation concentrates on investigating whether forced contraception inflicted on Yazidi women can be prosecuted at the ICC, in light of the Da'esh-Yazidi Conflict in Iraq and Syria. In order to first understand novel forms of international criminal conduct such as forced contraception, it is prudent to first contextualise and situate forced contraception within the broader historical framework of ICL. This is conducted through a historical analysis of the treatment of sexual and gender-based violence in the development of ICL.

Subsequently, the relevant historical background of the Yazidi People in Iraq is discussed in order to contextualise the legal contours of forced contraception in the Da'esh-Yazidi conflict. This highlights how such conduct is uniquely and solely experienced by women, providing a foundation to explore whether forced contraception can currently be prosecuted under the Rome Statute as either genocide, a war crime or a crime against humanity within the ICC Elements of Crimes. In ascertaining the usefulness of including forced contraception as a specific crime under the Rome Statute, the benefits and challenges to criminalising forced contraception are analysed, grounded on the theoretical foundations for international criminalisation. Lastly, recommendations are proposed, and a conclusion is drawn to answer the research questions presented.

1.11 SUMMARY OF OVERALL RESULTS AND CONCLUSIONS

Cognisant of the methodology used as well as the limitations imposed, this dissertation was able to examine whether forced contraception forced contraception inflicted on Yazidi women can be prosecuted at the ICC, in light of the Da'esh-Yazidi Conflict in Iraq and Syria.

The first research question sought to determine what extent the historical treatment of SGBV crimes demonstrated "gender-bias" flaws in the ICL framework. Chapter Two addressed this, through a critical historical analysis of how SGBV and reproductive crimes were treated in international criminal tribunals. It was found that throughout the history of ICL women were "nearly invisible" therefore not nearly enough substantive attention was given to sexual and gender-based crimes. Despite progressive steps made by both *ad-hoc* tribunals and the ICC, these crimes remained insufficiently addressed through the ICC's lack of prosecution

on the matter and the Tribunals failure to recognise the crucial gender element in the perpetration of these crimes.[66] This proved the first hypothesis to be correct.

The second research question investigated whether forced contraception can be sufficiently addressed within the current ICL framework. This was answered in Chapter Three, where it was found that the Da'esh-Yazidi conflict is firmly rooted in the historical persecution and discrimination against the Yazidi minority.[67] Furthermore, forced contraception would only be able to be addressed to a very limited extent in the ICL framework. The jurisdictional impasse confronting the ICC is also a hindrance to this, proving the second hypothesis correct. This demonstrates that having a specific crime of forced contraception on its own further underscoring the "gender-bias" within ICL's existing framework, as the currently flawed ICL structures appear to be unfit to respond to such novel emerging issues that specifically affect women.

The final research question examined the effects of criminalising forced contraception if it were made a specific crime under the Rome Statute. Chapter Four addressed this by establishing that international criminalisation is founded on theories which give high regard to the violation of "universal values", to the extent that breach of these values warrants international criminalisation.[68] It was hypothesised that the benefits of criminalising forced contraception under the Rome Statute outweigh the challenges to doing so. This is correct and is buttressed by the discussed aims of international criminal justice of retribution, deterrence, incapacitation, denunciation and justice for victims. In conclusion, ICL is currently defective and unable to sufficiently address novel forms of reproductive harm such

[66] Mouthaan S, 'The prosecution of gender-based crimes at the ICC: Challenges and opportunities', 785.
[67] Zoonen D and Wirya K, 'Yazidism and its community in Iraq', 9.
[68] Haenen I, *Force and marriage,* 140.

as forced contraception, which is a further indication of glaring "gender-bias" flaws within the ICL framework.[69]

1.12 CHAPTER BREAKDOWN

This dissertation is divided into five chapters.

Chapter 1 introduces the subject that will be studied, giving the background of the study, the statement of the problem, the research question, the objectives of the study, the hypotheses, the theoretical background, the literature review, as well as the research methodology.

Chapter 2 examines whether ICL's historical treatment of SGBV demonstrates "gender-bias" flaws in the ICL framework. This is done through a historical analysis of the treatment of sexual and gender-based violence in the development of ICL, from the post-World Warr II era to the establishment of the ICC, in order to contextualise and situate emerging crimes such as forced contraception.

Chapter 3 establishes the relevant historical background of the Yazidi People in Iraq in order to contextualise the current Da'esh-Yazidi conflict. It further elucidates on the details on the legal contours of forced contraception as well as how this is an experience that is specifically unique to women. Finally, it examines the evident jurisdictional impasse posed to the prosecution of forced contraception, as well as the relevant ICC Elements of Crimes, in an effort to determine whether forced contraception can be prosecuted currently under the Rome Statute as either genocide, a war crime or a crime against humanity.

Chapter 4 investigates the need to criminalise forced contraception, by examining the theoretical foundations of international criminalisation as well as the positive and negative

[69] Chappell L, 'Conflicting institutions and the search for gender justice at the international criminal court', 185-192.

effects of criminalising forced contraception. Another international legal mechanism that may address forced contraception is considered from the realm of international human rights law. This is done in an effort to determine the usefulness of including forced contraception as a specific crime under the Rome Statute.

Chapter 5 summarises the findings of the study and contains a conclusion that follows from the research questions and hypotheses of the study. Recommendations are also discussed.

CHAPTER TWO

SGBV IN ICL: A HISTORICAL PERSPECTIVE

2.0 INTRODUCTION

In order to truly understand the legal contours of forced contraception, as well as its unique ramifications on women, forced contraception must first be situated and contextualised within the realm of ICL. Therefore, this Chapter shall contextualise forced contraception within the realm of sexual and gender-based violence (SGBV) in ICL, by providing an in-depth history of SGBV in ICL, starting from the Nuremberg and Tokyo Trials to the more recent *ad-hoc* tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The primary focus here is the extent to which these ad-hoc tribunals addressed SGBV crimes, and what effect this had on subsequent jurisprudence. Lastly, this chapter shall examine how SGBV crimes have been treated at the ICC.

2.1 SEXUAL AND GENDER-BASED VIOLENCE IN INTERNATIONAL CRIMINAL LAW

Sexual violence is a form of gender-based violence and comprises of "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting."[70] Sexual violence can assume various forms and currently comprises of "rape, sexual abuse, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual enslavement, forced circumcision,

[70] Chapter 6, Sexual Violence, World Report on violence and Health, World Health Organisation, 149 at - https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf on 1 October 2020.

castration and forced nudity."[71] Gender based violence may be sexual or non-sexual in nature and is defined as violence directed against an individual specifically due to his or her gender.[72] Reproductive violence is generally seen to be violence which involves a "violation of reproductive autonomy", or violence that is directed at people specifically because of their reproductive capabilities.[73] While the term "reproductive violence" has not been used in any ICL legislative instruments, this term and its adaptations, such as "reproductive crimes" have been used throughout feminist scholarship on ICL for a while.[74] This dissertation shall use the terms "sexual violence" and "gender-based violence" interchangeably, and shall seek to emphasise and distinguish reproductive violence, primarily because of its inextricable link with forced contraception.

It is important to note that this initial discussion on SGBV is carried out in the context of the current recognised elements and crimes of SGBV. Forced contraception as a new manifestation of SGBV shall be subsequently examined in Chapter Three of this dissertation.

In ICL, reference to gender-based violence and crimes is predominantly centred on sexual violence against women (VAW), which is often a "reflection of gender inequalities underpinning patriarchal structures."[75] Patricia Viseur-Seller defines gender-based violence

[71] Article 7(g), Article 8(b)(xxii), Article 8(d)(vi), *Rome Statute* (1998).
[72] This reflects the definition of gender-based violence adopted by the United Nations High Commissioner for Refugees in the 2008 UNHCR Handbook for the Protection of Women and Girls. Geneva, UNHCR, 383.
[73] Grey R, 'The ICC's first forced pregnancy', 906.
[74] See for example Askin K, *War crimes against women: Prosecution in international war crimes tribunals*, Martinus Nijhoff, Publishers, 1997, 90-91. See also Askin K, 'The International Criminal Tribunal for Rwanda and its treatment of crimes against women', in Carey J, Dunlap W and Pritchard R (eds), *International humanitarian law: Origins, prospects, challenges*, Vol. 3, Transnational Publishers, 2003, 33, 36; Boon K, 'Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy, and consent', 32 *Columbia Human Rights Law Review* 625, 2001, 630.
[75] McKinnon C, 'Reflections on sex equality under law', 100 *Yale Law Journal*, 1990, 1281 and 1302.

as comprising of a "multitude of patriarchal sanctioned conduct, directed at persons because of their gender." It predominantly refers to violence perpetrated against women and girls, solely on the basis that they are females.[76] Historically, wartime rape of women was regarded as an inexorable corollary of war, "necessary to boost morale, and was lumped together with property crimes."[77] Therefore, gendered violence was excluded from international criminal law.[78] Despite the historical general attitudes towards SGBV during armed conflicts, gender-based war crimes have been recognised in some form in ICL for quite some time now.[79] In spite of this recognition, they continue to remain unpunished.[80]

2.1.1 Post-World War II: Nuremberg and Tokyo Tribunals

Despite centuries of armed conflicts within and amongst states, the atrocious brutalities perpetrated throughout World War II paved the way for the eventual creation of two international war crimes tribunals, formed to try those most responsible for serious crimes committed during the war.[81] The aftermath of the war therefore saw the establishment of the International Military Tribunals(IMT) which comprised of the Nuremberg Tribunal established in Nuremberg, Germany to prosecute Nazi leaders,[82] as well as the International Military Tribunal for the Far East (Tokyo Tribunal) in Tokyo, Japan to try senior Japanese leaders.[83] While the primary focus in these tribunals was prosecuting crimes against peace,

[76] Viseur-Sellers P, *The prosecution of sexual violence in conflict: The importance of human rights as a means of interpretation*, Women's Human Rights and Gender Unit, 2007, 4.
[77] Lehr-Lehnardt R, 'One small step for women: Female-friendly provisions in the Rome Statute of the International Criminal Court', *BYU Journal of Public Law* 16, 2002, 317.
[78] Aoláin F, 'Gendered harms and their interface with international criminal law', 624.
[79] Campanaro, J, 'Women, war, and international law: The historical treatment of gender-based war crimes', *The Georgetown Law Journal* 89, 2000, 2558.
[80] Mouthaan S, 'The prosecution of gender-based crimes at the ICC: Challenges and opportunities', 11 *International Criminal Law Review* 4, 2011, 777.
[81] Askin K, 'Treatment of sexual violence in armed conflicts: A historical perspective and the way forward', 19.
[82] *Charter of the International Military Tribunal*, annexed to the London Agreement, 8 UNTS 279, 8 August 1945.
[83] "Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo", 19 January 1946, TIAS No. 1589, 4 Bevans 20.

certain crimes of sexual violence were either implicitly or explicitly prosecuted as well, albeit to a very limited extent.[84]

It is critical to note that neither the Charters of the IMT of Nuremburg nor of the tribunal at Tokyo explicitly listed rape as a crime or expressly referred to any other crime of sexual violence.[85] However, scholars such as Cherif Bassiouni have argued that rape was tacitly contained in both the Nuremberg and Tokyo Charters as a crime against humanity by "being subsumed within the words 'or other inhumane acts.'"[86] Bassiouni also argues that sexual violence and rape "clearly constitute 'inhumane acts",[87] and that rape was also implicitly encompassed as a war crime as it was incorporated within the term "ill treatment".[88]

Throughout World War II, sexual violence was rampant.[89] While crimes of sexual violence were indeed prosecuted in both tribunals, these prosecutions were argued to be "unseen" as they were not overtly contained in the indictments, and the index of the transcripts did not refer to these crimes at all.[90] In the Tokyo Tribunal, the pervasive rapes perpetrated by Japanese soldiers against civilians in Nanking in 1937 led to Japanese defendants being

[84] Askin K, 'Treatment of sexual violence in armed conflicts: A historical perspective and the way forward', 20.

[85] Boot M, 'Crimes against humanity, Article 7(1)(g): Rape or any other form of sexual violence of comparable gravity' in Triffterer O et al (eds), C*ommentary on the Rome Statute of the international criminal court: Observers' notes, article by article*, 3ed, Beck CH Publishers, 2015, 207. See also Mouthaan S, 'The prosecution of gender-based crimes at the ICC: Challenges and opportunities', 779.

[86] Bassiouni C, *Crimes against humanity in international criminal law*, 2ed, Kluwer Law International, 1999, 349.

[87] Bassiouni C, *Crimes against humanity in international criminal law*, 348.

[88] Askin K, *War crimes against women: Prosecution in international war crimes tribunals*, 1ed, Martinus Nijhoff Publishers, 1997, 97.

[89] Askin K, 'Treatment of sexual violence in armed conflicts: A historical perspective and the way forward', 33.

[90] Askin K, 'Prosecutions and jurisprudence-What have we achieved?', International Gender Justice Dialogue, Conference Session II, Mexico, April 2010, 9.

charged with rape as a war crime .[91] However, only three defendants were actually found guilty of sex crimes.[92] Notwithstanding the explicit charges of rape, none of the female victims were ever called upon to provide evidence or testify before the Tokyo Tribunal.[93] Furthermore, the Tokyo Tribunal did not take into account any evidence of the so-called "comfort women"[94] that were coerced into enforced prostitution and sexual slavery in Japanese military brothels.[95]

Several forms of sex crimes were documented and submitted to the Nuremberg Tribunal by Axis troops.[96] The crimes of rape, sexual mutilation, sexual torture, sexual slavery, forced nudity, forced prostitution, forced abortion, forced sterilisation, sexual sadism and pornography are all existent in the evidence of the transcripts of the trials.[97] During the trials, the evidence of this sexual violence was often rapidly and unsympathetically dismissed.[98] The absence of public documentation and official prosecution furthered the perception that sex crimes were insubstantial in comparison to other crimes and were not prosecuted or

[91] *The International Military Tribunal for the Far East, The Tokyo Judgment,* 29 April 1946-12 November 1948, 389.

[92] Röling B and Ruter C (eds), *The Tokyo judgment: The International Military Tribunal for the Far East,* APA University Press, Amsterdam, 1977, 446-454.

[93] Brownmiller S, *Against our will: Men, women and rape,* Open Road Media, 2013, 58.

[94] Despite the term "comfort women" being reclaimed in contemporary discourse (with the use of the quotation marks to denote the term's strikingly troublesome connotations), many survivors continue to find it insulting- *See* Ruff O'Herne J, *Fifty years of silence*, 1994, 136–167. Therefore, the Author shall continue to use quotation marks in reference to comfort women in acknowledgement of the glaring problematic indications of the term. See also Henry N, 'Memory of an injustice: The "Comfort Women" and the legacy of the Tokyo trial', 37 *Asian Studies Review* 3, 2013, 362-380.

[95] Bensouda F, 'Gender and sexual violence under the Rome statute', 404.

[96] Robertson G, *Crimes against humanity: The struggle for global justice*, Allen Lane, London, 1999, 306.

[97] *Trial of the Major War Criminals Before the International Military Tribunal,* 14 November 1945- 1 October 1946, Volume II, 139; Volume IV, 170, 178, 212, 213-214, 404-407; Volume VII 453-457, 467, 494, 505, 548; Volume XX 381.

[98] For example, *Trial of the Major War Criminals Before the International Military Tribunal,* 14 November 1945- 1 October 1946 Volume II at 404 (after reporting a rape, the prosecutor asserts "I will not mention any more of the atrocities mentioned in this document"); at 405 ("54 women or young girls from 13 to 50 years of age were raped by maddened soldiers. The Tribunal will forgive me if I avoid citing the atrocious details which follow."); at 407 ("rapes were committed against three women in that area. I pass on.")

substantially addressed at the Nuremberg Tribunal.[99] It is important to note here that while the Allied Control Council Law No. 10[100] explicitly stated that "rape, or other inhumane acts committed against any civilian population" was a crime against humanity and was also seen as "ill treatment" of civilians,[101] no prosecutions were expressly put forth for rape on this basis.[102] Therefore, it has been argued that women were "nearly invisible" during the Nuremberg Trials, consequently not nearly enough substantive attention was given to sexual and gender-based crimes.[103]

2.1.2 International Criminal Tribunal for the Former Yugoslavia

Despite widespread political, artistic and literary awareness of wartime rape historically, it was not until the 1990s that sexual violence in armed conflict obtained any significant international, legal attention.[104] Over forty years after the Nuremberg and Tokyo Tribunals, sexual and gender-based crimes were finally prosecuted before an *ad hoc* international criminal tribunal. Upon creation of the ICTY, there existed numerous international declarations demanding that the crimes of sexual violence, including rape, sexual slavery, and forced pregnancy, should be addressed as war crimes and crimes against humanity.[105]

---

[99] Askin K, 'Treatment of sexual violence in armed conflicts: A historical perspective and the way forward', 33.

[100] This law allowed the Allies to prosecute German nationals in their 52 occupation zones. See *Allied Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

[101] Article I (1)(b) -(c), Appendix 6, *Allied Control Council Law No. 10 (1945*). See also Bassiouni C, 'International criminal investigations and prosecutions: From Versailles to Rwanda', *International Criminal Law Enforcement* 3, 1999, 79.

[102] Boot M, 'Crimes against humanity, Article 7(1)(g): Rape or any other form of sexual violence of comparable gravity', 207.

[103] Kuo P, 'Prosecuting crimes of sexual violence in an international tribunal', 34 *Case Western Reserve Journal of International Law* 305, 2002, 308.

[104] Henry N, 'The fixation on wartime rape: Feminist critique and international criminal law', 23 *Social & Legal Studies* 1, 2013, 94.

[105] See United Nations General Assembly Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/48/49, 23 February 1994, and its broad definition of "violence against women" and the call for states to take measures to prevent and punish such violence. See also Boot M, 'Crimes against humanity, Article 7(1)(g): Rape or any other form of sexual violence of comparable gravity', 207.

The United Nations Security Council (UNSC) Resolution that led to the establishment of the ICTY comprised of the first denunciation by the UNSC of rape during war. A crucial reason behind the establishment of the ICTY was to bring the perpetrators of rape and other atrocious crimes to justice.[106] The ICTY Statute explicitly refers to rape, classifying it as a crime against humanity.[107] The ICTY also acknowledged rape as torture[108] and adopted rules of evidence that were primarily geared towards preventing harassment and discrimination against victims of sexual violence who were witnesses at trial.[109]

The earliest indictment for rape as a war crime was seen in the case of *Prosecutor v. Gagovic et al. (Foca).*[110] In this case, the prosecutor concentrated entirely on sexual assault and classified rape as a violation of the ICTY's grave breaches provision,[111]a violation of the laws and customs of war,[112] as well as a crime against humanity.[113] The ICTY Trial Chamber found the three accused guilty of the crimes against humanity of sexual violence and war crimes.[114] Enslavement was also included in numerous indictments released by the ICTY. For instance, in *Prosecutor v. Gagovic et al. (Foca),* the indictment encompassed charges for forcible sexual penetration of a person or forcing a person to penetrate another

[106] Preamble, UN Security Council, Security Council resolution 827, International Criminal Tribunal for the former Yugoslavia (ICTY), 25 May 1993, S/RES/827 (1993); See also *Prosecutor v Furundzija,* Appeals Chamber, ICTY, 21 July 2000, para. 201, where the ICTR Appeals Chamber stated: "the general question of bringing justice to the perpetrators of crimes (such as rape) was one of the reasons that the UNSC established the Tribunal").

[107] Article 5(g), *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* U.N. Doc. S/RES/827 (1993) (hereinafter referred to as ICTY Statute); Goldstone R, 'Prosecuting rape as a war crime', 34 *Case Western Reserve Journal of International Law* 277, 2002, 278-279.

[108] *The Prosecutor v Zejnil Delalic,* Trial Chamber II, ICTY, 16 November 1998, para 480-496. See also Copelon R, 'Gender crimes as war crimes: integrating crimes against women into international criminal law', 46 *McGill Law Journal* 217, 2000, para. 32.

[109] *The Prosecutor v Dusko Tadic*, Trial Chamber, ICTY, 10 August 1995.

[110] *The Prosecutor v Gagovic*, ICTY Indictment, 1998.

[111] Article 2, *ICTY Statute* (1991).

[112] Article 3, *ICTY Statute* (1991).

[113] Article 5, *ICTY Statute* (1991); *Prosecutor v. Gagovic*,1998, Indictment, ICTY, para 4.8.

[114] Kuo P, 'Prosecuting crimes of sexual violence in an international tribunal', 305.

sexually.[115] Here, the Trial Chamber aptly held that rape was exercised as an "instrument of terror" in the course of ethnic cleansing, and defined slavery.[116]

During the ICTY's formative years, one of the central policy concerns that was deliberated on was whether crimes against women should be independent of other indictments or "incorporated and mainstreamed" into them.[117] The eventual decision was to implement both approaches simultaneously.[118] Individuals in the ICTY were also held accountable for "collective sexual violence."[119]

The former Gender Legal Expert for the ICTY Patricia Viseur Sellers contends that armed conflict, systematic attacks on civilians, and genocide all "breed collective criminal conduct", and that within these circumstances "the susceptibility of sexual violence to collective conduct seems predictable. The number of individuals eventually charged and tried for these crimes, in truth, only hint at the total number of perpetrators."[120] She further notes that before the ICTY, the Trial Chambers and Appeals Chamber addressed the notion of collective sexual violence by using a form of direct liability that was not explicitly contained within the ICTY statute, against military and political superiors, specifically, "co-perpetration or joint criminal enterprise.., based upon a perpetrator undertaking to participate in criminal conduct with a plurality of actors."[121] Additionally, she posits that the common

[115] *The Prosecutor v Gagovic,* ICTY Indictment, 1998, para 4.8.
[116] *The Prosecutor v Kunarac et al*., Trial Chamber, ICTY, 31 October 2001, para 576.
[117] Kuo P, 'Prosecuting crimes of sexual violence in an international tribunal', 310.
[118] Kuo P, 'Prosecuting crimes of sexual violence in an international tribunal', 310.
[119] Sellers P, 'Individual('s) liability for collective sexual violence', in Knop K (eds), *Gender and Human Rights,* Oxford University Press, 2004, 153.
[120] Sellers P, 'Individual('s) liability for collective sexual violence', 153.
[121] Sellers P, 'Individual('s) liability for collective sexual violence', 176-177.

purpose doctrine might possibly amount to "an engine of liability for sexual violence" in cases against high-ranking officials.[122]

In *Prosecutor v Krsztic*, the ICTY Trial Chamber held General Krsztic liable for "incidental" rapes and other crimes that stemmed from a joint criminal enterprise to execute forced transfers.[123] Viseur Sellers highlighted that the Trial Chamber elected to disregard General Krzstic's specific knowledge, or lack thereof, of sexual violence and instead rationalised that "because of his acquiescence to the collective plan to cleanse the area he knowingly assumed the risk that other crimes, such as sex-based crimes, would occur."[124]

She determined:

> "that wartime sexual assault crimes are ostensibly characterised as the natural and foreseeable consequences of other violations is landmark jurisprudence. It reverses the inevitable conventional belief that wartime sexual abuse is either the unrelated, variant conduct of individual soldiers, or the consequence of soldiers obeying superior orders."[125]

Therefore, while a step in the right direction, it seems that the ICTY could perhaps stand to further add to the jurisprudence of sexual crimes in ICL, which it serves to bolster and enrich.

2.1.3 International Criminal Tribunal for Rwanda

The ICTR was created as an *ad hoc* tribunal to address the grave breaches of IHL during the 1994 Rwandan Genocide.[126] The ICTR also played a crucial role in enriching the

[122] Sellers P, 'Individual('s) liability for collective sexual violence', 156.
[123] *The Prosecutor v Krstic*, Trial Chamber, ICTY, 2 August 2001, para. 2.
[124] Sellers P, 'Individual('s) liability for collective sexual violence', 184.
[125] Sellers P, 'Individual('s) liability for collective sexual violence', 182-185.
[126] Article 1, *Statute of the International Tribunal for Rwanda,* United Nations Security Council Resolution 955, Annex, 8 November 1994.

jurisprudence on sexual crimes in ICL.[127] The Rwandan Genocide was deeply ethnically charged, perpetrated by the Hutu majority against the Tutsi minority.[128] Gender-based war crimes which occurred comprised of forced pregnancy, forced abortion, forced childbirth and of course, rape.[129]

The ground-breaking case of *Prosecutor v Akayesu*, reveals both the advances and the challenges facing international prosecution of gender-based war crimes.[130] Here, the ICTR recognized rape and sexual violence as international crimes for the first time.[131] Richard Goldstone notes that the Trial Chamber in *Akayesu* made radical strides toward filling the gap in international law with regard to the fact that at the time, there existed no explicit definition for rape under international law.[132] Goldstone specifically refers to the ICTR's definition of rape as a "physical invasion of a sexual nature committed on a person under circumstances which are coercive."[133] Rape was also taken to amount to genocide whereby the intent was to destroy a specific ethnic group; therefore, the Tribunal underscored the ethnic targeting behind the sexual violence.[134] This decision was further upheld in *Prosecutor v Gacumbitsi.*[135]

[127] Bianchi L, 'The prosecution of rape and sexual violence: Lessons from prosecutions at the ICTR', in Brouwer A, Ku C, Romkens R and Herrik L (eds) *Sexual violence as an international crime: Interdisciplinary approaches*, 1ed, Intersentia Publishing Ltd, Cambridge, 2013, 123.
[128] Kamatali J, 'Freedom of expression and its limitations: The case of the Rwandan genocide', 38 *Stanford Journal of International Law* 57, 2002, 68.
[129] Higgins A, 'Else we are condemned to go from darkness to darkness: Victims of gender-based war crimes and the need for civil redress in US Courts', 70 *UMKC Law Review* 677, 2001, 698.
[130] Askin K, 'Developments in international criminal law: Sexual violence in decisions and indictments in the Yugoslav and Rwandan tribunals: Current status', 93 *American Journal of International Law* 97, 1999, 108.
[131] *The Prosecutor v Jean-Paul Akayesu*.
[132] Goldstone R, 'Prosecuting rape as a war crime', 283.
[133] Goldstone R, 'Prosecuting rape as a war crime', 283.
[134] Copelon R, 'Gender crimes as war crimes: integrating crimes against women into international criminal law', 46 *McGill Law Journal* 217, 2000, para. 22-23.
[135] *The Prosecutor v Gacumbitsi*, Trial Chamber II, 17 June 2004, para. 291-293.

The ICTR also correctly defined rape as a form of aggression, therefore cementing the notion that sex can be used to destroy a people.[136] The Tribunal has therefore demonstrated that when international criminal prosecutions for gender-based war crimes occur, even when they constitute parts of wider prosecutions of war crimes, significant convictions can still be achieved.[137] There is also widespread consensus that these prosecutions were fair and effective,[138] and that victims who were able to testify may have gained a sense of vindication.[139]

However, there has been widespread feminist criticism of both the ICTY and ICTRs approach to sexual offences, which has been argued to be constructing an order of offences that lowered the status of sexual offences, belittling the global perceptions of survivors' anguish and offenders' guilt.[140] Both tribunals treated the issues of VAW akin to determinations on the ethnic dimensions of the conflicts,[141] or dependent on the idea of torture,[142] thereby eradicating the inherently harmful nature of gender-based violence.[143]

Lastly, it is important to note that while the ICTY and ICTR made significant contributions to the criminalisation of gender-based crimes in ICL, their mandate was restricted to only

[136] *The Prosecutor v Jeal-Paul Akayesu*, para 688.
[137] Akhavan P, 'Beyond impunity: Can international criminal justice prevent future atrocities?', 95 *American Journal of International Law* 7, 2001, 9.
[138] Goldstone R, 'The institute for global legal studies inaugural colloquium: The UN and the protection of human rights: The role of the United Nations in the prosecution of international war criminals', 5 *Washington University Journal of Law and Policy* 119, 2001, 124-125.
[139] Wald P, 'The institute for global legal studies inaugural colloquium: The UN and the protection of human rights: The international criminal tribunal for the Former Yugoslavia comes of age: Some observations on day-to-day dilemmas of an international court, 5 *Washington University Journal of Law and Policy* 119, 2001, 109.
[140] D'Aoust M, 'Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case', 214.
[141] Buss D, 'The curious visibility of wartime rape: Gender and ethnicity in international criminal law', 4-5.
[142] Copelon R, 'Gender crimes as war crimes: integrating crimes against women into international criminal law', para. 32.
[143] D'Aoust M, 'Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case', 214.

examine rape and to view rape as a crime of sexual violence- rather than the broader category of gender.[144] This restriction thereby limited any progress that could be made in addressing other forms of sexual and gender-based violence, as the recognition of the element of gender in the perpetration of these crimes is crucial in order to do this.

2.2 HISTORY OF SGBV AT THE ICC

The Rome Statute established the ICC in 1998 and entered into forced on 1 July 2002.[145] The ICC is the first permanent criminal court tasked with the criminal prosecution of war crimes which occur during armed conflicts.[146] The Rome Statute is often lauded for its progressive legislative framework which makes reference to gender-based violence.[147] This has been demonstrated through critical historical developments and their reflection in the ICC's legal framework.[148] In particular, the ICC can prosecute gender-based crimes which are now codified within the Rome Statute, as well as the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[149] Under the Rome Statue, gender-based crimes include, but are not limited to, rape, forced prostitution, forced sterilisation, forced pregnancy/childbirth, and sexual slavery.[150]

The inclusion of a gender mandate within the ICC structures and procedures further illustrates the Rome Statues progressive legislative framework, such as the duty of the Office of the Prosecutor(OTP) to investigate gender-based crimes, as well as the implementation of gender-sensitive rules of evidence and procedure to enable victims to testify and be heard

[144] Mouthaan S, 'The prosecution of gender-based crimes at the ICC: Challenges and opportunities', 785.
[145] *Rome Statute* (1998).
[146] International Criminal Court, About the Court, -<http://www.icc-cpi.int/about.html> on 7 October 2020.
[147] Mouthaan S, 'The prosecution of gender-based crimes at the ICC: Challenges and opportunities', 785.
[148] Luping D, 'Investigation and prosecution of sexual and gender-based crimes before the International Criminal Court', 17 *American University Journal of Gender, Social Policy & the Law* 2, 2009, 433.
[149] Article 5(1), *Rome Statute* (1998).
[150] *Rome Statute* (1998).

in a safe environment.[151] As noted by the first prosecutor of the ICC Louis Moreno-Ocampo, gender crimes "must be presented in the larger context of an armed conflict, as a widespread or systematic attack against a civilian population or genocide." Furthermore, the mandate of the OTP in relation to gender-based crimes is to capture the gendered reality present in all armed conflicts and within the different cases before the ICC and present them in connection with the contextual elements of crimes as defined by the Rome Statute.[152] The ICC's first policy paper on sexual and gender-based crimes issued by the OTP in 2014 was also a significant step in tackling how gendered conduct within "genocide, mass atrocity, and war" is prosecuted.[153] However, it fell short on a critical issue: recognising reproductive violence, and the specific gendered harms faced by women in conflict.

Therefore, despite rising acknowledgement of the pervasiveness of sexual violence in the situations under the jurisdiction of the court, as well as the inclusion of a gender mandate within ICC structures, it has taken the ICC 18 years to issue a single, final conviction for the crime of sexual violence.[154] Louise Chappell aptly exemplifies this by stating that "the predominant path of the ICC's early years has been toward gender misrecognition and ongoing gender status subordination."[155]

[151] Mouthaan S, 'The prosecution of gender-based crimes at the ICC: Challenges and opportunities', 785.
[152] Moreno-Ocampo L, 'The place of sexual violence in the strategy of the ICC prosecutor', in Brouwer A, Ku C, Romkens R and Herrik L (eds) *Sexual violence as an international crime: Interdisciplinary approaches*, 1ed, Intersentia Publishing Ltd, Cambridge, 2013, 153.
[153] Ooosterveld V, 'The ICC policy paper on sexual and gender-based crimes: A crucial step for international criminal law', 24 *William and Mary Journal of Race, Gender and Social Justice* 3, 2018, 433.
[154] SaCouto S and Sellers P, 'The bemba appeals chamber judgment: Impunity for sexual and gender-based crimes', 27 *William & Mary Bill of Rights Journal* 3, 2019, 599.
[155] Chappell L, *The politics of gender justice at the international criminal court: Legacies and legitimacy*, 103.

2.2.1 Thomas Lubanga Dyilo Decision

The case of *Prosecutor v Thomas Lubanga Dyilo* concerned Thomas Lubanga Dyilo (Lubanga) of the Democratic Republic of Congo (DRC) who was charged with the crimes of conscription, enlistment, and use of child soldiers.[156] The case was initially deemed to be fairly uncomplicated and was thought to be able to be handled expeditiously. However, it took almost six years for Trial Chamber I to ultimately find him guilty as charged. This was the first conviction by the ICC, after over 10 years of operation.[157]

One of the most contentious concerns throughout this case was the lack of sexual violence charges in the document containing the charges, despite the surmounting evidence of sexual violence that had transpired in DRC during the conflict. This reverberated throughout the trial and into the reparations phase.[158] In the *Lubanga* sentencing decision on 10 July 2012, the Chamber heavily criticised the Prosecutors treatment of sexual violence.[159] The Chamber stated that it "strongly deprecates the attitude of (former) Prosecutor Ocampo in relation to the issue of sexual violence", highlighting how he had failed to include any sexual violence charges in the charges document or in any stage of the proceedings against Lubanga, while still attempting to suggest "that sexual violence ought to be considered for the purposes of sentencing."[160] Gender justice advocates monitoring *Lubanga* were also disheartened that the Chamber did not seize the opportunity to apply the evidence on sexual violence that arose at the trial to further jurisprudence on the issue.[161]

[156] *The Prosecutor v Thomas Lubanga Dyilo,* Trial Chamber I, ICC, 5 April 2012.
[157] Chappell L, 'Conflicting institutions and the search for gender justice at the international criminal court', 67 *Political Research Quarterly* 1, 2014, 183.
[158] Chappell L, *The politics of gender justice at the international criminal court: Legacies and legitimacy*, 145.
[159] Chappell L, *The politics of gender justice at the international criminal court: Legacies and legitimacy,* 143.
[160] *The Prosecutor v Thomas Lubanga Dyilo*, para. 60.
[161] Chappell L, *The politics of gender justice at the international criminal court: Legacies and legitimacy,* 143.

Admittedly, the dissenting judgment of Judge Odio Benito slightly remedied these concerns, as she argued that the Prosecutor was correct in viewing sexual violence as "embedded in the crimes of which Mr. Lubanga is accused"[162] and that it is as "an intrinsic element of the criminal conduct of 'use to participate actively in the hostilities'."[163] In her interpretation of Article 21(3) of the Rome Statute,[164] which states that no adverse distinction be based on gender, she further argued that:

> "it is discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys. The use of young girls' and boys' bodies by combatants within or outside the group is a war crime and as such encoded in the charges against the accused."[165]

Nevertheless, Judge Odio Benito did reprimand the Prosecutor, arguing that "crimes of sexual violence could have been evaluated separately had the Prosecution included them in the charges."[166] In her sentencing decision, she strongly disagreed with the Majority Chambers decision which, in her opinion "disregards the damage caused to the victims and their families, particularly with as a result of the harsh punishments and sexual violence experienced by the victims."[167] She was of the view that despite the fact that Lubanga might not have intentionally discriminated against women, his crimes nevertheless caused this effect and therefore should have been considered in his sentencing.[168] In doing so, Judge Odio Benito exhibited a deep concern to make visible crimes suffered by females which

[162] *Prosecutor v Thomas Lubanga Dyilo*, para. 21.
[163] *Prosecutor v Thomas Lubanga Dyilo*, para. 20.
[164] Article 21(3), *Rome Statute* (1998).
[165] *Prosecutor v Thomas Lubanga Dyilo*, para. 21.
[166] *Prosecutor v Thomas Lubanga Dyilo*, para. 20.
[167] *Prosecutor v Thomas Lubanga Dyilo*, Dissenting Judgment of Judge Odio Benito, ICC, para. 2.
[168] *Prosecutor v Thomas Lubanga Dyilo*, Dissenting Judgment of Judge Odio Benito, ICC, para. 21.

otherwise go on unacknowledged, thereby undertaking the role envisioned by the Drafters of the Rome Statute to "surface" the gender dimensions of crimes that were otherwise ignored.[169]

2.2.2 Jean-Pierre Bemba Decision

In March 2016, the ICC Trial Chamber held Jean-Pierre Bemba, ex-president of the Democratic Republic of Congo, guilty for his involvement in operations in the Central African Republic from 2002 to 2004.[170] He was found guilty of war crimes and crimes against humanity when acting in his capacity as military commander.[171] This was the first decision by the ICC to address sexual violence as a weapon of war within the context of command responsibility.[172]

By holding Bemba liable as a military commander under the Rome state, the ICC addressed women's historical invisibility in ICL by acknowledging the systematic use of rape in war.[173] While command responsibility is an indirect way to address women's visibility as victims of conflict, it has also been effective at imposing responsibility for wartime violence as an international issue, as the systematic nature of sexual violence was a critical element to Bemba's eventual conviction.[174]

However, it has been argued that this was a wasted opportunity by the ICC to finally expound on the meaning of the phrase "sexual violence"[175] that is used in the Rome Statute, despite

[169] Chappell L, *The politics of gender justice at the international criminal court: Legacies and legitimacy,* 113.
[170] *The Prosecutor* v. *Jean-Pierre Bemba Gombo*, Trial Chamber II, ICC, 21 March 2016.
[171] *The Prosecutor* v. *Jean-Pierre Bemba Gombo*, para. 752.
[172] D'Aoust M, 'Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case', 209.
[173] D'Aoust M, 'Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case', 214.
[174] D'Aoust M, 'Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case', 214.
[175] Article 7(g) and Article 8(b)(xxii), *Rome Statute* (1998).

the acknowledgment that reforming international law on sexual violence does not form part of the ICC's mandate.[176]

Regrettably, upon appeal in 2018, the Appeals Chamber reversed the Trial Chambers decision, thereby acquitting Bemba of all sexual violence charges.[177] This was primarily based on an incredibly narrow analysis of the concept of command responsibility established under the Rome Statute,[178] which if followed by the court in subsequent decisions, will significantly reduce the prospects for addressing sexual and gender-based crimes at the ICC.[179]

2.2.3 Dominic Ongwen and Bosco Ntaganda Decisions

Despite reproductive violence historically being excluded from ICL and the jurisprudence of the ICC, the *Dominic Ongwen*[180] case was a major contribution in illuminating particular gender-based harms that have long been invisible in ICL, specifically regarding the recognition of forced pregnancy as a crime on its own.[181] Furthermore, the *Ongwen* case was the first to explicitly recognise the individual reproductive autonomy of women and girls.[182] This can be seen as a substantial step in addressing certain(not all) manifestations of reproductive violence.

The *Ntaganda*[183] case can also be lauded as a major step in addressing gender-based harms, as the ICC convicted the defendant Bosco Ntaganda of rape and sexual slavery, both as war

[176] D'Aoust M, 'Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case', 215.
[177] *The Prosecutor* v. *Jean-Pierre Bemba Gombo,* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", Appeals Chamber, ICC, 2018.
[178] Article 28(a), *Rome Statute* (1998).
[179] SaCouto S and Sellers P, 'The bemba appeals chamber judgment: Impunity for sexual and gender-based crimes', 601.
[180] *The Prosecutor v Dominic Ongwen,* Pre-Trial Chamber II, ICC, 23 March 2016.
[181] De Vos D, 'Prosecuting sexual and gender-based violence at the international criminal court', 400.
[182] Grey R, 'The ICC's first 'forced pregnancy' case in historical perspective', 909.
[183] *The Prosecutor v Bosco Ntaganda,* Trial Chamber VI, ICC, 8 July 2019.

crimes and crimes against humanity. This represented the first international conviction of sexual slavery.

In conclusion, while the ICC's legal framework appears to represent significant strides in recognising sexual and gender-based crimes, there is still a long road ahead in actually convicting those accused of perpetrating such acts. With only two cases (Ongwen and Ntaganda) that represent substantial recognition of reproductive violence, there is a significant amount more than can be done to bring perpetrators to justice.

2.3 CONCLUSION

This Chapter has traced the evolution of sexual and gender-based violence within the realm of ICL, as well as specifically at the ICC. In doing so it has demonstrated that throughout all the proceedings that have taken place at both the *ad-hoc* tribunals, as well as the ICC, although there have been significant strides taken to address SGBV within situations of armed conflict, the element of gender in particular has not been substantially addressed. Therefore, it appears to be imperative for new manifestations of SGBV and reproductive violence such as forced contraception to be addressed within the Rome Statute, in order to bring the perpetrators of such heinous acts to justice.

CHAPTER THREE

THE YAZIDI AND THE EMERGENCE OF FORCED CONTRACEPTION IN ICL

3.0 INTRODUCTION

This Chapter shall first establish the relevant historical background of the Yazidi People in Iraq in order to contextualise the current Da'esh-Yazidi situation. It shall then further elucidate on the details of what exactly forced contraception is, it's legal contours as well as how this is an experience that is specifically unique to women. Lastly, it shall examine the evident jurisdictional impasse posed to the prosecution of forced contraception, as well as the relevant ICC Elements of Crimes, in an effort to determine whether forced contraception can be prosecuted currently under the Rome Statute as either genocide, a war crime or a crime against humanity. This analysis is imperative in understanding whether forced contraception can be sufficiently addressed within the current ICL framework, or whether further measures are needed to aptly address this specific gendered harm.

3.1 HISTORY OF THE YAZIDI PEOPLE IN IRAQ

3.1.1 The Yazidi and Religious Persecution

The Yazidis are an Iraqi monotheistic and endogamous minority, who primarily live in Northern Iraq, North-Eastern Syria, South-Eastern Turkey and the Caucasus.[184]The Yazidi community have been historically persecuted, marginalised and subjugated to discrimination and violence.[185] Organised violence against the Yazidi community can be traced back as far as the Ottoman Empire, when Yazidis were targeted by religious violence

[184] De Vido S, 'Protecting Yazidi cultural heritage through women: An international feminist law analysis', *Journal of Cultural Heritage*, 2017, 2.

[185] Zoonen D and Wirya K, 'Yazidism and its community in Iraq: The Yazidis: Perceptions of reconciliation and conflict', *Middle East Research Institute*, 2017, 9.

and forced conversion campaigns.[186] The general Yazidi identity and community narrative is now inherently comprised of their status as victims of persecution and genocide.[187]

A common misconception that has largely contributed to the Yazidis further marginalisation in Iraq is that many people believe Yazidis worship the Devil.[188] This emanates from a misunderstanding of Yezidism due to the similarity between the Yazidi's archangel and the narrative of Satan in Islam. In Islam, Muslims believe that the angel Iblees declined to bow down to the Prophet Adam out of sinful arrogance, and was consequently removed from Gods graces, and became Satan.[189] They believe that Satan now continues his attempts to corrupt mankind so that they may disobey God.[190] However, in Yazidism, Yazidis believe that while the angel (whom they refer to as Melek Taus) refused to bow down to Adam and was consequently banished from Heaven, he cried for 7,000 years until his remorseful tears extinguished the fires of Hell. Yazidis therefore believe that Melek Taus was redeemed in Gods eyes and is now an intermediary between mankind and God.[191]

The misinformed perception that Yazidis worship the devil, as well as the community's incapacity to confront those views through written sources, has historically led to Yazidis not being considered as "People of the Book".[192] Consequently, Da'esh exploited these views to initiate and rationalise its genocidal operation intended to eliminate the Iraqi Yazidi community.[193]

---

[186] Hastings J, *Encyclopaedia of Religion and Ethics Part 18*, Kessinger Publishing, 2003, 769.
[187] Zoonen D and Wirya K, 'Yazidism and its community in Iraq', 9.
[188] Zoonen D and Wirya K, 'Yazidism and its community in Iraq', 9.
[189] Verse 34, Surah Al Baqarah, *The Holy Qur'an.*
[190] Verse 36, Surah Al Baqarah, *The Holy Qur'an.*
[191] Asatrian G and Arakelova V, *The religion of the peacock angel: The Yezidis and their spiritual world*, Routledge, 2014, 10.
[192] Asatrian G and Arakelova V, *The religion of the peacock angel*, 10.
[193] Zoonen D and Wirya K, 'Yazidism and its community in Iraq', 9.

3.2 FORCED CONTRACEPTION

"Da'esh didn't come to kill the women and girls, but to use us as spoils of war, as objects to be sold with little or to be gifted for free. Their cruelty was not merely opportunistic. They had one intention, to destroy the Yazidi identity by force."[194]

On 3 August 2014, Da'esh attacked the Yazidi community of Sinjar, in north-western Iraq.[195] Only a few day later, reports surfaced of slain men and boys; of women and girls, some as young as nine, being "kidnapped, sold, sexually enslaved, beaten" and subjected to forced labour; and of boys ripped from their families and "driven into Da'esh training camps."[196] The United Nations estimates that 7,000 Yazidi women have been kidnapped and forced into sexual slavery by Da'esh, while over 3,200 women are believed to remain in captivity.[197] However, out of over 700 Yazidi rape survivors who have escaped and sought treatment, physicians found that a mere five percent became pregnant during their enslavement, compared to expected figures of between 20-25 percent based on ordinary fertility rates for young women.[198]

The women reported that Da'esh fighters forced them to use oral and injectable contraception, as well as undergo forced abortions to comply with a highly contentious reference to a ruling in Da'esh's law that sex with enslaved women is allowed and even encouraged, provided that men ensure that the woman is not pregnant prior to engaging in

[194] Taha Murad N, trafficking survivor in her address to the UN Security Council, 18 December 2015, http://www.webtv.un.org/watch/nadia-murad-basee-taha-unodc-goodwill-ambassador-on-trafficking-in-persons-in-conflict-situations-security-council-7847th-meeting/5255419222001 on 15 November 2020.

[195] "They came to destroy: ISIS crimes against the Yazidis", Human Rights Council, A/HRC/32/CRP.2, 15 June 2016 Report, para. 163. See also Murad N and Krajeski J, *The last girl: My story of captivity and my fight against the Islamic state*, Penguin Books, London, 2017.

[196] Cetorelli V and Ashraph S, 'A demographic documentary of ISIS's attack on the Yazidi village of Kocho', LSE Middle East Centre Reports, June 2019.

[197] "They came to destroy: ISIS crimes against the Yazidis", Human Rights Council, A/HRC/32/CRP.2, 15 June 2016 Report.

[198] Al-Dayel N and Mumford A, 'ISIS and their use of slavery', *International Centre for Counter-Terrorism-The Hague*, 17 January 2020.

intercourse.[199] This also ensures that the women can be resold, traded, or given to other Da'esh soldiers. While rape and sexual slavery are frequent methods of warfare, the use of forced contraception in order to prevent pregnancy and thereby ensure continued sexual violence is a new manifestation of sexual violence.[200] It should also be noted that the violence against Yazidi women is intersectional in nature,[201] as it is established on numerous interconnected grounds of discrimination: gender, religion and ethnicity.[202]

One of the multiple victims of the Da'esh sexual slavery, who suffered immensely and was continuously raped, stated that "Every day, I had to swallow one in front of him. He gave me one box per month. When I ran out, he replaced it. When I was sold from one man to another, the box of pills came with me."[203] Da'esh have made sexual slavery a fundamental component to their operations, by targeting captured Yazidi women and girls. As Rukmini Callimachi notes, "to keep the sex trade running, the fighters have aggressively pushed birth control on their victims so they can continue the abuse unabated while the women are passed among them."[204]

[199] Callimachi R, 'To maintain supply of sex slaves, ISIS pushes birth control', New York Times, 12 March 2016, at -< https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html> on 10 October 2020.
[200] Edwards C, 'Forced contraception as a means of torture', 139.
[201] De Vido S, 'Protecting Yazidi cultural heritage through women: An international feminist law analysis', 1.
[202] An ethnic group is defined as "a group whose members shared a common language or culture", *The Prosecutor v Jean-Paul Akayesu,* para. 513.
[203] Callimachi R, 'To maintain supply of sex slaves, ISIS pushes birth control', New York Times, 12 March 2016, at -< https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html> on 10 October 2020.
[204] Callimachi R, 'To maintain supply of sex slaves, ISIS pushes birth control', New York Times, 12 March 2016, at -< https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html> on 10 October 2020.

3.2.1 Uniqueness of Forced Contraception

Evidently, forced contraception has been used as a method to enable the acts of rape by Da'esh against Yazidi women and girls.[205] From the standpoint of international law, this confronts prevailing perceptions of the methods used to specifically target women and girls as well as how their reproductive capabilities are overtly exploited as tools of conflict.[206] As previously noted, forced contraception has hardly been defined or even mentioned within the sphere of ICL, perhaps owing to its novelty and recent emergence, therefore it remains largely unaddressed to date. Currently reproductive violence is not criminalised under the Rome Statute, outside of forced pregnancy and enforced sterilisation as either crime against humanity or a war crime.[207] This has been interpreted to mean the "deprivation of a person's biological reproductive capacity without their genuine consent."[208] At first glance, this may encompass the act of forcing contraception on Yazidi women and girls. However, a footnote in the Rome Statute's Elements of the Crimes stipulates that enforced sterilisation "is not intended to include birth-control measures which have a non-permanent effect in practice", [209] consequently preventing charging forced contraception under enforced sterilisation.

Forced contraception might possibly be regarded as part of contextual considerations for the crime of rape as a crime against humanity or a war crime. However, this could conceivably restrict the indicative nature of the charges, and perhaps deleteriously influence any prospects of expressly mending that harm throughout the reparations process. Not having a

[205] "They came to destroy: ISIS crimes against the Yazidis", Human Rights Council, A/HRC/32/CRP.2, 15 June 2016 Report, para. 69 and 146.
[206] Duggan C *et al*, 'Reparations for sexual and reproductive violence: prospects for achieving gender justice in Guatemala and Peru', 194.
[207] *Rome Statute* (1998).
[208] Grey R, 'The ICC's First 'Forced Pregnancy', 906.
[209] Footnote 19, Article 7 (1)(g)-5, *Elements of Crimes, Rome Statute* (1998).

specific crime of forced contraception on its own therefore appears to underscore the currently flawed ICL structures which appear to be unfit to respond to such novel emerging issues that specifically affect women.

While it should be noted that numerous Yazidi women were 'relieved' to receive birth control, owing to the stigma by both the Yazidi community and the state on children born out of rape, which would put these women in precarious positions[210], it is imperative to stress the fact that this forced birth control is implemented to ensure continued rape and sexual violence. Therefore, the Rome Statute should substantively address this.

3.3 JURISDICTIONAL IMPASSE IN THE PROSECUTION OF FORCED CONTRACEPTION

Jurisdiction appears to be one of the critical difficulties in indicting those responsible for the offences perpetrated against Yazidi women and girls in Iraq and Syria. This is because neither Iraq nor Syria are State Parties to the ICC, which means that the Court is unable to employ its jurisdiction over any crimes committed on the two countries' territories or by their nationals, unless Iraq signs and ratifies the Rome Statute thereby allowing it to do so.[211] Therefore it is unlikely that the ICC would have jurisdiction in this instance.

However, there are only two exceptions to this. The first, is that if nationals of a State Party to the Rome Statute-who are also members of Da'esh-commit these crimes, despite them doing so in Iraq and Syria, the ICC may have jurisdiction, in accordance with Article 13(a)

[210] Electronic communication with Güley Bor, Former Manager of the Yazidi Genocide Documentation Project of Yazda in Duhok, Kurdistan Region of Iraq, on 22 October 2020.
[211] Article 4(2), *Rome Statute* (1998). See also Article 13, *Rome Statute* (1998).

of the Rome Statute.[212] The second exception is if the UNSC refers the circumstances in the Iraqi and Syrian region to the ICC, in accordance with Article 13(b) of the Rome Statute.[213]

The first instance appears to be somewhat ambiguous, as it would be pragmatically difficult to ascertain the nationalities of the specific perpetrators. The second instance is yet to happen, which if it does, the following analysis on where to situate forced contraception within the ICC's Elements of Crimes and how to address this specific gendered harm shall be very pertinent. However, it is imperative to note that efforts have been made in this direction, primarily due to political urgency.[214] In September 2017, a UNSC Resolution instituted an Investigative Team (UNITAD) led by a UN Special Adviser with the mandate "to support domestic efforts to hold ISIL . . . accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group . . . in Iraq."[215] Unfortunately, despite numerous calls for trials before the ICC by those advocating for the Yazidi cause,[216] this goal has largely been abandoned to date due to legal and political constraints.[217]

[212] Article 13(a), *Rome Statute* (1998).
[213] Article 13(b), *Rome Statute* (1998).
[214] Akhavan P, Ashraph S, Brazani B and Matyas D, 'What justice for the Yazidi genocide? Voices from below', 42 *Human Rights Quarterly* 1, 2020, 4.
[215] See U.N. Secretary-General, Secretary-General Appoints Karim Asad Ahmad Khan of United Kingdom to Head Team Investigating Islamic State Actions in Iraq, SG/A/1806- BIO/5091 (31 May 2018). See also UN Security Council Resolution 2379, 21 September 2017.
[216] See 'Nadia Murad- From rape survivor in Iraq to Nobel peace prize', BBC News, 5 October 2018 at -< https://www.bbc.com/news/world-europe-45759669> on 4 December 2020. See also Guest R, 'Nadia Murad's fight to bring Islamic State to justice', The Economist, 19 January 2017 at -< https://www.economist.com/1843/2017/01/19/nadia-murads-fight-to-bring-islamic-state-to-justice> on 4 December 2020.
[217] Akhavan P *et al*, 'What justice for the Yazidi genocide? Voices from below', 5.

3.4 ELEMENTS OF CRIMES OF THE ROME STATUTE

The Rome Statute in Articles 6,7 and 8 establishes the list of crimes which the ICC shall have jurisdiction over; "genocide, crimes against humanity and war crimes."[218] In order to further clarify and provide more certainty on the contents of each of these crimes, the UN General Assembly established a Preparatory Commission with the mandate of preparing a document on the elements of crimes.[219] Consequently, Article 9 of the Rome Statute states that the "Elements of Crimes shall assist the Court in the interpretation and application of Articles 6, 7, and 8. They shall be adopted by . . . the members of the Assembly of States Parties."[220] Furthermore, Article 21 of the Rome Statute provides that "the Court shall apply . . . the Elements of Crimes."[221] On the basis of these rules, the ICC elements of crime are critical to the court's interpretation of the Rome Statutes provisions on crimes.[222]

As noted earlier, the Rome Statute does not expressly criminalise reproductive violence, outside of criminalising "sexual slavery, forced pregnancy, enforced prostitution, enforced sterilisation, gender-based persecution and other forms of sexual violence as crimes against humanity, war crimes and in certain instances, acts of genocide."[223] The lack of attention specifically toward reproductive violence and its gendered elements reinforces Louise Chappell's' trailblazing position, that ICL has been gendered owing to the "gender capture" of men as "rule makers", as well as via "gender bias" which greatly impacted legal proceedings within courts, and the law itself.[224] Despite this, this Chapter shall attempt to

[218] Articles 6,7 and 8, *Rome Statute* (1998).
[219] Dormun K, Kolb R and Doswald-Beck L, *Elements of war crimes under the Rome statute of the international criminal court: Sources and commentary*, Cambridge University Press, Cambridge, 2003, 2.
[220] Article 9, *Rome Statute* (1998).
[221] Article 21, *Rome Statute* (1998).
[222] Dormun K *et al, Elements of war crimes under the Rome statute of the international criminal court,* 2.
[223] *Rome Statute* (1998).
[224] Chappell L, 'Conflicting institutions and the search for gender justice at the international criminal court', 67 *Political Research Quarterly* 2, 2014, 185-192.

situate forced contraception within the ICC Elements of Crimes in order to evaluate how it can be prosecuted at the ICC.

3.4.1 Forced Contraception as Genocide

Article 6(d) of the ICC Elements of Crimes states that "imposing measures intended to prevent births can constitute the crime of genocide."[225] It is evident that forced contraception is an example of a method of imposing measures to prevent births. Within the Da'esh-Yazidi context, forced contraception is the principal method utilised by Da'esh to ensure that the Yazidi women taken as sexual slaves, remain that way and can therefore continue to be sexually abused.[226] However, the evidentiary threshold for the crime of genocide is incredibly high, as there must be sufficient evidence submitted to the court illustrating how these acts were perpetrated with explicit "genocidal intent"- with "intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such."[227] Therefore, given this high evidentiary threshold, actual convictions on this basis would appear to be largely unsuccessful.

3.4.2 Forced Contraception as a War Crime

3.4.2.1 "Any other form of sexual violence"

Article 8(b)(xxii) of the Rome Statute makes provision for "any other form of sexual violence" other than enforced pregnancy, forced sterilisation and other crimes listed in Article 7(2)(f) to be considered a "grave breach of the Geneva Conventions" and therefore, a war crime.[228] "Other forms of sexual violence" under the ICC Elements of Crimes occurs when:

---

[225] Article 6(d), *Elements of Crimes, Rome Statute* (1998).
[226] Callimachi R, 'To maintain supply of sex slaves, ISIS pushes birth control', New York Times, 12 March 2016, at -< https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html> on 11 November 2020.
[227] Article 6(d)(3), *Elements of Crimes, Rome Statute* (1998).
[228] Article 8(b)(xxii), *Rome Statute* (1998).

> "The perpetrator committed acts of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent."[229]

From this definition, it is evident that categorising forced contraception as an "other form of sexual violence" under the Rome Statute is contingent on the ascertainment of whether certain conduct is of a sexual nature. In the Yazidi context, women and girls taken by Da'esh as sex slaves were forced to take birth control pills in order for them to continue being raped by Da'esh. As Callimachi notes, "the injunction against raping a pregnant slave is functionally the only protection for the captured women."[230] Therefore, Da'esh's deliberate suspension of Yazidi women's reproductive capabilities through the use of forced contraception were a crucial element that constitutes the conditions that enable rape to occur. In this sense, if the motivation behind the precise conduct of forced contraception is conceived as the "sexual nature" component of the description provided in the ICC Elements of Crimes, it might be possible to charge forced contraception as "other forms of sexual violence."

Yet, in *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, where the acts in this instance were charged by the Prosecution as "other forms of sexual violence", Pre-Trial Chamber II of the ICC ruled that penile amputation-which essentially deprives men of their biological reproductive capacities- failed to meet the

[229] Article 7(1)(g)-6, *Elements of Crimes, Rome Statute* (1998).
[230] Callimachi R, 'To maintain supply of sex slaves, ISIS pushes birth control', New York Times, 12 March 2016, at -< https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html> on 11 November 2020.

threshold components of "acts of a sexual nature."[231] The Chamber explicitly declared that "not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence."[232] Despite the heavy criticism this particular decision has received,[233] it definitely highlights the fact that there is still a lack of clarity in understanding what exactly "of a sexual nature" denotes in the Rome Statute.

3.4.2.2 Torture

While prosecuting forced contraception as a crime under ICL is still relatively unexplored, Christie Edwards-one of the only scholars who has written on forced contraception- has considered whether forced contraception can be prosecuted as a war crime, specifically under torture.[234] For torture to qualify as a war crime, four elements specific to IHL regarding non-international armed conflicts (NIAC's) must be met, in addition to the requirements codified in the Convention Against Torture. These are: "the status of victim as either civilian, *hors de combat,* medical personnel or religious personnel taking no part in the hostilities; the perpetrators knowledge of the victim's status; the act happening during or being associated with a NIAC; and the perpetrators knowledge of the factual circumstances establishing the existence of the armed conflict."[235]

---

[231] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, ICC, 23 January 2012, para. 265-266.

[232] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, para. 265.

[233] Inder B, Executive Director, Women's Initiatives for Gender Justice in 'Kenya: Plea to ICC over forced male circumcision', IRIN News, 25 April 2011 at -< https://www.thenewhumanitarian.org/report/92564/kenya-plea-icc-over-forced-male-circumcision>- on 1 December 2020. See also Corey-Boulet R, 'In Kenya, Forced Male Circumcision and a Struggle for Justice', The Atlantic, 1 August 2011 at -https://www.theatlantic.com/international/archive/2011/08/in-kenya-forced-male-circumcision-and-a-struggle-for-justice/242757/>- on 15 December 2020.

[234] Edwards C, 'Forced contraception as a means of torture', 154.

[235] Article 8 (2)(c)(i)-3, *Elements of Crimes, Rome Statute* (1998).

Furthermore, the ICC Elements of Crimes describes the war crime of "inhumane treatment" as the infliction of "severe pain or mental suffering."[236] It also defines the war crime of "outrages upon personal dignity" as "acts which humiliate, degrade or otherwise violate the dignity of a person to such a degree as to be generally be recognized as an outrage on personal dignity."[237]

Of further importance to this is that the Elements of Crimes take cognizance of the fact that the victims cultural background must be considered, when assessing treatment that may be humiliating to a person of a particular nationality or religion.[238] Edwards notes that there is no doubt concerning Da'esh's awareness of the status of Yazidis' as civilians who take no part in hostilities, as well as the fact that the acts in question occurred within the context of a NIAC. Da'esh are also well aware that they are actively taking part in the conflict,[239] therefore Edwards concludes that the use of forced contraceptives on Yazidi women and girls may be charged as a war crime under one or more of the thresholds of torture, inhumane treatment and an outrage on personal dignity.[240]

3.4.3 Forced Contraception as a Crime Against Humanity

3.4.3.1 Torture and Other Inhumane Acts

The ICC Elements of Crimes defines crimes against humanity of torture as:

> "The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. Such person or persons were in the custody or under the control of the perpetrator. Such pain or suffering did not arise only from, and was not inherent in

[236] Article 8(2)(a)(ii)-2, *Elements of Crimes, Rome Statute* (1998).
[237] Article 8(2)(b)(xxi) and (c)(ii), *Elements of Crimes, Rome Statute* (1998).
[238] Footnote 57, Article 8(2)c) (ii), *Elements of Crimes, Rome Statute* (1998).
[239] 'Escape from hell: Torture and sexual slavery in Islamic state captivity in Iraq', Amnesty International Report, 2014, 7 at -< https://www.amnesty.org/download/Documents/MDE140212014ENGLISH.pdf>- on 1 December 2020.
[240] Edwards C, 'Forced contraception as a means of torture', 155.

> or incidental to, lawful sanctions. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

The perpetrator of the crime against humanity must cause "severe physical or mental pain or suffering" to an individual under their control or may alternatively be charged with the crime against humanity of other inhumane acts if the "perpetrator inflicted great suffering, or serious injury to body or to mental or physical health…"[241] In the Yazidi context, the severity of the harm inflicted by Da'esh against Yazidi women and girls would first need to be determined. However, given that the acts of forced contraception occurred as components of a pervasive and "systematic" assault on Yazidi civilians and the Da'esh perpetrators were cognisant of this, they could possibly be charged with the crime against humanity of torture or other inhumane acts.[242]

Perhaps the charge that would most likely be successful would be under "other inhumane acts", which Dominic Ongwen was charged by the OTP regarding the acts of forced marriage- a crime which the Rome Statute also does not provide for.[243] "Other inhumane acts" may therefore appear to be a critical feature in ICL to respond to novel forms of VAW in armed conflict, which remain unaddressed.

However, until the ICC can assert its jurisdiction over the crimes Da'esh have committed, any dialogue on prosecuting conduct such as forced contraception committed against Yazidi women and girls unfortunately remains theoretical.

---

[241] Article 7(1)(k), *Elements of Crimes, Rome Statute* (1998).
[242] Edwards C, 'Forced contraception as a means of torture', 155.
[243] *The Prosecutor v Dominic Ongwen,* Pre-Trial Chamber II, ICC, 23 March 2016.

3.5 CONCLUSION

This Chapter has established the relevant historical background of the Yazidi People in Iraq in order to contextualise the current Da'esh-Yazidi situation, and has demonstrated that the Da'esh-Yazidi conflict is firmly rooted in the historical persecution and discrimination against the Yazidi minority. It has also elucidated on the details of what exactly forced contraception is, it's legal contours as well as how this is an experience that is specifically unique to women, especially with regard to the Yazidis in armed conflict. Additionally, it has highlighted the evident jurisdictional impasse posed to the prosecution of forced contraception, as well examined the relevant ICC Elements of Crimes and determined whether it is currently possible to prosecute forced contraception under the Rome Statute as genocide, a crime against humanity or a war crime. While forced contraception may appear to fit into some of the elements of crimes such as crimes against humanity of "other inhumane acts", charging it as such a crime would conceivably restrict the indicative nature of the charges, and perhaps deleteriously influence any prospects of expressly mending that harm throughout the reparations process. Not having a specific crime of forced contraception on its own therefore seems to further highlight the "gender-bias" within ICL's existing frame.

CHAPTER FOUR

CRIMINALISING FORCED CONTRACEPTION: SOME CHALLENGES

4.0 INTRODUCTION

This chapter shall investigate the need to criminalise forced contraception by first exploring the theoretical foundations of international criminalisation, in an attempt to understand the circumstances that elevate particular conduct to international crime status. It shall then propose arguments for international criminalisation of forced contraception and discuss the positive effects of criminalising forced contraception, as well as explore counterarguments to this. Lastly, it shall examine another international legal mechanism that may address forced contraception, considered from the realm of international human rights law.

4.1 INTERNATIONAL CRIMINALISATION

4.1.1 Historical Summary of International Criminalisation

International criminalisation of individual conduct is a neoteric trend that truly began developing from the 1990's onwards.[244] However, its initial development can be traced back to the post-World War II movements in ICL, to address the atrocities committed by both the Nazis and Japanese in the Nuremberg and Tokyo Tribunals.[245] This was when the "core crimes"[246] truly emanated, whereby international law imposed direct criminal liability on

[244] Cryer R, *Prosecuting international crimes: Selectivity and the international criminal law regime*, 1 ed, Cambridge University Press, 2005, 9-72. See also, Haenen I, *Force and marriage: The criminalisation of forced marriage in Dutch, English and international criminal law*, Intersentia Publishing Ltd, 2014, 138.

[245] Haenen I, *Force and marriage,* 139. As Haenen aptly notes, the initial efforts regarding international criminalisation of core international crimes can specifically be dated back to the 1919 report of the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, and also to the 1919 Treaty of Versailles after the First World War. See also Bassiouni C, 'The future of international criminal justice', 11 *Pace International Law Review* 309, 1999, 253.

[246] This phrase refers to genocide, crimes against humanity, war crimes and the crime of aggression. See Haenen I, *Force and marriage,* 139.

the perpetrators of such crimes.[247] The core crimes continued to develop considerably, especially after the inception of both the ICTR and ICTY, where both *ad-hoc* tribunals were given jurisdiction over genocide, war crimes and crimes against humanity.[248] As discussed in Chapter 2, these developments eventually led to the establishment of the ICC under the Rome Statute, which grants the Court "jurisdiction over all core crimes."[249] In sum, the general development of international criminalisation primarily consisted of sporadic responses to certain events, therefore it lacked any methodological form or categorisation.[250]

4.1.2 Theoretical Foundations of International Criminalisation

There is no general consensus on the principles that can be used to justify criminalisation. As Iris Haenen aptly notes, international crimes are partially constructed on "intuitive-moralistic[251] and legal-political considerations."[252] Given the fact that future international criminal offences will be inevitably included in the ICC's jurisdiction, it is therefore of paramount importance to examine the theoretical foundations of international criminalisation.[253] It is particularly relevant to do so when addressing novel forms of international criminal conduct such as forced contraception.

[247] Haenen I, *Force and marriage,* 139.
[248] Bassiouni C, *International criminal law, volume 1: Sources, subjects and contents*, 3 ed, Martinus Nijhoff Publishers, 2008, 131.
[249] Article 5, *Rome Statute* (1998).
[250] Bassiouni C, 'The future of international criminal justice', 253. See also Cryer R, *Prosecuting international crimes*, 119-120 and Haenen I, *Force and marriage,* 140.
[251] Tallgren I, 'The sensibility and sense of international criminal law', 13 *European Journal of International Law*, 2002, 564.
[252] Haenen I, *Force and marriage,* 140.
[253] May L, *Crimes against humanity: A normative account*, Cambridge University Press, Cambridge, 2005, 25, 64-68. See also Haenen I, *Force and marriage,* 140.

There have been multiple attempts by ICL scholars to uncover the theoretical foundations of international criminalisation. Of these attempts, there are there are three primary theories which this Chapter shall focus on, advanced by Cherif Bassiouni, Antonio Cassese and Larry May.

Bassiouni and Cassese concentrate their analysis on ICL from a "broad perspective"[254] by not only examining the core crimes, but also transnational and treaty crimes which are not encompassed under individual criminal liability under international law.[255] However, May tends to take a more focused approach on the criminalisation of crimes against humanity.[256]

4.1.2.1 Bassiouni's 'Inductive' Approach

Cherif Bassiouni has been identified as being among the earliest scholars who used an empirical method to establish a theoretical foundation for the policy of international criminalisation.[257] This occurred in 1983, when Bassiouni undertook a study of all the pertinent sources of international law. In doing so, he identified two alternative common elements from twenty international crimes.[258] These elements can be classified as either international or transnational, therefore in order for certain conduct to be categorised as an international crime, one of these elements must be present.[259]

[254] Haenen I, *Force and marriage,* 140.

[255] Bassiouni C, 'The future of international criminal justice' and Cassese A, *International criminal law*, Oxford University Press, Oxford, 2008.

[256] May L, *Crimes against humanity: A normative account.*

[257] Haenen I, *Force and marriage,* 141.

[258] Bassiouni C, 'The penal characteristics of conventional international criminal law', *Case Western Reserve Journal of International law* 15, 1983, 28. He lists these 20 crimes as international crimes in the broad sense: aggression, war crimes, unlawful use of weapons, crimes against humanity, genocide, apartheid, slavery and slave-related practices, torture, unlawful medical experimentation, piracy, hijacking, kidnapping of diplomats, taking of civilian hostages, unlawful use of the mail, drug offences, falsification and counterfeiting, theft of archaeological and national treasures, bribery of public officials, interference with submarine cables, and international traffic in obscene publications.

[259] Haenen I, *Force and marriage,* 141.

The international element applies to conduct which comprises of an offence against the global community, also known as *"delicto ius gentium."* On the other hand, the transnational element concerns conduct that has an impact on multiple states' interests.[260] Bassiouni further posited that the essential nature of international crimes is that "they affect the interests of the world community as a whole because they threaten the peace and security of mankind and because they shock the conscience of mankind."[261]

It is also important to note here that a third element of "international necessity" was also identified by Barbara Yarnold. This refers to conduct which the international community has criminalised for effective control. For example, Yarnold lists crimes such as the international crimes of "hijacking, unlawful use of mails, drug offences, falsification and counterfeiting and interference with submarine cables."[262]

In 2013, Bassiouni undertook another study of the relevant sources of international law, and this time recognised twenty-seven international crimes.[263] He then derived five criteria from the common characteristics of these crimes, which he believed applied to international criminalisation policy. He determined that each of the twenty-seven offences were internationally criminalised because the conduct either:

> "1. (…) affects a significant international interest, in particular, if it constitutes a threat to international peace and security;

[260] Bassiouni C, 'The penal characteristics of conventional international criminal law', 27-29.
[261] Bassiouni C (ed.), *International Criminal Law Volume 1: Crimes*, Transnational Publishers, Ardsley, 1999, 42.
[262] Yarnold B, 'Doctrinal basis for the international criminalization process', 8 *Temple International and Comparative Law Journal*, 1994, 99-100, 102-14, 106, 115.
[263] Bassiouni C, *Introduction to international criminal law: Second revised edition*, 2ed, Martinus Nijhoff Publishers, Leiden, 2013, 144–146.

2. (…) constitutes an egregious conduct deemed offensive to the commonly shared values of the world community, including what has historically been referred to as conduct shocking to the conscience of humanity;
3. (…) has transnational implications in that it involves or affects more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries;
4. (…) is harmful to an internationally protected person or interest; or
5. violates an internationally protected interest but it does not rise to the level required by (1) or (2), however, because of its nature, it can best be prevented and suppressed by international criminalisation."[264]

4.1.2.2 Cassese's 'Descriptive' Approach

Antonio Cassese is yet another example of a prominent scholar who examined the process of international criminalisation. He used a descriptive method to formulate a much "narrower"[265] definition of international criminalisation in comparison to Bassiouni.[266] He posited that an international crime stems from the collective existence of the following features:

"1. An international crime violates international customary rules, either unwritten or codified in treaties;

2. These rules protect values that are considered important by the whole international community, they are binding and enshrined in a gamut of international instruments;

3. There exists a universal interest in repressing these crimes, which, in principle, results in universal jurisdiction; [267]and finally

[264] Bassiouni C, *International Criminal Law, volume 1*, 133.
[265] Haenen I, *Force and marriage*, 142.
[266] Cassese A, *International criminal law*, 11-12.
[267] Cassese A, *International criminal law*, 12.

4. The perpetrators of international crimes do not enjoy functional immunity, which means that de facto or de jure state officials can be held accountable for committing international crimes."

4.1.2.3 May's 'Normative' Approach

Larry May takes another varied approach to the process of international criminalisation. He argues that international criminalisation and prosecution are justifiable when the concerned acts breach one of the victims "security interests" and in doing so, harms one of the global communities' interests. He therefore approaches the international criminalisation process from a normative perspective, particularly with regards to the legitimacy of international prosecutions for crimes against humanity. This is starkly different from both Cassese's and Bassiouni's descriptive responses to the question "what are international crimes?", which summarise the criteria employed to identify such crimes.

May argues that there are three fundamental moral principles which legitimise criminalisation on both the national and international plane. These are the principles of legality, harm and proportionality.[268] If a criminal rule fails to observe these three fundamental principles, then it is not "morally legitimate", and therefore its implementation cannot be substantiated.[269]

May also contends that additional moral justifications are necessary in international criminalisation and prosecutions. He believes that these justifications are provided by two additional principles of ICL: the security principle and the "international harm principle." The security principle fortifies prosecution before international criminal courts and tribunals, by allowing the international community to intercede in a state's internal affairs

[268] May L, *Crimes against humanity: A normative account,* 66-67.
[269] May L, *Crimes against humanity: A normative account,* 65-67.

in certain circumstances, when the state loses its claim to sovereignty. This often occurs when a state has failed to protect its citizens from violations to their "physical security or subsistence" or when it deprives its own citizens of "physical security or subsistence."[270] However, he states that the security principle on its own is insufficient in justifying international criminalisation and prosecution.[271]

May postulates that the essential additional justification is the "international harm principle." This principle denotes that group-based crimes breach one of the international communities "strong interests" as they are either effected by a group, or they victimise a group. Since this "group-based harm" injures humanity, this elevates such conduct to the status of an international crime.[272] In the event that crimes harm a large group of victims, these crimes can be classified as widespread. When the perpetrator can be categorised as a group, then the crimes committed are systematic.[273] Hence, the international harm principle acknowledges that international crimes (especially crimes against humanity) are those that are either "widespread or systematic and so egregious that they harm humanity."[274]

In sum, the common thread between all three theories espoused above is the importance they all place on the violation of "universal values." The international community bestows a high degree of importance on these universal values, to the extent that breach of these values warrants international criminalisation. Despite the varied approaches taken by each of the authors, all three theories posit criteria which may be used to justify the creation of crimes

[270] May L, *Crimes against humanity: A normative account,* 68-69.
[271] May L, *Crimes against humanity: A normative account,* 70.
[272] May L, *Crimes against humanity: A normative account,* 80-95.
[273] May L, *Crimes against humanity: A normative account,* 81-82, 84-90.
[274] May L, *Crimes against humanity: A normative account,* 80 and 82.

under ICL. Therefore, all three theories form a theoretical foundation for the international criminalization process.

4.2 CRIMINALISING FORCED CONTRACEPTION

As this Chapter has demonstrated thus far, it is imperative to first understand the circumstances that elevate particular conduct to international crime status. Now that the doctrinal basis for international criminalisation has been established, the crucial question that arises is what are the benefits and challenges of criminalising forced contraception? An apt starting point would be to examine the laws of one of the only jurisdictions in the world who have actually recognised forced contraception as a crime under their domestic law: Colombia.

4.2.1 The Helena Case

In December 2019, the Colombian Constitutional Court issued a landmark verdict in the '*Helena' case*, which arose out of the fifty-five-year Colombian civil conflict. The decision acknowledged that former combatant women and girls who were subjected to both forced contraception and forced abortion at the hands of their armed groups, should be understood to be "victims of armed conflict."[275] The Court expressly recognised that forced contraception was a distinctive type of harm, perpetrated against women and girls specifically attacking their biological reproductive capacities. This decision is amongst the very few globally to expressly recognise reproductive violence as a certain harm perpetrated against women and girls during armed conflicts. Therefore, it establishes crucial legal

[275] *Helena, contra la Unidad de Atención y Reparación Integral a las Víctimas*, Decisión del tribunal Constitucional de Colombia, (2019) para 2.3 at -< https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/528C5233113A87D5C12584EB004D647C/CASE_TEXT/Colombia%20-%20Sexual%20violence%20decision%20CCC%2C%202019%20%5BSP%5D.pdf> on 16 January 2021.

precedent that is certainly a step forward in acknowledging types of gender-based violence that have to date, remain largely unaddressed.[276]

From *Helena's case,* it is evident that criminalising forced contraception comes with numerous benefits. Chief among them in this instance is surfacing specific gender-based and reproductive harms that have remained unaddressed to date, whilst the women and girls being subjected to them continue to suffer. In addressing reproductive violence, even at the domestic level, the heinous nature of such acts comes to light, and gains international attention. This can in turn spark additional awareness and movements within the international sphere, and lead to the already established benefits of criminalisation. Admittedly, these benefits are derived from arguments that have been posited from a domestic level lens. However, if they are applied within ICL specifically to the ICC Elements of Crimes, perhaps the benefits would be similar, if not greater. The specific benefits and accompanying challenges that may arise from criminalising forced contraception are discussed below.

4.2.2 Benefits and Challenges to Criminalising Forced Contraception

The benefits and challenges of criminalising forced contraception can be viewed in line with the general aims of international criminal justice and shall be discussed in tandem. Either a "teleological" or "deontological" approach is taken in uncovering these aims.[277] These aims include retribution, deterrence, incapacitation and denunciation. This also incorporates

[276] De Vos D, 'Colombia's Constitutional Court issues landmark decision recognising victims of reproductive violence in conflict', European University Institute, 11 January 2020 at -< https://me.eui.eu/dieneke-de-vos/blog/colombias-constitutional-court-issues-landmark-decision-recognising-victims-of-reproductive-violence-in-conflict/> on 16 January 2021.

[277] Cohen S, 'An introduction to the theory, justifications and modern manifestations of criminal punishment', 27 *McGill Law Journal,* 1981,73.

further-reaching goals such as justice for victims.[278] International criminal tribunals such as the ICTY have affirmed that for purposes of its own practice, retribution and deterrence are its two primary aims.[279] It has also stated that rehabilitation of offenders, as well as other objectives are pertinent considerations.[280]

4.2.2.1 Retribution

Retribution is one of the most long-standing justifications of criminal punishment, which occurs as a result of criminalisation. Presently, retributive theories are often largely associated with Immanuel Kant.[281] These theories postulate that wrongful acts necessitate punishment, and that this punishment must be proportionate to the harm that was occasioned.[282] International criminal tribunals such as the ICTY in the *Todorovic case* have emphasised the positive aspect of retributivism, particularly regarding the proportionality element as "reflecting a fair and balanced approach to the exaction of punishment for wrongdoing." In essence, "the punishment must be made to fit the crime."[283] This specific approach focuses on the perpetrators themselves, by considering that viewing perpetrators as a "means to an end" is neglecting to respect them as "reasoning moral agents", or human beings of their own accord.[284]

Contemporary retributive theorists make a point of carefully differentiating their stance from that of mere retaliation. Evidently, international criminal tribunals have attempted to avoid

[278] Cryer R, Friman H, Robinson D and Wilmhurst E, *An introduction to international criminal law and procedure*, 2 ed, Cambridge University Press, Cambridge, 2010, 23.
[279] This was stated in *Prosecutor v Zlatko Aleksovski,* Appeals Chamber, ICTY, 24 March 2000, para. 185.
[280] *Prosecutor v Momir Nikolic*, Trial Chamber I, ICTY, 2 February 2003, para. 85.
[281] Duff A and Garland D, 'Thinking about punishment' in Duff R and Garland A (eds), *A reader on punishment*, Oxford Readings on Socio-Legal Studies, Oxford, 1995, 1, 2–3.
[282] Cryer R *et al*, *An introduction to international criminal law and procedure*, 24.
[283] *The Prosecutor v Todorvic*, Trial Chamber I, ICTY, 31 July 2001, para. 29.
[284] Cryer R *et al*, *An introduction to international criminal law and procedure*, 24.

amalgamating *"lex talionis"*[285] and retributive rationalisations for criminalisation and punishment. A prime example of this is seen in the *Aleksovski case,* where the ICTY averred that retribution:

> "is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. This factor has been widely recognised by Trial Chambers of this International Tribunal as well as Trial Chambers of the ICTR. Accordingly, a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show 'that the international community was not ready to tolerate serious violations of IHL and human rights."[286]

Similarly, the ICTY in the *Nikolic case* stated that:

> "… Retribution is better understood as the expression of condemnation and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time that people may be at their most vulnerable, namely during armed conflict. It is also recognition of the harm and suffering caused to the victims. Furthermore, within the context of international criminal justice, retribution is understood as a clear statement by the international community that crimes will be punished, and impunity will not prevail."[287]

A popular critique to retributive theories questions whether punishments for international crimes can be proportionate to potentially copious amounts of harm committed and their accompanying criminal liability.[288] However, Mark Osiel puts forth a convincing counterargument in response to such contentions. He states that "There is a sense in which

[285] *Lex talionis* refers to the Babylonian law, Roman law and biblical notion of 'an eye for an eye' to symbolise the law of retaliation. See also Deuteronomy 19:21, Biblical Old Testament.
[286] *Prosecutor v Zlatko Aleksovski,* para. 185.
[287] *The Prosecutor v Momir Nikolic,* para. 85.
[288] Harhoff F, 'Sense and sensibility in sentencing- Taking stock of international criminal punishment', in Engdahl O and Wrange P (eds), *Law at war: The law as it was and how it should be*, Brill Nijhoff Publishers, 2008, 125.

this argument is true, but trivial. After all, many ordinary offenders commit multiple offences for which they cannot "repay" . . . in fitting measure, within their remaining lifespan."[289] Similarly, the horrendous acts perpetrated by Da'esh fighters against Yazidi women and girls cannot possibly "repaid" in any sense of the word, as the physical and emotional trauma inflicted on Yazidi victims is insurmountable. However, this does not mean that Da'esh should not be punished for the use of forced contraception to continue inflicting harm on these victims.

Despite this, there are further problems with the retributive approach have been identified. For example, critics claim that it is imperative to surpass a "culture of blame."[290] They also argue that since retributivism establishes unreasonably high standards as it seemingly demands punishment without taking into account the cost of the punishment and necessitates punishment even where it is "pointless." This can especially be seen in "disadvantaged societies."[291] While Robert Cryer acknowledges that this position may have merit, he posits that the critical issue from a Kantian point of view is "not what is practicable, but what is morally necessary." He argues that even in this instance, "moral absolutism and insensitivity to context" of such stances still pose a significant threat.[292]

4.2.2.2 Deterrence

Deterrence is one of the most recognised justifications of criminalisation and punishment. Simply put, deterrence advocates for punishment with the aim of discouraging potential offenders.[293] Scholars such as Jeremy Bentham for example are one of the primary

[289] Osiel M, 'Why prosecute? Crimes of punishment for mass atrocity', 22 *Human Rights Quarterly* 118, 2000, 129.
[290] Tutu D, *No future without forgiveness*, Doubleday Publishing, New York, 1999.
[291] Cryer R *et al*, *An introduction to international criminal law and procedure*, 25.
[292] Cryer R *et al*, *An introduction to international criminal law and procedure*, 26.
[293] Cryer R *et al*, *An introduction to international criminal law and procedure*, 26.

proponents of deterrence theories, who concentrate on the benefits of prosecution in relation to the future from a utilitarian perspective.[294]

Despite the widespread position that punishment should be enforced to prevent future engagement in prohibited conduct by both the offender and the general population, there are numerous critiques that arise in response to this, from an ICL lens. The first critique is philosophical and is made primarily by "Kantian retributivists." They state that deterrence theories, particularly those that advocate for general deterrence view people as merely "a means to an end" and that this is irreconcilable with human beings' intrinsic moral value.[295]

The second critique is that deterrence theories do not consider the reality of the decision-making process that leads to the decision to commit a crime, as these approaches view people as rationally calculating the costs and benefits of their actions, which is not the case.[296] Many scholars argue that the seminal considerations in the minds of the perpetrators of international crimes are the notions of "fighting for a higher good", bigotry and oppression as well as other more pertinent factors, rather than the idea that they may be brought before an international court or tribunal to answer for their crimes.[297] While this may be the case in certain instances, this particular argument appears to underrate the shrewd actions of multiple senior ranking leaders whose aims are not derailed by other concerns, but are perhaps fuelled by them.[298] Da'esh fighters are a prime example of this, whereby they

[294] Cryer R *et al*, *An introduction to international criminal law and procedure*, 26.
[295] Cryer R *et al*, *An introduction to international criminal law and procedure*, 26.
[296] Wippan D, 'Atrocities, deterrence and limits of international criminal justice', *Fordham International Law Journal*, 1999, 473.
[297] Harhoff F, 'Sense and sensibility in sentencing- Taking stock of international criminal punishment', 127.
[298] Roach S, 'Justice of the peace? Future challenges and prospects for a cosmopolitan court' in Roach S (ed.), *Governance, order and the international criminal court: Between realpolitik and a cosmopolitan court*, Oxford University Press, Oxford, 2009, 225, 226–9.

employ cold calculating tactics fuelled by bigotry and the will to oppress, such as forced contraception, to ensure the continuity of the sexual enslavement and rape of Yazidi women and girls.[299]

Nevertheless, the Rome Statute does acknowledge that deterrence has a role to play in ICL.[300] Paragraph 5 of the Rome Statute Preamble stipulates that parties to the Statute are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[301]

However, as Tom Farer observes, the historical absence of the enforcement of ICL and the minor number of prosecutions against perpetrators in international criminal tribunals have diluted aims of deterrence, as a culture of impunity has thrived.[302] Arguments which express doubt of the possibility of deterrence in ICL emphasise the pertinent fact that the creation of the ICTY did not hinder any crimes being committed in the former Yugoslavia from 1993 and 1995. However, it should be noted here that the Tribunal was an embryonic institution at the time, with only a handful of people in custody. Furthermore, it was often thought that a peace agreement would be brokered, and the Tribunal used as a bargaining chip to do so. Therefore, this particular example may not be applicable to ICL in general. Cryer asserts that this critique may gradually lose significance, if a "culture of accountability" is generated

[299] Callimachi R, 'To maintain supply of sex slaves, ISIS pushes birth control', New York Times, 12 March 2016, at -< https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html> on 17 January 2021.

[300] Akhavan P, 'Can international criminal justice prevent future atrocities?', 85 *American Journal of International Law* 7, 2001.

[301] Preambular paragraph 5, *Rome Statute* (1998).

[302] Farer T, 'Restraining the barbarians: Can international law help?', 22 *Human Rights Quarterly* 90, 2000, 92.

and if domestic courts perform their roles in prosecution of international crimes as per the intentions of the drafters of the Rome Statute.[303]

4.2.2.3 Incapacitation

Incapacitation is yet another utilitarian justification of criminalisation and punishment.[304] It is closely related to deterrence in the sense that it strives to prevent crimes by detaining the person who committed the harm.[305] Mark Drumbl and Cryer argue that this has not had a significant influence on ICL.[306] However, during the Tokyo Tribunals, Judge Röling averred that "the justification for prosecuting aggression, in spite of the fact that it was not previously criminal, was that the defendants were dangerous and their influence on Japan had to be excluded by their imprisonment."[307] Certain claims against amnesty are closely connected to the deterrence justification of punishment, such as the ideas which postulate that those who seek amnesties will not withdraw without a fight or 'quietly' so to speak. In sum, both Laura Zedner and Cryer opine that theories of incapacitation are extremely controversial, as they do not focus on the actions committed, but essentially punish people for future offences that they may commit.[308]

4.2.2.4 Denunciation

Denunciation is a more contemporary theory that justifies criminalisation and punishment and has received a significant amount of support thus far.[309] This approach states that criminal procedures and punishment are "an opportunity for communicating with the

---

[303] Cryer R *et al*, *An introduction to international criminal law and procedure*, 28.
[304] Cryer R *et al*, *An introduction to international criminal law and procedure*, 28.
[305] Drumbl M, 'Collective violence and individual punishment', 99 *Northwestern University Law Review* 2, 2005, 589.
[306] Drumbl M, 'Collective violence and individual punishment' 589. See also Cryer R *et al*, *An introduction to international criminal law and procedure*, 28.
[307] Dissenting Opinion of the Member from the Netherlands, 10–51 in Boister N and Cryer R, *Documents on the Tokyo International Tribunal*, Oxford University Press, Oxford, 2008, 684–703.
[308] Zedner L, *Criminal justice*, Oxford University Press, Oxford, 100. See also Cryer R *et al*, *An introduction to international criminal law and procedure*, 28.
[309] See generally Duff A, *Punishment, communication and community*, Oxford University Press, Oxford, 2001.

offender, the victim and wider society the nature of the wrong done."[310] The theory is aimed at engaging perpetrators in an attempt to make them comprehend the wrong in their actions, whilst underscoring the deplorable nature of the prohibited conduct to the international community. This approach has also been argued to reassert confidence in the rule of law.[311]

However, critics of this theory disagree with the notion that international criminals are members of the relevant community with whom punishments is meant to communicate with the offender, as the very acts they committed as well as their general attitude toward the international community would render it highly unlikely that they would be open to communication, or even to obey the communication at all.[312]

With regards to international crimes in particular, the relevant "community" is humanity at large, therefore some argue that the likelihood of the message being rejected does not mean that no attempts should be made to encourage such messages being communicated. [313] Furthermore, these messages are also directed toward the broader international community to promote general deterrence. However, concerns have been raised regarding the obstacles that arise in identifying the "moral message" when expansive liability principles, such as joint criminal enterprise, which exceed individual culpability are employed.[314]

[310] Zedner L, *Criminal justice*, 109.
[311] Drumbl M, *Atrocity, punishment and international law*, Cambridge University Press, Cambridge, 2009, 173.
[312] Cryer *et al*, *An introduction to international criminal law and procedure*, 29.
[313] Duff A, 'Can we punish perpetrators of atrocities?', in Duff A (ed), *The religious responses to mass atrocities*, Cambridge University Press, Cambridge, 2009, 85-100.
[314] Damaška M, 'What is the point of international criminal justice', 83 *Chicago-Kent Law Review* 1, 2008, 350–356.

4.2.2.5 Justice for Victims

Justice for victims is a paramount concern in ICL, and its importance cannot be overstated. Prosecution and punishment of crimes are likely to generate feelings of closure, or justice being served for victims who have suffered heinous acts perpetrated against them. This can either be grounded on the acts of watching the perpetrators being prosecuted, or even the process of testifying.[315] This would appear to be especially useful to Yazidi victims who were subject to forced contraception which ensured continued rape and sexual abuse. While it is unlikely that criminalisation and punishment will completely remedy these traumatic experiences which they were forced to undergo, it could possibly foster a sense of closure. This would be an important step in their arduous journey to heal from their suffering at the hands of Da'esh.

Furthermore, the ICTY in the *Nikolic´ case* noted the importance of this role in relation to victims, when it stated that "punishment must therefore reflect both the calls for justice from the persons who have – directly or indirectly – been victims of the crimes."[316] A critique to this is whether international criminal trials and punishment of offenders actually have the proposed healing effects on victims.[317] Cryer opines that this is unlikely, as international criminal tribunals tend to concentrate on higher level offenders, therefore victims will not have an opportunity to see those who perpetrated the specific offences against them come to trial.[318] Nevertheless, the Rome Statute does provide for victims participation in proceedings and for reparations.[319] However, these provisions can evidently only apply if the conduct in

[315] Cryer *et al, An introduction to international criminal law and procedure*, 30.
[316] *Prosecutor v Momir Nikolic*, ICTY, para. 86.
[317] O'Connell J, 'Gambling with the psyche: Does prosecuting human rights violators console their victims?', 46 *Harvard International Law Journal*, 2005, 295.
[318] Cryer *et al, An introduction to international criminal law and procedure*, 31.
[319] Article 75, *Rome Statute* (1998).

question is recognised as a crime in the first place. If not, crimes such as forced contraception shall continue to be unaddressed, while victims subjected to it continue to suffer.

4.2.2.6 Other International Legal Mechanisms to Address Forced Contraception

Admittedly, there are other international legal mechanisms that may address forced contraception. A prime example of this is international human rights law, specifically on the law on torture. Christie Edwards advances that forced contraception can and should be viewed as a means of torture, concluding that forced contraception meets the elements of torture. Of note here was the first element constituting torture: the intentional infliction of severe mental or physical pain or suffering by the perpetrator,[320] as this was directly related to forced contraception. Edwards argues that the severe mental suffering experienced by Yazidi women as a result of their abuse is evident, as the forced use of oral and injectable contraception caused severe physical pain and suffering to Yazidi women.[321] These tactics allowed Da'esh fighters to continuously rape their victims by preventing or eliminating pregnancies, as well as by enabling them to sell, trade, or gift their victims to other fighters with assurances that the women and girls were not pregnant.[322]

On the face of it, the existence of these alternative legal mechanisms may present a challenge in the efforts to criminalise forced contraception under the Rome Statute. However, their mere existence may also serve to bolster such efforts, as they serve as a reminder that such reproductive harms must be wholly addressed in the most comprehensive way possible.

---

[320] Article 1(1), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

[321] Edwards C, 'Forced contraception as a means of torture', 146.

[322] "They came to destroy: ISIS crimes against the Yazidis", Human Rights Council, A/HRC/32/CRP.2, 15 June 2016 Report, para. 69.

4.3 CONCLUSION

This chapter has explored the doctrinal basis of international criminalisation, and established that international criminalisation is founded on theories which give high regard to the violation of "universal values", to the extent that breach of these values warrants international criminalisation. Forced contraception appears to be an act that breaches these "universal values." Furthermore, it discussed the benefits and challenges to internationally criminalising forced contraception, with specific regards to retribution, deterrence, incapacitation, denunciation and justice for victims. It also highlighted another international legal mechanism that may address forced contraception, considered from the realm of international human rights law. Despite the evident challenges posed to criminalising forced contraception, the fact remains that such conduct remains unaddressed on the international plane, while its victims are forced to endure it. Perhaps international courts such as the ICC should therefore follow in the footsteps of jurisdictions such as Colombia, who has boldly taken steps to ensure that such reproductive harms are expressly recognised and that the victims of such crimes receive the justice they deserve.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 INTRODUCTION

This dissertation has explored whether the current framework of ICL can allow forced contraception to be prosecuted at the ICC, in light of the Da'esh-Yazidi conflict. The first chapter introduced the scope of the dissertation and outlined the need to investigate the primary research questions and objectives regarding forced contraception. In addressing both the research questions and objectives, the need for ICL to recognise forced contraception and for it to be able to be prosecuted at the ICC became apparent. Forced contraception was situated within the ICL framework through an analysis of the treatment of SGBV in the development of ICL. This aided in determining whether ICL's historical treatment of SGBV demonstrates gender-bias flaws in the ICL framework. The legal contours of forced contraception were also established, specifically within the Da'esh-Yazidi context. This underscored how such conduct is uniquely and solely experienced by women, providing a foundation to explore whether forced contraception can currently be prosecuted under the Rome Statute as either genocide, a war crime or a crime against humanity within the ICC Elements of Crimes. Furthermore, the benefits and challenges to criminalising forced contraception were analysed, grounded on the theoretical foundations for international criminalisation. The object of this was to ascertain the usefulness of including forced contraception as a specific crime under the Rome Statute.

Forced contraception has been used by Da'esh as a method to ensure the continued rape and sexual abuse of Yazidi women and girls. Ultimately, this dissertation has found that no ICL instrument can sufficiently address this specific reproductive harm, which is a further

indication of glaring "gender-bias" flaws within the ICL framework.[323] Such defects must not remain unaddressed; solutions must be pursued.

This final chapter shall therefore answer the research questions posed in Chapter One and propose recommendations.

5.1 CONCLUSION OF THE STUDY

5.1.1 Situating Forced Contraception in the History of SGBV in ICL

The first research question sought to determine what extent the historical treatment of SGBV crimes demonstrated gender-bias flaws in the ICL framework. Chapter Two addressed this, through a critical historical analysis of how SGBV and reproductive crimes were treated in international criminal tribunals. The overwhelming finding was that during the Post World War II Nuremberg and Tokyo Tribunals, women were "nearly invisible" therefore not nearly enough substantive attention was given to sexual and gender-based crimes, nor was reproductive violence even mentioned.[324] Notwithstanding the increased attention toward SGBV and reproductive violence in the ICTY and ICTR, these crimes remained insufficiently addressed through the Tribunals failure to recognise the crucial gender element in their perpetration.[325] Despite the noteworthy strides taken towards recognising sexual and gender-based crimes in the Rome Statute, that there have been only two cases (*Ongwen*[326] and *Ntaganda*[327]) in the history of ICL that represent substantial recognition of

[323] Chappell L, 'Conflicting institutions and the search for gender justice at the international criminal court', 185-192.
[324] Kuo P, 'Prosecuting crimes of sexual violence in an international tribunal', 308.
[325] Mouthaan S, 'The prosecution of gender-based crimes at the ICC: Challenges and opportunities', 785.
[326] *The Prosecutor v Dominic Ongwen*, Pre-Trial Chamber II, ICC, 23 March 2016.
[327] *The Prosecutor v Bosco Ntaganda*, Trial Chamber VI, ICC, 8 July 2019.

reproductive violence. Therefore, the gender-bias flaws within the ICL framework are evident, and the first hypothesis posed in Chapter One was correct. This is also a further indication that generally, ICL's historical treatment of SGBV exhibits gender-bias flaws in the ICL framework.

5.1.2 Capturing Forced Contraception Within the ICL Framework

The second research question investigated whether forced contraception can be sufficiently addressed within the current ICL framework. This was answered in Chapter Three, where it was found that the Da'esh-Yazidi conflict is firmly rooted in the historical persecution and discrimination against the Yazidi minority.[328] In this context, forced contraception was also revealed as an act that is uniquely experienced by women as it is a clear assault on a woman's reproductive capabilities in order to ensure continued rape and sexual abuse by Da'esh fighters against Yazidi women and girls.

A glaring challenge encountered in prosecuting forced contraception was the evident jurisdictional impasse posed. This consequently posed a crucial limitation to this study, as well as any future practical implementation of the findings of this study. Until the ICC can assert its jurisdiction over the crimes Da'esh have committed, any dialogue on prosecuting conduct such as forced contraception on Yazidi women and girls, unfortunately remains theoretical.

Lastly, while forced contraception appears to fit into some of the elements of crimes such as crimes against humanity of "other inhumane acts", charging it as such a crime would conceivably restrict the indicative nature of the charges, and may have a deleterious effect on any prospects of expressly mending that harm throughout the reparations process. Therefore, in the current ICL framework, forced contraception would only be able to be

[328] Zoonen D and Wirya K, 'Yazidism and its community in Iraq', 9.

addressed to a very limited extent. This limitation bars forced contraception from being sufficiently tackled in ICL. The second hypothesis posed in Chapter 1 is therefore also correct. Not having a specific crime of forced contraception on its own is consequently reveals the "gender-bias" within ICL's existing framework,[329] as the currently flawed ICL structures appear to be unfit to respond to such novel emerging issues that specifically affect women.

A significant limitation in proving this hypothesis and arriving at this conclusion was the lack of anecdotal evidence on forced contraception. The voices of the victims are critical in prosecuting such acts as they establish a firmer basis to determine the specific elements of this conduct. Accordingly, the findings of this dissertation could certainly be enriched through the collection of extensive anecdotal evidence which represent the varied experiences of forced contraception endured by these victims.

5.1.3 The Effects of Criminalising Forced Contraception

The final research question examined the effects of criminalising forced contraception if it were made a specific crime under the Rome Statute. Chapter Four addressed this by establishing that international criminalisation is founded on theories which give high regard to the violation of "universal values", to the extent that breach of these values warrants international criminalisation.[330] Forced contraception is an act that breaches these "universal values" as it involves a violation of women's reproductive autonomy, as well as ensures continued sexual abuse and enslavement within the Da'esh-Yazidi context. The benefits and challenges to international criminalisation were also discussed with specific regards to retribution, deterrence, incapacitation, denunciation and justice for victims. While these elements posed concerning challenges, the fact remains that conduct such as forced

[329] Chappell L, 'Conflicting institutions and the search for gender justice at the international criminal court', 185-192.
[330] Haenen I, *Force and marriage,* 140.

contraception persists unaddressed on the international plane, while its victims are forced to endure it. The ICC should therefore follow in the footsteps of jurisdictions such as Colombia, who, as discussed, have boldly taken steps to ensure that such reproductive harms are expressly recognised and that the victims of such crimes receive the justice they deserve.[331] It was hypothesised that the benefits of criminalising forced contraception under the Rome Statute outweigh the challenges to doing so. This is correct and is buttressed by the discussed aims of international criminal justice of retribution, deterrence, incapacitation, denunciation and justice for victims.

A critical limitation in proving this hypothesis was the absence of literature on the effects of criminalising forced contraception specifically, as it is a new manifestation of VAW. However, these findings are rooted in the aims of international criminal justice, therefore they can still serve as a foundation for, and guide further research conducted on the matter.

5.2 RECOMMENDATIONS

5.2.1 Amendment to the Rome Statute and ICC Elements of Crimes

Amendments ought to be made to the Rome Statute and the ICC Elements of Crimes to include forced contraception as one of the specific elements of crime. Article 121 of the Rome Statute provides for the possibility of amendment.[332] This provision is essential, as the ICC only has jurisdiction over crimes provided in the Rome Statute.[333] Therefore, the

[331] *Helena, contra la Unidad de Atención y Reparación Integral a las Víctimas*, Decisión del Tribunal Constitucional de Colombia, (2019) para 2.3 at -< https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/528C5233113A87D5C12584EB004D647C/CASE_TEXT/Colombia%20-%20Sexual%20violence%20decision%20CCC%2C%202019%20%5BSP%5D.pdf> on 25 January 2021.
[332] Article 121, *Rome Statute* (1998).
[333] Article 22(1), *Rome Statute* (1998).

offence of forced contraception should be explicitly listed as a "war crime of forced contraception", under Article 8 of the ICC Elements of Crimes.[334]

The ICC Elements of Crimes may also be amended to include forced contraception as one of the elements of a crime against humanity of enforced sterilisation,[335] only under the condition that Footnote 19 which precludes charging "non-permanent measures such as birth control", is repealed.[336]

5.2.2 Policy and Advocacy Efforts

International organisations (IO's) and advocacy groups ought to utilise their platforms and concentrate their efforts towards lobbying members of the Rome Statute to institute domestic legislation against forced contraception. The effects of this can be seen through jurisdictions that have already criminalised forced contraception such as Colombia,[337] which already took strides in surfacing specific gender-based and reproductive harms that have remained unaddressed to date, whilst the women and girls being subjected to them continue to suffer in silence. In addressing reproductive violence, even at the domestic level, the heinous nature of such acts is highlighted, aiding in gaining international attention. This can spark additional awareness and movements within the international sphere, and lead to the already established benefits of criminalisation.

IO's and advocacy groups should also monitor and continue to provide periodic reports on the ongoing atrocities perpetrated by Da'esh against the Yazidi minority, with a specific focus on reproductive violence and the harms suffered by women and girls specifically, such

---

[334] Article 8, *Elements of Crimes, Rome Statute* (1998).

[335] Article 7(1)(g)-5, *Elements of Crimes, Rome Statute* (1998).

[336] Footnote 19, Article 7(1)(g)-5, *Elements of Crimes, Rome Statute* (1998).

[337] *Helena, contra la Unidad de Atención y Reparación Integral a las Víctimas*, Decisión del Tribunal Constitucional de Colombia, (2019) para 2.3 at -< https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/528C5233113A87D5C12584EB004D647C/CASE_TEXT/Colombia%20-%20Sexual%20violence%20decision%20CCC%2C%202019%20%5BSP%5D.pdf> on 25 January 2021.

as forced contraception. This would bolster efforts in surfacing these reproductive harms in the international sphere and generating dialogue within both the ICL and international community at large on harms that are uniquely suffered by women, specifically Yazidi women and girls.

Lastly, these organisations may also use their platforms to motivate and mobilise the international community to apply pressure on the ICC to launch investigations into the crimes committed by Da'esh against Yazidi women and girls, as well as to engage the Government of Iraq in a dialogue on the matter. Such efforts shall be instrumental toward the pursuit of justice for Yazidi victims and their suffering.

5.2.3 Second ICC Policy Paper on Reproductive Harms

The first policy paper on sexual and gender-based crimes issued by the OTP of the ICC in 2014 was a significant step in tackling how gendered conduct within "genocide, mass atrocity, and war" is prosecuted.[338] However, it falls short on a critical issue: recognising reproductive violence. Therefore, without the acknowledgment of manifestations of reproductive violence such as forced contraception in essential policy papers- which greatly influence the work of the OTP- forced contraception and other manifestations of reproductive violence shall remain unaddressed.

In light of this, a second policy paper ought to be drafted and issued, with a specific focus on reproductive harms and emerging issues with enduring ramifications, such as forced contraception. This paper would ideally incorporate and further develop the current gender analysis provided in the 2014 policy paper. As Fatou Bensouda duly noted when commemorating the implementation of the first policy paper; "words and promises are not enough to comfort the victims of these atrocious crimes. Only concrete measures will

[338] Ooosterveld V, 'The ICC policy paper on sexual and gender-based crimes: A crucial step for international criminal law', 443.

suffice."[339]Therefore, the proposed second policy paper shall play a monumental role in guaranteeing a robust framework to further guide the OTP in pursuing justice for the victims of these crimes.

5.3 CONCLUSION

Da'esh's use of forced contraception against Yazidi women and girls has been a critical factor in fuelling and ensuring their continued rape and sexual abuse. As a result, Yazidis have suffered jarring physical and psychological wounds from these atrocities. It is abhorrent that there is currently no legislative instrument in ICL that recognises this deplorable conduct. Instead of aiding a culture of impunity where such conduct continues to go unaddressed, criminalising forced contraception shall be a critical step forward in propelling ICL toward a more inclusive and comprehensive understanding of reproductive harms and sexual and gender-based crimes, and ensuring that future reprehensible acts are punished.

[339] Bensouda F, 'The prosecution of sexual and gender-based crimes by international courts', *Speech given at the international conference organised by His Excellency, Mr Sidiki Kaba, President of the Assembly of States Parties to commemorate the Day of International Criminal Justice*, Dakar, Senegal, 2016, 7.

BIBLIOGRAPHY

Books

1. Asatrian G and Arakelova V, *The religion of the peacock angel: The Yezidis and their spiritual world*, Routledge, 2014.
2. Bassiouni C (ed.), *International criminal law volume 1: Crimes*, Transnational Publishers, Ardsley, 1999.
3. Bassiouni C, *International criminal law, volume 1: Sources, subjects and contents*, 3 ed, Martinus Nijhoff Publishers, Leiden, 2008.
4. Bassiouni C, *Introduction to international criminal law: Second revised edition*, 2ed, Martinus Nijhoff Publishers, Leiden, 2013.
5. Boister N and Cryer R, *Documents on the Tokyo International Tribunal*, Oxford University Press, Oxford, 2008.
6. Cassese A, *International criminal law*, Oxford University Press, Oxford, 2008.
7. Cryer R, Friman H, Robinson D and Wilmhurst E, *An introduction to international criminal law and procedure*, 2 ed, Cambridge University Press, Cambridge, 2010.
8. Cryer R, *Prosecuting international crimes: Selectivity and the international criminal law regime*, 1 ed, Cambridge University Press, 2005.
9. Dormun K, Kolb R and Doswald-Beck L, *Elements of war crimes under the Rome statute of the international criminal court: Sources and commentary*, 1 ed, Cambridge University Press, Cambridge, 2003.
10. Drumbl M, *Atrocity, punishment and international law*, Cambridge University Press, Cambridge, 2009.
11. Duff A, *Punishment, communication and community*, Oxford University Press, Oxford, 2001.
12. Haenen I, *Force and marriage: The criminalisation of forced marriage in Dutch, English and international criminal law*, Intersentia Publishing Ltd, 2014.
13. Hastings J, *Encyclopaedia of Religion and Ethics Part 18*, Kessinger Publishing, 2003.
14. Levit N, Minow M and Verchick R, *Feminist legal theory: a primer*, 2ed, New York University Press, New York, 2016.
15. MacKinnon C, *Sexual harassment of working women*, Yale University Press, London, 1979.

16. May L, *Crimes against humanity: A normative account*, Cambridge University Press, Cambridge, 2005.
17. McCants W, *The ISIS apocalypse: The history, strategy, and doomsday vision of the Islamic state*, St Martin's Press, New York, 2015.
18. Murad N and Krajeski J, *The last girl: My story of captivity and my fight against the Islamic state,* Penguin Books, London, 2017.
19. Scales A, *Legal feminism: Activism, lawyering and legal theory,* New York University Press, New York, 2006.
20. Stern J and Berger J, *ISIS: The state of terror*, Harper Collins Publishers, New York, 2016.
21. Tutu D, *No future without forgiveness,* Doubleday Publishing, New York, 1999.
22. Weiss M and Hassan H, *ISIS: Inside the army of terror*, Regan Arts, New York, 2016.
23. Zedner L, *Criminal justice*, Oxford University Press, Oxford, 2004.

Chapters in Books

24. Askin K, 'The International Criminal Tribunal for Rwanda and its treatment of crimes against women', in Carey J, Dunlap W and Pritchard R (eds), *International humanitarian law: Origins, Prospects, Challenges*, Vol. 3, Transnational Publishers, 2003, 399-454.
25. Askin K, 'Treatment of sexual violence in armed conflicts: A historical perspective and the way forward' in Brouwer A, Ku C, Romkens R and Herrik L (eds) *Sexual violence as an international crime: Interdisciplinary approaches*, 1ed, Intersentia Publishing Ltd, Cambridge, 2013, 19-56.
26. Bensouda, F, 'Gender and sexual violence under the Rome statute' in Decaux E, Dieng A and Sow M (eds), *From human rights to international criminal law,* Brill Publishers, 2007, 401- 417.
27. Bianchi L, 'The prosecution of rape and sexual violence: Lessons from prosecutions at the ICTR', in Brouwer A, Ku C, Romkens R and Herrik L (eds) *Sexual violence as an international crime: Interdisciplinary approaches*, 1ed, Intersentia Publishing Ltd, Cambridge, 2013, 123-149.
28. Boot M, 'Crimes against humanity, Article 7(1)(g): Rape or any other form of sexual violence of comparable gravity' in Triffterer O et al (eds), C*ommentary on the Rome*

Statute of the international criminal court: Observers' notes, article by article, 3ed, Beck CH Publishers, 2015, 207.

29. Brouwer A, Ku C, Romkens R and Herrik L, 'Interdisciplinary approaches to recognizing, investigating and prosecuting sexual violence as an international crime' in Brouwer A, Ku C, Romkens R and Herrik L (eds) *Sexual violence as an international crime: Interdisciplinary approaches*, 1ed, Intersentia Publishing Ltd, Cambridge, 2013, 3-18.
30. De Vos D, 'Prosecuting sexual and gender-based violence at the international criminal court' in Shepherd L (ed), *Handbook on gender and violence,* Edward Elgar Publishing, 2019, 395-409.
31. Duff A and Garland D, 'Thinking about punishment' in Duff R and Garland A (eds), *A reader on punishment*, Oxford Readings on Socio-Legal Studies, Oxford, 1995, 1-43.
32. Duff A, 'Can we punish perpetrators of atrocities?', in Duff A (ed), *The religious responses to mass atrocities,* Cambridge University Press, Cambridge, 2009, 79-104.
33. Edwards C, 'Forced contraception as a means of torture' in Centre for Human Rights and Humanitarian Law: Anti-Torture Initiative, *Gender perspectives on torture: Law and practice,* 139-159.
34. Gordon L, 'The struggle for reproductive freedom: three stages of feminism', in Eisenstein (ed) *Capitalist patriarchy and the case for socialist feminism,* Monthly Review Press, New York,1979.
35. Harhoff F, 'Sense and sensibility in sentencing- Taking stock of international criminal punishment', in Engdahl O and Wrange P (eds), *Law at war: The law as it was and how it should be*, Brill Nijhoff Publishers, 2008, 133-152.
36. Minda G, 'Feminist legal theory' in Minda G (ed) *Postmodern legal movements: law and jurisprudence at century's end*, New York University Press, New York, 1995.
37. Moreno-Ocampo L, 'The place of sexual violence in the strategy of the ICC prosecutor', in Brouwer A, Ku C, Romkens R and Herrik L (eds) *Sexual violence as an international crime: Interdisciplinary approaches*, 1ed, Intersentia Publishing Ltd, Cambridge, 2013, 151-155.
38. Roach S, 'Justice of the peace? Future challenges and prospects for a cosmopolitan court' in Roach S (ed.), *Governance, order and the international criminal court: Between realpolitik and a cosmopolitan court*, Oxford University Press, Oxford, 2009, 225-235.

39. Sellers P, 'Individual('s) liability for collective sexual violence', in Knop K (eds), *Gender and Human Rights,* Oxford University Press, 2004, 153-194.
40. Surah Al Baqarah, *The Holy Qur'an.*

Journal Articles

41. Akhavan P, 'Beyond impunity: Can international criminal justice prevent future atrocities?', 95 *American Journal of International Law* 7, 2001.
42. Akhavan P, 'Can international criminal justice prevent future atrocities?', 85 *American Journal of International Law* 7, 2001.
43. Al-Dayel N, Mumford A and Bales K, 'Not dead yet: The establishment and regulation of slavery by the Islamic state', *Studies in Conflict and Terrorism*, 2020.
44. Aoláin F, 'Gendered harms and their interface with international criminal law', 16 *International Feminist Journal of Politics* 4, 2014.
45. Askin K, 'Developments in international criminal law: Sexual violence in decisions and indictments in the Yugoslav and Rwandan tribunals: Current status', 93 *American Journal of International Law* 97, 1999.
46. Bassiouni C, 'International criminal investigations and prosecutions: From Versailles to Rwanda', *International Criminal Law Enforcement* 3, 1999.
47. Bassiouni C, 'The future of international criminal justice', 11 *Pace International Law Review* 309, 1999.
48. Bassiouni C, 'The penal characteristics of conventional international criminal law', *Case Western Reserve Journal of International law* 15, 1983.
49. Boon K, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent', 32 *Columbia Human Rights Law Review* 625, 2001.
50. Buss D, 'The curious visibility of wartime rape: Gender and ethnicity in international criminal law', 25 *Windsor Yearbook on Access to Justice* 3, 2007.
51. Campanaro, J, 'Women, war, and international law: The historical treatment of gender-based war crimes', *The Georgetown Law Journal* 89, 2000.
52. Chappell L, 'Conflicting institutions and the search for gender justice at the international criminal court', 67 *Political Research Quarterly* 1, 2014.
53. Cohen S, 'An introduction to the theory, justifications and modern manifestations of criminal punishment', 27 *McGill Law Journal,* 1981.
54. Copelon R, 'Gender crimes as war crimes: integrating crimes against women into international criminal law', 46 *McGill Law Journal* 217, 2000, para. 32.

55. Copelon R, ‘Gender crimes as war crimes: integrating crimes against women into international criminal law’, 46 *McGill Law Journal* 217, 2000.
56. D’Aoust M, ‘Sexual and gender-based violence in international criminal law: a feminist assessment of the bemba case’, 17 *International Criminal Law Review* 1, 2017.
57. Damaška M, ‘What is the point of international criminal justice’, 83 *Chicago-Kent Law Review* 1, 2008.
58. Drumbl M, ‘Collective violence and individual punishment’, 99 *Northwestern University Law Review* 2, 2005.
59. Duggan C, Bailey C and Guillerot J, ‘Reparations for sexual and reproductive violence: prospects for achieving gender justice in Guatemala and Peru’, 2 *International Journal of Transitional Justice* 2, 2008.
60. El-Masri S, ‘Prosecuting ISIS for the sexual slavery of the Yazidi women and girls’ 22 *The International Journal of Human Rights* 8, 2018.
61. Farer T, ‘Restraining the barbarians: Can international law help?’, 22 *Human Rights Quarterly* 90, 2000.
62. Fineman M, “Feminist Legal Theory”, 13 *American University Journal of Gender, Social Policy & the Law* 1, 2005.
63. Goldstone R, ‘Prosecuting rape as a war crime’, 34 *Case Western Reserve Journal of International Law* 277, 2002.
64. Goldstone R, ‘The institute for global legal studies inaugural colloquium: The UN and the protection of human rights: The role of the United Nations in the prosecution of international war criminals’, 5 *Washington University Journal of Law and Policy* 119, 2001.
65. Grey R, ‘The ICC’s First ‘Forced Pregnancy’ Case in Historical Perspective’, 15 *Journal of International Criminal Justice* 5, 2017.
66. Halley J, ‘Rape in Berlin: Reconsidering the criminalization of rape in the law of international armed conflict’, 9 *Melbourne Journal of International Law* 1, 2008.
67. Henry N, ‘Memory of an injustice: The “Comfort Women” and the legacy of the Tokyo trial’, 37 *Asian Studies Review* 3, 2013.
68. Henry N, ‘The fixation on wartime rape: Feminist critique and international criminal law’, 23 *Social & Legal Studies* 1, 2013.

69. Higgins A, ‘Else we are condemned to go from darkness to darkness: Victims of gender-based war crimes and the need for civil redress in US Courts’, 70 *UMKC Law Review* 677, 2001.
70. Kamatali J, ‘Freedom of expression and its limitations: The case of the Rwandan genocide’, 38 *Stanford Journal of International Law* 57, 2002.
71. Kuo P, ‘Prosecuting crimes of sexual violence in an international tribunal’, 34 *Case Western Reserve Journal of International Law* 305, 2002.
72. Lehr-Lehnardt R, ‘One small step for women: Female-friendly provisions in the Rome Statute of the International Criminal Court’, *BYU Journal of Public Law* 16, 2002.
73. Luping D, ‘Investigation and prosecution of sexual and gender-based crimes before the international criminal court’, 17 *American University Journal of Gender, Social Policy & the Law* 2, 2009.
74. McKinnon C, ‘Reflections on sex equality under law’, 100 *Yale Law Journal,* 1990.
75. Menkel-Meadow C, ‘Feminist legal theory, critical legal studies, and legal education or “the fem-crits go to law school”’ 38 *Journal of Legal Education* 1,1988.
76. Mouthaan S, ‘The prosecution of gender-based crimes at the ICC: Challenges and opportunities’, 11 *International Criminal Law Review* 4, 2011.
77. O’Connell J, Gambling with the psyche: Does prosecuting human rights violators console their victims?’, 46 *Harvard International Law Journal,* 2005.
78. Oosterveld V, ‘Feminist debates on civilian women and international humanitarian law’, 27 *Windsor Yearbook on Access to Justice,* 2009.
79. Ooosterveld V, ‘The ICC policy paper on sexual and gender-based crimes: A crucial step for international criminal law’, 24 *William and Mary Journal of Race, Gender and Social Justice* 3, 2018.
80. Osiel M, ‘Why prosecute? Crimes of punishment for mass atrocity’, 22 *Human Rights Quarterly* 118, 2000.
81. SaCouto S and Sellers P, ‘The bemba appeals chamber judgment: Impunity for sexual and gender-based crimes’, 27 *William & Mary Bill of Rights Journal* 3, 2019.
82. Salzman T, ‘Rape camps as a means of ethnic cleansing: religious, cultural, and ethical responses to rape victims in the former Yugoslavia’, 20 *Human Rights Quarterly* 2, 1998.
83. Sanin F and Franco F, ‘Organising women for combat: the experience of FARC in the Colombian war’, *Journal of Agrarian Change,* 2017.

84. Tallgren I, 'The sensibility and sense of international criminal law', 13 *European Journal of International Law*, 2002.
85. Tanner J, 'Eugenics before 1945', 10 *Journal of Modern European History* 4, 2012.
86. Viseur-Sellers P, *The prosecution of sexual violence in conflict: The importance of human rights as a means of interpretation*, Women's Human Rights and Gender Unit, 2007.
87. Wald P, 'The institute for global legal studies inaugural colloquium: The UN and the protection of human rights: The international criminal tribunal for the Former Yugoslavia comes of age: Some observations on day-to-day dilemmas of an international court, 5 *Washington University Journal of Law and Policy* 119, 2001.
88. Wippan D, 'Atrocities, deterrence and limits of international criminal justice', *Fordham International Law Journal*, 1999.
89. Yarnold B, 'Doctrinal basis for the international criminalization process', 8 *Temple International and Comparative Law Journal*, 1994.

Conference Papers, Reports, Press Releases and Newspaper Articles.

90. Bensouda F, 'The prosecution of sexual and gender-based crimes by international courts', *Speech given at the international conference organised by His Excellency, Mr Sidiki Kaba, President of the Assembly of States Parties to commemorate the Day of International Criminal Justice*, Dakar, Senegal, 2016.
91. 'Escape from hell: Torture and sexual slavery in Islamic state captivity in Iraq', Amnesty International Report, 2014, 7 at -< https://www.amnesty.org/download/Documents/MDE140212014ENGLISH.pdf>-
92. 'Nadia Murad- From rape survivor in Iraq to Nobel peace prize', BBC News, 5 October 2018 at -< https://www.bbc.com/news/world-europe-45759669>
93. "Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo", 19 January 1946, TIAS No. 1589, 4 Bevans 20.
94. "They came to destroy: ISIS crimes against the Yazidis", Human Rights Council, A/HRC/32/CRP.2, 15 June 2016 Report.
95. Al-Dayel N and Mumford A, 'ISIS and their use of slavery', *International Centre for Counter-Terrorism-The Hague*, 17 January 2020.
96. Askin K, 'Prosecutions and jurisprudence-What have we achieved?', International Gender Justice Dialogue, Conference Session II, Mexico, April 2010, 9.

97. Callimachi R, 'To maintain supply of sex slaves, ISIS pushes birth control', New York Times, 12 March 2016, at -< https://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html>
98. Callimachi R, *ISIS Enshrines a Theology of Rape,* New York Times, 13 August 2015 at-< http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?_r=0>-
99. Cetorelli V and Ashraph S, 'A demographic documentary of ISIS's attack on the Yazidi village of Kocho', LSE Middle East Centre Reports, June 2019.
100. Chapter 6, Sexual Violence, World Report on violence and Health, *World Health Organisation,* at - https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf
101. 2008 UNHCR Handbook for the Protection of Women and Girls. Geneva, *UNHCR.*
102. Corey-Boulet R, 'In Kenya, Forced Male Circumcision and a Struggle for Justice', The Atlantic, 1 August 2011 at - https://www.theatlantic.com/international/archive/2011/08/in-kenya-forced-male-circumcision-and-a-struggle-for-justice/242757/>-
103. David P, 'Colombian guerrilla movement FARC denies alleged forced abortion', Latin Post, 4 January 2016, at - <https://www.latinpost.com/articles/106021/20160104/colombian-guerrilla-movement-farc-denies-alleged-forced-abortion.htm>
104. Guest R, 'Nadia Murad's fight to bring Islamic State to justice', The Economist, 19 January 2017 at -< https://www.economist.com/1843/2017/01/19/nadia-murads-fight-to-bring-islamic-state-to-justice>
105. Inder B, Executive Director, Women's Initiatives for Gender Justice in 'Kenya: Plea to ICC over forced male circumcision', IRIN News, 25 April 2011 at - < https://www.thenewhumanitarian.org/report/92564/kenya-plea-icc-over-forced-male-circumcision>-
106. Press Release, Amnesty International, *Women's Lives and Bodies- Unrecognized Casualties of War,* 8 December 2004.

107. Press Release, *Fight Against Sexual Violence in Conflict Reaches "New Juncture", Security Council Told*, 15 April 2015, -< https://www.un.org/press/en/2015/sc11862.doc.htm>-

108. Taha Murad N, trafficking survivor in her address to the UN Security Council, 18 December 2015, http://www.webtv.un.org/watch/nadia-murad-basee-taha-unodc-goodwill-ambassador-on-trafficking-in-persons-in-conflict-situations-security-council-7847th-meeting/5255419222001

109. Taha Murad N, trafficking survivor in her address to the UN Security Council, 18 December 2015, http://www.webtv.un.org/watch/nadia-murad-basee-taha-unodc-goodwill-ambassador-on-trafficking-in-persons-in-conflict-situations-security-council-7847th-meeting/5255419222001

110. UN Secretary-General, Secretary-General Appoints Karim Asad Ahmad Khan of United Kingdom to Head Team Investigating Islamic State Actions in Iraq, SG/A/1806- BIO/5091 (31 May 2018).

111. Zoonen D and Wirya K, 'Yazidism and its community in Iraq: The Yazidis: Perceptions of reconciliation and conflict', *Middle East Research Institute*, 2017.

Other Internet Sources

112. De Vos D, 'Colombia's Constitutional Court issues landmark decision recognising victims of reproductive violence in conflict', European University Institute, 11 January 2020 at -< https://me.eui.eu/dieneke-de-vos/blog/colombias-constitutional-court-issues-landmark-decision-recognising-victims-of-reproductive-violence-in-conflict/>

113. *Encyclopaedia Britannica*, "FARC" at -< https://www.britannica.com/topic/FARC>-

114. International Criminal Court, About the Court, -<http://www.icc-cpi.int/about.html>

Other Personal Communication

115. Electronic communication with Güley Bor, Former Manager of the Yazidi Genocide Documentation Project of Yazda in Duhok, Kurdistan Region of Iraq, on 22 October 2020.