

# A Feminist Critique of Approaches to International Criminal Justice in the Age of Identity Politics

A Case Study of Conflict-Related Sexual Violence  
Prosecutions Before the International Criminal Tribunal for  
the Former Yugoslavia

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## A. The 'Problem' of Gender in CRSV Prosecutions Before the ICTY

Feminists have struggled for decades to make the gendered operation and effects of war visible in international law. They have also long struggled against a highly patriarchal international legal system.<sup>1</sup> It is unsurprising, then, that the problem of 'gender' has also emerged in the context of prosecutions of conflict-related sexual violence (CRSV) as international crimes. This chapter undertakes a feminist analysis of the problem of 'gender' in CRSV prosecutions before the International Criminal Tribunal for the former Yugoslavia (ICTY).

In this analysis, we use 'gender' as an analytic category to capture the operation of hierarchical power relations between men and women. We understand this operation of hierarchical power as a 'gendering process' of 'masculinization' and 'feminization', which privileges and values the masculine over the

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<sup>1</sup> Hilary Charlesworth, Christine Chinkin, and Shelly Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613 (hereafter Charlesworth, Chinkin, and Wright, 'Feminist Approaches').

feminine.<sup>2</sup> As such, ‘gender’ is a system of cultural and economic structures and social processes. Following this approach, we use ‘gender’ as an analytical category to capture the processes of ‘gendering’ persons, institutions, and legal norms in international criminal justice.

We analyse the ICTY as a case study of the gendered framework of international criminal justice. Our analysis examines the ‘gendering process’ within CRSV prosecutions before the ICTY. We define CRSV prosecutions as those in which CRSV allegations are expressly charged, or are the factual basis underlying charges.<sup>3</sup> Drawing on international jurisprudence, we define ‘CRSV’ as sexual acts that were committed in the coercive circumstances of the conflicts in the former Yugoslavia.<sup>4</sup>

Examining CRSV prosecutions by the ICTY offers a unique picture of the construction of ‘gender’ in international criminal justice for three key reasons. First, the ICTY prosecutions constitute the most significant body of CRSV jurisprudence.<sup>5</sup> Second, these prosecutions were explicitly linked to accountability for crimes against women and wider international feminist efforts to establish gender equality and peace.<sup>6</sup> Third, following feminist work in this area, we understand CRSV as a gender-based crime that is, crimes in which gender is an integral component.<sup>7</sup> For the purposes of this analysis, we follow the United Nations (UN) Committee for the Elimination of All Forms of Discrimination against Women’s (CEDAW) General Recommendations 19 and 35, and characterize gender-based crimes as those ‘directed against a woman because she

<sup>2</sup> See Cynthia Enloe, *Globalization and Militarism: Feminists Make the Link* (2nd edn, Rowman and Littlefield 2016) 1–15.

<sup>3</sup> This definition of CRSV was developed as part of the Gender of Justice research project. For further discussion see Jasenka Ferizović and Gorana Mlinarević, ‘Applying International Experiences in National Prosecutions of Conflict-related Sexual Violence’ (2020) 18 *Journal of International Criminal Justice* 325; Kirsten Campbell, ‘Producing Knowledge in the Field of Sexual Violence in Armed Conflict Research: Objects, Methods, Politics, and Gender Justice Methodology’ (2018) 25 *Social Politics* 469 (hereafter Campbell, ‘Producing Knowledge’).

<sup>4</sup> *Prosecutor v Jean Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) [688].

<sup>5</sup> While the International Criminal Tribunal for Rwanda (ICTR) has provided leading decisions, such as *Akayesu*, overall its record on CRSV prosecutions has been highly criticized: Hilmi Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (OUP 2014). See also OTP, ‘Best Practices Manual for the Prosecution of Sexual Violence in Post-Conflict Regions’ (ICTR 2014) <<http://unictr.unmict.org/en/documents/best-practices-manuals-and-conference-reports>> accessed 1 February 2021. While of clear significance, the International Criminal Court (ICC) is still relatively new and does not yet provide the depth of cases or established court practice to serve as the basis for analysis of the wider field of international criminal justice.

<sup>6</sup> Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law* (Springer 2001) 148.

<sup>7</sup> This ‘gender’ component distinguishes CRSV from other crimes, such as murder, which may have gendered effects (such as more men are murdered) or reflect hierarchical gender norms (such as the privileging of murder as harm in the IHL system, reflecting the greater protection to male combatants). In these crimes, unlike in CRSV, gender is not integral to the shaping and understanding of the criminal act itself.

is a woman or that affect[s] women disproportionately.<sup>8</sup> These crimes (1) use gendered means and methods, (2) have gendered causes and impacts, and (3) reflect and produce gendered inequalities and hierarchies in social, political, and economic structures.<sup>9</sup> Gender-based crimes express the gendered hierarchies that privilege masculinities over femininities, and reflect ‘structural disadvantages that exist in all societies for women.’<sup>10</sup> For this reason, we emphasize the importance of understanding how ‘power relations and structures’ produce gender-based crimes.<sup>11</sup> CRSV crimes committed in the former Yugoslavia clearly show how CRSV is a gender-based crime. This is because CRSV disproportionately affected women or was directed against women as women in the conflict in the former Yugoslavia.<sup>12</sup> It is also because CRSV operated as a process of ‘gendering’, in which women (and some men) were targeted to produce their subordinate position in the hierarchical (social, political, and economic) structures of the war.

We analyse these prosecutions to capture how cases, positive law, and institutional practices construct CRSV as international crimes. We use this feminist socio-legal methodology to examine how ICTY CRSV prosecutions construct ‘gender’. This methodology enables an understanding of how norms, practices, and jurisprudence work together to shape CRSV as an international crime.<sup>13</sup> Rather than focusing on the individual impact of judicial decisions, prosecutorial discretion, or institutional policies, our methodology takes a wholistic approach that considers the outcome of these combined elements in the formation of CRSV as an international crime before the ICTY. This feminist framework also captures how this body of CRSV cases represent women, conflict, and society in particular ways.<sup>14</sup> Capturing this representation is important

<sup>8</sup> CEDAW, ‘General Recommendation 19: Violence Against Women’ (1992) UN Doc A/47/38 (hereafter CEDAW, ‘GR19’).

<sup>9</sup> The recommendations characterize discrimination against women as including gender-based violence: *ibid*; CEDAW, ‘General Recommendation 35 on gender-based violence against women, updating general recommendation 19’ (26 July 2017) UN Doc CEDAW/C/GC/35.

<sup>10</sup> Judith Gardam, ‘Feminist Interventions Into International Law: A Generation On’ (2019) 40 *Adelaide Law Review* 219, 223.

<sup>11</sup> Dubravka Žarkov, ‘Intersectionality: A Critical Intervention’ in Gaby Zipfel, Kirsten Campbell, and Regina Muhlhauser (eds), *In Plain Sight: Sexual Violence in Armed Conflict* (Zubaan Books 2019) 223, 224 (hereafter Žarkov, ‘Intersectionality’).

<sup>12</sup> Vesna Kesic, ‘A Response to Catherine MacKinnon’s Article ‘Turning Rape Into Pornography: Postmodern Genocide’ 5(2) (1994) *Hastings Women’s Law Journal* 267.

<sup>13</sup> For further discussion of why this integrated approach is needed, see Kirsten Campbell, ‘The Gender of Justice’ (2007) 1(3) *International Journal of Transitional Justice* 411 (hereafter Campbell, ‘The Gender of Justice’).

<sup>14</sup> Doris Buss, ‘Performing Legal Order’ (2011) 11 *International Criminal Law Review* 409.

because these prosecutions have a social impact upon victims and their societies.<sup>15</sup>

Our analysis describes the formation of CRSV in the ICTY jurisprudence within the paradigm of contemporary international criminal justice. We argue that this paradigm has two key conceptual components: the ‘individual’ and ‘identity’. These components are most visible in the ICTY’s concepts of individual criminal responsibility and identity-based conflict. We trace how this paradigm frames the gendered understanding of conflict, criminality, and victimization in the CRSV jurisprudence. We argue that the shaping of CRSV jurisprudence through this paradigm blocked the development of the legal conception of CRSV as a gender-based crime.

## B. The ICTY and the Shaping of Prosecutions of Sexual Violence as International Crimes

The ICTY was created to prosecute serious violations of international humanitarian law (IHL) committed during the conflicts in the former Socialist Federal Republic of Yugoslavia (SFRY) in the 1990s, including the rape of women.<sup>16</sup> Rape as a crime against humanity was the only enumerated offence of sexual violence in the ICTY Statute.<sup>17</sup> Nevertheless, rape and other forms of sexual violence were also prosecuted as other serious violations of IHL.<sup>18</sup> According to the official figures of the ICTY, sexual violence was charged against more than seventy-eight accused, with thirty-two of those accused being convicted on the basis of individual or superior responsibility.<sup>19</sup> This indicates both a significant increase in CRSV prosecutions at the international level, and the increasing recognition of the importance of addressing these crimes.<sup>20</sup>

The ICTY established that sexual violence can be successfully prosecuted as war crimes, crimes against humanity, and genocide. Through the successful

<sup>15</sup> For discussion of these social functions of ICTY judgments, see Dubravka Žarkov and Marlies Glasius (eds), *Narratives of Justice In and Out of the Courtroom: Former Yugoslavia and Beyond* (Springer 2014).

<sup>16</sup> UNSC Resolution 827 (25 May 1993) UN Doc S/RES/827.

<sup>17</sup> UNSC, Statute of the International Criminal Tribunal for the former Yugoslavia (hereafter ICTYSt) (established 25 May 1993) art 5(g).

<sup>18</sup> See Kate Vigneswaran, ‘Charges and Outcomes in ICTY Cases Involving Sexual Violence’ in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Violence at the ICTY* (OUP 2016) 429.

<sup>19</sup> ICTY, ‘In Numbers’ (ICTY, September 2016) <[www.icty.org/en/features/crimes-sexual-violence/in-numbers](http://www.icty.org/en/features/crimes-sexual-violence/in-numbers)> accessed 28 April 2020.

<sup>20</sup> For the prior neglect of sexual violence prosecutions, see Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Fawcett Columbine 1975).

prosecution of these crimes, the ICTY established the legal basis of sexual violence as a category of international crimes, and showed that the commission of these crimes was an integral part of illegal conduct in the conflict in the former SFRY. In doing so, the ICTY, together with the International Criminal Tribunal for Rwanda (ICTR), shifted conflict-related sexual violence from being an ‘invisible crime’ to being seen as prosecutable as an international crime as such.<sup>21</sup>

The record of the ICTY shows the importance of focusing upon sexual violence prosecutions. This focus was necessary because of the difficulty of establishing accountability for these crimes within rigid and patriarchal institutions. The Office of the Prosecutor (OTP) described ‘operationalising this objective’ of prosecuting sexual violence crimes as ‘one of the most significant tests . . . in the discharge of its mandate.’<sup>22</sup> As a result of this early focus on CRSV, the ICTY led significant jurisprudential and procedural developments in this area.<sup>23</sup>

However, this record also shows the limitations of focusing on CRSV prosecutions when these are undertaken without a wider engagement with the concept of gender and the operation of gender in legal norms and practices as a whole. This focus had the effect of concentrating time and resources on these crimes, while neglecting the gender component of CRSV, as well as other gender-based crimes. The ICTY did not develop comprehensive or consistent written policies, strategies, or review processes for prosecuting CRSV or other gender-based crimes.<sup>24</sup> Initially the ICTY confronted particular challenges in developing a comprehensive approach because of its *ad hoc* nature. Nevertheless, the Tribunal did not adequately address CRSV as a gender-based crime in particular, or ‘gender’ in general, over the twenty-five years of its operation. Furthermore, the ICTY did not sustain its early focus on building accountability for CRSV, which continued to be a struggle throughout the life of the Tribunal.<sup>25</sup>

As a result of these issues, the ICTY did not develop the legal concept of CRSV as a gender-based crime. Instead, there was a ‘mainstreaming of sexual

<sup>21</sup> Rhonda Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’ (2000) 46 McGill Law Journal 217 (hereafter Copelon, ‘Gender Crimes as War Crimes’).

<sup>22</sup> Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Violence at the ICTY* (OUP 2016) 2 (hereafter Brammertz and Jarvis, *Prosecuting Conflict-Related Violence*).

<sup>23</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law* (Manchester University Press 2000) 308–9 (hereafter Charlesworth and Chinkin, *Boundaries*).

<sup>24</sup> See Michelle Jarvis and Najwa Nabti, ‘Policies and Institutional Strategies for Successful Sexual Violence Prosecutions’ in Brammertz and Jarvis, *Prosecuting Conflict-Related Violence* (n 22) 73, 80. By contrast, the OTP of the ICC adopted a public Policy Paper on Sexual and Gender-Based Crimes in 2014: ICC OTP ‘Policy Paper on Sexual and Gender-Based Crimes’ (ICC 2014).

<sup>25</sup> See Brammertz and Jarvis, *Prosecuting Conflict-Related Violence* (n 22) 97–98, 103–4.

violence crimes' in prosecutions,<sup>26</sup> which situated sexual violence in broader categories of substantive international crimes.<sup>27</sup> In the next two sections, we explore how the emerging paradigm of contemporary international criminal justice shaped the development of these substantive international crimes, and prevented the development of a feminist approach to CRSV as a gender-based crime.

### C. The Concept of the 'Individual' in the International Criminal Justice Paradigm

The ICTY Statute only provided for individual criminal responsibility.<sup>28</sup> This was the result of the explicit decision by the UN that membership in criminal associations or organizations should not give rise to criminal responsibility under the ICTY Statute.<sup>29</sup> This was in contrast to the approach taken at the Nuremberg war crimes trials of Nazi leadership in 1945, which treated the SS, Gestapo, and other groups as criminal organizations, as well as providing for individual criminal responsibility.<sup>30</sup> However, at the time of establishment of the ICTY, the UN made an explicit decision that natural persons who carried out the criminal acts set out in the ICTY Statute were to be subject to the jurisdiction of the Tribunal irrespective of membership in groups. As a consequence, the concept of the 'individual' underpins the model of criminal liability at the ICTY.

Because of this doctrinal focus on individual responsibility, and rejection of any notion of organizational or systemic criminal responsibility, the ICTY confronted a crucial problem concerning its prosecutions of mass atrocities. On the one hand, it focused on the individual, to the exclusion of the systems, structures, and collectivities that enabled mass atrocities to occur. On the other hand, it needed to account for the collective nature of these crimes.

As a result of this problem, the ICTY addressed what it called 'collective criminality' through the doctrine of joint criminal enterprise (JCE) from the

<sup>26</sup> Copelon, 'Gender Crimes as War Crimes' (n 21) 229.

<sup>27</sup> Michelle Jarvis and Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases' in Brammertz and Jarvis, *Prosecuting Conflict-Related Violence* (n 22) 33, 58.

<sup>28</sup> *ibid.* See also ICTYSt (n 17) art 7.

<sup>29</sup> UNSC, 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808' (3 May 1993) UN Doc S/25704 [51].

<sup>30</sup> See eg 'Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg', 14 November 1945–1 October 1946, vol I (1947) 255–73 <[www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf)> accessed 5 April 2021.

*Tadić* case onwards.<sup>31</sup> According to the Tribunal jurisprudence, JCE consists of: (1) a plurality of persons; (2) the existence of common plan, design, or purpose; and (3) participation of the accused in the common design of the crimes under the Statute.<sup>32</sup> Like all other forms of collective participation in international criminal law (ICL) (such as aiding or abetting), JCE is conceptualized as a form of individual liability for participation in group criminality.

JCE should be distinguished from ideas of organizational or ‘system criminality’ as developed in the post-World War II war crimes trials in Nuremberg, Germany. This is because JCE does not criminalize groups or organizations as such (organizational criminality),<sup>33</sup> nor the ‘whole pattern of criminality ... encompassing large-scale crimes perpetrated to advance the war effort, at the request of, or with the encouragement or toleration of government authorities’ (system criminality).<sup>34</sup> The concept of ‘system criminality’ refers to ‘collective entities [that] order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes.’<sup>35</sup> The idea of system criminality captures the structural and systemic nature of the crimes of the Nazi State.<sup>36</sup> In contrast, JCE does not address how collective criminal participation is part of an organized system of criminality, and so it does not address the structural nature of these crimes. Instead, its conceptualization focuses on the individual accused as a member of a plurality of persons, rather than considering how that group of persons formed systems of criminality in waging war.<sup>37</sup>

Without addressing system criminality, it was neither possible to adequately address the patriarchal nature of the conflict, criminality, and victimization, nor to properly prosecute gender-based crimes. In the case of CRSV

<sup>31</sup> *Prosecutor v Dusko Tadić* (Appeal Judgment) IT-94-1-A (15 July 1999) [195] (hereafter *Tadić*). The judgment draws on World War II war crimes jurisprudence to set out three forms of JCE: *ibid* [195] ff. However, it does not consider that certain groups—such as the SS, Gestapo, and the Corps of the Political Leaders of the Nazi Party—were themselves recognized as criminal organizations: *ibid*.

<sup>32</sup> *Tadić* (n 31) [227].

<sup>33</sup> *Prosecutor v Milutinović et al* (Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003) [25].

<sup>34</sup> *Prosecutor v Dusko Tadić* (Judgment in Sentencing Appeals) IT-94-1-A and IT-94-1-Abis (26 January 2000) [14]. While the idea of a ‘system’ appears in JCE II, where it is understood as ‘an organised system of ill treatment’, it still focuses upon the participation in the organized system, rather than criminalizing the organized system as such: *Tadić* (n 31) [202]–[203].

<sup>35</sup> Andre Nollkaemper, ‘Systemic Effects of International Responsibility for International Crimes’ (2010) 8(1) *Santa Clara Journal of International Law* 313, 316.

<sup>36</sup> Andre Nollkaemper, ‘Introduction’ in Andre Nollkaemper and Hermen Van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 1, 5. These structures and systems include the judiciary, doctors, industrialists and others prosecuted under Council Control Law No 10.

<sup>37</sup> Our concern with JCE here is to show that it provides a limited understanding of organizational and system criminality because of its focus on individual criminal responsibility, rather than providing a critique of JCE as such.



prosecutions before the ICTY, we can see that the individualized conceptualization of criminal responsibility hides the gender ‘dimension’ of crimes by obscuring (1) the gendered patterns and effects of CRSV and (2) the gendered structures that create these crimes. The first problem is that the ICTY’s conceptualization of individual responsibility disconnects individual acts of CRSV from the wider gendered patterns and effects of CRSV that occurred in the conflict, as can be seen in the *Karadžić* and *Mladić* judgments.<sup>38</sup> These cases focus on rape as persecution against a given ‘ethnic’ group in detention settings and the ‘take-over’ of particular municipalities. They focus on individual acts of sexual violence, which are only characterized as gender-neutral acts of persecution and do not show other gendered patterns of CRSV, such as gendered patterns of torture or sexual enslavement. The ICTY had established in earlier cases that these different forms of sexual violence were part of the criminal conduct for which *Karadžić* and *Mladić* were charged. Consequently, both the *Karadžić* and *Mladić* cases could have adopted a more accurate legal characterization of these crimes that acknowledged their gendered nature, rather than charging them solely as persecution as a crime against humanity. For example, *Kunarac* and *Kvočka* establish and make visible that sexual violence occurred under the conditions of enslavement and in the form of torture.<sup>39</sup> However, the patterns of sexual violence of torture and enslavement established in these cases disappear in *Karadžić*, and, instead, are understood as being solely part of the persecutory conduct, with the focus on the ethnic rather than the gender dimension of these crimes. This approach hides the different forms and crimes of sexual violence, and the connections between them that were part of the organizational and systemic criminality in the conflict.

Taking a broader perspective on patterns of sexual violence across the conflict enables a holistic gender analysis of these crimes. It shows how gender shapes patterns of victimization and perpetration, both in terms of who become victims and perpetrators and what crimes are committed. It also shows that these patterns of victimization and perpetration are connected to the wider gendered power relations of war, in that it reveals that the majority of perpetrators of CRSV were men participating in patriarchal masculinized (valued) military, police, and political groups, and the majority of the victims

<sup>38</sup> *Prosecutor v Radovan Karadžić* (Judgment) IT-95-5/18-T (24 March 2016) (hereafter *Karadžić*); *Prosecutor v Ratko Mladić* (Judgment) IT-09-92-T (22 November 2017).

<sup>39</sup> *Prosecutor v Dragoljub Kunarac, Radimir Kovač and Zoran Vuković* (Trial Judgment) IT-96-23-T&IT-96-23/1-T (22 February 2001) (hereafter *Kunarac et al*, Trial Judgment); *Prosecutor v Miroslav Kvočka, Dragoljub Prcač, Milojica Kos, Mlado Radić & Zoran Žigić* (Trial Judgment) IT-98-30/1 (2 November 2001) (hereafter *Kvočka et al*, Trial Judgment).



were women who were unarmed, feminized (devalued) civilians. Understood as such, patterns of sexual violence are an important aspect of understanding how CRSV is a gender-based crime, and how those crimes are connected to gender power relations.

The second problem of this model of individual responsibility, with its related idea of individualised cases, is that it hides the wider structures that enable gender-based crimes. For example, the *Kunarac* case established the existence of a system of enslavement and the individual responsibility of each perpetrator for their participation in sexual violence.<sup>40</sup> However, it did not establish liability for (sexual) enslavement as part of the wider structures of the war. It connected enslavement of women and CRSV against them to the attack on the civilian population committed in the town of Foča where the crimes prosecuted in the *Kunarac* case took place. However, it did not connect enslavement and sexual violence in Foča to other cases of sexual enslavement and other forms of sexual violence in other parts of Bosnia or even other parts of the former Yugoslavia that comprised attacks on civilian populations, and which were committed as part of the wider conflict. Consequently, it did not characterize enslavement and CRSV committed under circumstances of enslavement as a part of wider systems of gender-based crimes that were an integral part of the whole war. In the later leadership cases of *Karadžić* and *Mladić*, the criminal conduct in Foča that had been previously charged as enslavement in *Kunarac* appears as individual cases of rape charged under the umbrella charge of persecution, but not as enslavement.<sup>41</sup> Despite *Karadžić* and *Mladić* being charged as leaders of the criminal group that included the accused in the *Kunarac* case, these rapes were not characterized as being part of a gendered system of enslavement involving political, military, and administrative structures. Rather, they were disconnected from other crimes of enslavement, and the perpetrators were not connected to other individuals and groups in organizational and systemic structures across the conflict as a whole. In the later leadership cases of *Karadžić* and *Mladić*, which should capture the overall criminality of the war, because of this approach we only see that sexual violence is committed against all persons ('men and women, boys and girls').<sup>42</sup> We do not see that it has specific gendered patterns, such as the sexual enslavement of women (and not men). Nor do we see that these patterns are produced by

<sup>40</sup> *Kunarac et al*, Trial Judgment (n 39).

<sup>41</sup> *Prosecutor v Radovan Karadžić* (Third Amended Indictment) IT-95-5/18-PT (19 October 2009) [60(c)] (hereafter, *Karadžić*, Third Amended Indictment); *Prosecutor v Ratko Mladić* (Fourth Amended Indictment) IT-09-92-PT (16 December 2011) [59(c)].

<sup>42</sup> *Karadžić* (n 38) [2506].

gendered political, military, and administrative structures, which were dominated by militarized masculinities and patriarchal values. In this way, this model of individual criminal responsibility hides those structures that enable gender-based crimes.

The focus on individual criminal responsibility thereby further deepened the challenge of situating rape in collective participation, and in the structured and systemic organization of collective violence in the war. Patricia Viseur Sellers points out that the development of modes of liability in CRSV cases can capture ‘manifestations of collective criminality’, insofar as they describe group participation in the criminal conduct.<sup>43</sup> However, it can only capture those manifestations (torture in the *Tadić* case, the detention camp in the *Mucić* case, and so on). It does not capture how that torture or that detention camp are part of military, political, and economic systems that are an integral part of the criminal conduct of the conflict. Nor does it capture how these systems create the entities or organizations (such as armed groups, political parties, or war profiteers) that engaged in this criminal conduct. For example, in the region of Prijedor, the local police force was subject to ‘ethnic cleansing’ in which all non-Serbs were removed from their positions. Subsequently, in this way ‘ethnically cleansed’ police played an integral part in establishing and running the detention camps in the area, which were key sites of sexual violence.<sup>44</sup> The ‘ethnically cleansed’ local police force also participated in rape and enslavement in Foča.<sup>45</sup> Both local forces were part of the same police organization, which was under the command of the Bosnian Serb Ministry of the Interior. As a result, it does not show how ‘ethnically cleansed’ police enabled and participated in rapes, and that this organization created a system of sexual violence as part of system criminality. The focus on individual criminal responsibility thereby obscures how rape as a gender-based crime is enabled by these criminal military, political, and economic systems and, as such, is part of the criminal conduct of the conflict itself.

Furthermore, reducing rape and enslavement to individual criminal responsibility still conceptualizes sexual violence as opportunistic or incidental. It is seen as individual perpetrators taking advantage of the opportunities in a particular place (such as a municipality), which are provided by the context of conflict, an attack on a civilian population, or the intention to destroy a protected group. It is not seen as a system of rape and enslavement of civilian

<sup>43</sup> Patricia Viseur Sellers, ‘Individual(s) Liability for Collective Sexual Violence’ in Karen Knop (ed), *Gender and Human Rights* (OUP 2004) 153, 176.

<sup>44</sup> *Kvočka et al*, Trial Judgment (n 39).

<sup>45</sup> *Kunarac et al*, Trial Judgment (n 39).

women by militarized men that exists across the conflict as a whole (that is, across municipalities), and that this system is created by the gendered entities or organizations, such as military forces or local police organizations, that were an integral part of the criminality of the war. It is only by addressing the structural and systemic nature of criminality that these patriarchal elements of the war become visible.

Finally, the focus on the individual makes it more difficult to address the structural and systemic nature of the gender dimensions, not only of sexual violence, but also of the crimes themselves. Understanding these gender dimensions is crucial for understanding the structural nature of these crimes as such.<sup>46</sup> For example, the *Krstić* case is commonly characterized as recognizing the ‘gender dimension’ of genocide because it addressed the harm of genocide to women.<sup>47</sup> However, it does not address CRSV in relation to the charges of genocide at Srebrenica, but only in relation to persecution as a crime against humanity, where it is described as ‘incidental’ to the criminal enterprise at Potočari.<sup>48</sup> Consequently, the *Krstić* judgment does not offer a gender analysis of the systemic criminality of the Srebrenica genocide. Rather, the only ‘gender dimension’ provided in the *Krstić* judgment is an orientalist and unfounded description of the ‘traditionally patriarchal’ Muslim community in Srebrenica.<sup>49</sup> This is because the *Krstić* judgment treats ‘ethnicity’ as a pre-existing group identity, such as ‘Serb’ and ‘Muslim’, rather than seeing how ‘ethnic identity’ was constructed as a category of group belonging in war-time violence.<sup>50</sup> It does not examine how such ethno-nationalist ideas of ‘ethnic identity’ are integral to the organizational and systemic criminality of the crimes committed in Srebrenica.<sup>51</sup> As a result, this approach cannot see how gender operates within those structures, and cannot develop a gender analysis of criminal organizations and systems. If, instead, the ascription of legal responsibility included the organizational and systemic context that enable international crimes, it would

<sup>46</sup> Mark A Drumbly, ‘Accountability for System Criminality’ (2010) 8(1) *Santa Clara Journal of International Law* 373.

<sup>47</sup> eg Brammertz and Jarvis, *Prosecuting Conflict-Related Violence* (n 22) 14–15.

<sup>48</sup> *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) [617]: as were other acts of murder and mistreatment. Potočari was the location of the UN compound on the outskirts of Srebrenica, where Bosnian Muslims fled after the Bosnian Serb forces entered Srebrenica: *ibid* [37].

<sup>49</sup> *ibid* [595]. See also Doris Buss, ‘Knowing Women: Translating Patriarchy in International Criminal Law’ (2014) 23(1) *Social & Legal Studies* 73 (hereafter Buss, ‘Knowing Women’).

<sup>50</sup> Dubravka Žarkov, ‘Ontologies of International Humanitarian and Criminal Law: “Locals” and “Internationals” in Discourses and Practices of Justice’ in Dubravka Žarkov and Marlies Glasius (eds), *Narratives of Justice In and Out of the Courtroom* (Springer 2014) 3, 8.

<sup>51</sup> In the context of the ICTY, the ideology of ethno-nationalism refers to the promotion of one ethnic group over all other ethnic groups. See Anthony Smith, *Ethno-Symbolism and Nationalism* (Routledge 2009) 108 (hereafter Smith, *Ethno-Symbolism*).

then be possible to identify the gendered nature of crimes in terms of structures of collective criminal participation.

#### D. The Concept of ‘Identity’ in the International Criminal Justice Paradigm of CRSV

This individualized model of criminal responsibility holds the individual responsible only for his or her actions. However, the ICTY still needed to account for collective criminality to prosecute the crimes before it. To account for the collective dimensions of mass atrocity, it used ideas of ‘identity’ to stand in for organizational or systemic criminality and the social and political structures that enable this collective criminality. These ideas understand ‘identity’ as the fixed and essential characteristics of individuals, which derive from group and cultural belonging, and explain war as the conflict between identities. In this approach, these ideas of identity become the dominant explanatory framing of criminal culpability and victimization.

In the ICTY CRSV jurisprudence, we see the construction of victims and perpetrators as belonging to pre-existing and distinct identities that are in conflict. For example, in *Karadžić* the ‘overarching’ JCE of persecution in the municipalities results in the characterization of ‘Bosnian Serbs’ as the perpetrator ethnic group and ‘Bosnian Muslim and Bosnian Croat civilian populations’ as the victim ethnic group.<sup>52</sup> In this framing, the siege of Sarajevo cannot be conceptualized as part of the ‘overarching’ persecution because it cannot be framed in these ethnic terms.<sup>53</sup> During the siege, the population of Sarajevo was targeted because they lived in Sarajevo. As such, it was an attack on the civilian population that resided in Sarajevo, and not on a particular ethnic group, which would be characterized as persecution on ethnic grounds. However, because of this approach, women do not become visible as victims to the ICTY unless they are recognized as belonging to a pre-existing and distinct ethnic identity that is different from that of the perpetrator group. As a result, the ICTY sees women through the identity that the perpetrator assigns to them, regardless of how the women saw themselves or which dimension of identity they privileged before and at the time of the crime.

<sup>52</sup> Note that for the genocide charges, the protected groups were characterized as the ‘Bosnian Muslims and Bosnian Croats’ because the protected group in genocide cannot be defined negatively, that is, as ‘non-Serb’: *Karadžić* (n 38) [2573].

<sup>53</sup> eg the separate treatment of the area of Sarajevo as a municipality as distinct from the Sarajevo siege component: *Karadžić*, Third Amended Indictment (n 41) [48], [76ff], [88].

Because the ICTY understood the conflict in terms of warring ethnic identities, it privileges ethnicity as the primary dimension of identity. This conceptualization of identity assumes the prior existence of the 'ethnic' group as such, together with its masculine and feminine norms. However, this approach defines the targeted ethnic group by the perpetrator, and not by the victim. Such an approach reproduces the perpetrator's 'gendering' of sexual violence victims, and their hierarchical 'feminization' of these victims.<sup>54</sup> Consequently, the ICTY jurisprudence understands CRSV as directed towards the identity of the group, and reduces that identity to, and characterizes it by, one dimension: ethnicity.<sup>55</sup> It ignores other relevant axes of social differentiation and subordination, such as gender, class, sexuality, and disability, that structure victimization,<sup>56</sup> or frames them within dominant ethnic discourses.

In the context of the ICTY CRSV prosecutions, these ideas of ethnic identity are constructed within the hierarchy of international crimes, which traditionally understands genocide as the 'crime of crimes.'<sup>57</sup> In this hierarchy, the protection of the ethnic (national, racial, religious) group is one of the highest interests of international criminal justice. In the context of the ICTY, the hierarchy of protected interests can be seen in the privileging of harm to the ethnographic group. This is evident, for example, in *Karadžić*, where CRSV was charged in the first count of genocide in the municipalities as serious bodily and mental harm to Bosnian Muslims and Bosnian Croats, as well as conditions of life calculated to bring about their destruction.<sup>58</sup> As a result, gendered harm became invisible. That rape is a condition of life calculated to bring about the destruction of women as a group is not able to be considered within this doctrinal and conceptual framing.

<sup>54</sup> Žarkov, 'Intersectionality' (n 11) 227.

<sup>55</sup> *Prosecutor v Radoslav Brđanin* (Judgment) IT-99-36-T (1 September 2004) [55] (hereafter *Brđanin*).

<sup>56</sup> Chiseche Salome Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (University of Pennsylvania Press 2013) 82 (hereafter Mibenge, *Sex and International Tribunals*).

<sup>57</sup> Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (CUP 2012) 47. Genocide consists of the intent to destroy a national, ethnical, racial, or religious group in whole or in part: Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 2. Although the ICTY jurisprudence established that there is no hierarchy of crimes under international law, it should be noted that genocide remains the only such crime for which there is positive duty to punish and prevent that is enforceable before the ICJ. Further, this hierarchy is evident in the conceptualization of the gravity of the core crimes in relation to sentencing: Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (CUP 2019) 470 (hereafter Cryer, Robinson, and Vasiliev, *An Introduction*). At a conceptual level, the patriarchal nature of this hierarchy is indicated by the omission of 'gender' as a protected group in genocide.

<sup>58</sup> *Karadžić* (n 38) [40].

The privileging of the protection of the ethno-national group can be also seen in the characterization of the *dolus specialis* of genocide as expressive of its conceptual status as ‘an exceptionally grave crime.’<sup>59</sup> Such a hierarchical privileging is also evident within crimes against humanity, which characterize persecution as being of higher gravity than other underlying acts of crimes against humanity because of the additional element of discrimination against racial, religious, and political groups.<sup>60</sup> For example, in *Kvočka*, the ICTY Trial Chamber characterized the protected group in terms of their ethnic identity, even though it recognized on the facts that the grounds of discrimination were political.<sup>61</sup> It also described sexual violence in ‘ethnic’ and not ‘gender’ terms. This was despite the fact that rape was charged as a distinct offence and, as such, had been appropriately situated in the context of the systematic attack on a civilian population.<sup>62</sup> This approach is also evident in the high number of CRSV charges characterized as underlying acts of persecution against ethnic groups.<sup>63</sup>

This problematic notion of identity can also be seen in the concept of discrimination in substantive international crimes. First, discrimination is not recognized as an element of all international crimes. Rather, it is a prohibited ground of torture as a war crime and as a crime against humanity, which includes discrimination on gender grounds.<sup>64</sup> It is also a discriminatory ground of persecution as a crime against humanity, which does not however include discrimination on gender grounds.<sup>65</sup> Second, where discrimination is recognized by the ICTY, it is understood through the prism of identity. Because of the ICTY’s focus on ethnicity, it understands discrimination through ideas of ethnic identity and ethnic belonging, rather than the power relations that construct that ‘identity.’<sup>66</sup> As a result, the ICTY’s one-dimensional understanding

<sup>59</sup> See *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) [553]. See generally Diane Amann, ‘Group Mentality, Expressivism, and Genocide’ (2002) 2(2) *International Criminal Law Review* 93; on the ICTY jurisprudence, see Michelle Jarvis and Alan Tieger, ‘Applying the Genocide Convention at the ICTY’ (2016) 14 *Journal of International Criminal Justice* 857.

<sup>60</sup> *Kvočka et al*, Trial Judgment (n 39) [187].

<sup>61</sup> *ibid* [195].

<sup>62</sup> See findings on cumulative convictions in *Kvočka et al* Trial Judgment (n 39) [232]–[234].

<sup>63</sup> Laurel Baig and others, ‘Contextualizing Sexual Violence: Selection of Crimes’ in Brammertz and Jarvis, *Prosecuting Conflict-Related Violence* (n 22) 205 (hereafter Baig and others, ‘Contextualizing Sexual Violence’).

<sup>64</sup> Under customary international law, the elements of torture as a war crime (when connected to armed conflict) or crimes against humanity (when committed as part of an attack on a civilian population) include the infliction of pain and suffering for the purposes of obtaining information or a confession, punishment, intimidation, or coercion or *for any reason based on discrimination of any kind*: Cryer, Robinson and Vasiliev, *An Introduction* (n 57) 280, 247 [emphasis added].

<sup>65</sup> The elements of persecution are the deprivation of fundamental rights on discriminatory grounds: *ibid* 253. Under the ICTY Statute, these grounds include political, racial, and religious but not gender: ICTYSt (n 17) art 5.

<sup>66</sup> On the production of identity by power, see Žarkov, ‘Intersectionality’ (n 11).

of the concept of discrimination does not capture its intersectional nature.<sup>67</sup> Regardless of how CRSV is charged, it is not understood as gender-based discrimination by the ICTY.<sup>68</sup> In *Mucić*, for example, in relation to the charge of rape as torture, the ICTY established the discriminatory ground of this crime and granted legal status as a protected person on the basis of the victim's ethnic identity. However, the Trial Chamber recognized as a matter of fact that she was victimized because of her gender identity.<sup>69</sup> This approach is patriarchal because it reduces women to their apparent membership and role in ethnic collectives, rather than recognizing them as rights-holders as such. Similarly, in *Kvočka*, the ICTY acknowledged that the sexual violence was committed on gender as well as ethnic identity grounds in its factual findings.<sup>70</sup> However, it also subsumed charges of rape in charges of persecution of non-Serbs, on the grounds that persecution contained an additional discriminatory element of ethnic discrimination that the offence of rape did not.<sup>71</sup> This resulted in rape not being legally characterized as such in the judgement.

Despite the acknowledgement of gender identity in *Kvočka*, the identity model of discrimination did not capture CRSV as a gender-based crime. The Trial Chamber found that 'rape and other forms of sexual violence were committed only against the non-Serb detainees in the camp and that they were committed solely against women, making the crimes discriminatory on multiple levels. Radić did not rape any of the male non-Serb detainees.'<sup>72</sup> This characterization of CRSV implies that if the accused raped both 'non-Serb' men and women, then these assaults would not be discriminatory on gender identity grounds. In these terms, rape becomes seen as an ethnic-based crime, and not a gender-based crime, with the corollary that rape must be committed against a specific protected ethnic group to be recognized as an international crime, as we discuss below. These cases show the problematic logic of discrimination understood through the 'identity' model. The concept of 'identity' is integral to the charging of rape as torture or as persecution as a crime against humanity because the elements of discrimination inherent to these crimes are

<sup>67</sup> This issue reflects long-standing feminist concerns about liberal models of national law to capture the intersectional nature of identity and discrimination, that is, that they are based in intersecting axes of oppression of race, class, and gender: Kimberlé Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti Discrimination Law' (1988) 101 *Harvard Law Review* 1331.

<sup>68</sup> See Doris Buss, 'Sexual Violence, Ethnicity, and the Limits of Intersectionality in International Criminal Law' in Emily Grabham and others (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge 2008) 105.

<sup>69</sup> *Prosecutor v Mucić et al* (Judgment) IT-96-21-T (16 November 1998) [265], [941].

<sup>70</sup> *Kvočka et al*, Trial Judgment (n 39) [560].

<sup>71</sup> *ibid* [187].

<sup>72</sup> *ibid* [560].



understood in terms of fixed and essential characteristics of persons, defined by their national, religious, or ethnic group belonging. Where the ICTY jurisprudence uses discrimination to characterize the prohibited grounds of conduct, it does so using these patriarchal identity categories.<sup>73</sup>

Furthermore, the concept of identity does not capture the structural dynamics of the conflict, and how the conflict itself constructs groups of victims and perpetrators. In the context of the ICTY's privileging of ethnic identity, the concept obscures the ideology of ethno-nationalism,<sup>74</sup> and its patriarchal nature (that is, how only certain women are recognized as victims and only certain men recognized as perpetrators). As a result, an important patriarchal dimension of the conflict as a whole is lost. This is because patriarchal structures are integral to the organizational and systemic criminality that produces and sustains CRSV in conflict. An accused is most often a man who seeks hegemonic status within the construction of militarized masculinity,<sup>75</sup> and often uses CRSV against women to establish himself within the hegemonic masculinity of the highly militarized group he identifies himself with.<sup>76</sup> However, this status is not seen by the ICTY as part of the patriarchal structures that enabled the mass atrocities in the wars in the former Yugoslavia.<sup>77</sup> This problem is evident in the *Kunarac* judgment, for example. The ICTY does not 'see' the connection between the 'Serb' perpetrators and their roles as police or soldiers, which were gendered as masculine (both in the former Yugoslavia and globally).<sup>78</sup> It also does not see the connection between those roles and the gendered structures of police forces and military forces (or in other cases, political or media organizations) that are part of the structures that enabled the perpetrators to commit gendered crimes.<sup>79</sup> Because the ICTY does not see these gendered connections, it cannot see how the patriarchal values of Yugoslav society became rearticulated through ethno-nationalist dynamics in the conflict.<sup>80</sup> As a result, it was not possible for the ICTY to develop an adequate gender analysis

<sup>73</sup> For explanation of ethnicity as a patriarchal category, see Nira Yuval-Davis, *Gender and Nation* (Sage 1997).

<sup>74</sup> Smith, *Ethno-Symbolism* (n 51) 108.

<sup>75</sup> On hegemonic masculinity, see Raewyn Connell and James Messerschmidt, 'Hegemonic Masculinity: Rethinking the Concept' (2005) 19 *Gender & Society* 829. On militarized masculinity, see Cynthia Cockburn, 'War and Security, Women and Gender' (2013) 21(3) *Gender and Development* 433.

<sup>76</sup> Cynthia Enloe, 'All the Men are in the Militias, All the Women are Victims: The Politics of Masculinity and Femininity in Nationalist Wars' in Lois Ann Lorentzen and Jennifer Turpin (eds), *Women and War Reader* (New York University Press 1998) 50.

<sup>77</sup> See Žarkov, 'Intersectionality' (n 11)

<sup>78</sup> See Joshua Goldstein, *Gender and War* (CUP 2001).

<sup>79</sup> On masculinities and war, see RW Connell, *The Men and the Boys* (Allen and Unwin 2000) Ch 12.

<sup>80</sup> In this regard, Yugoslav society was not dissimilar from other European societies and should not be viewed through orientalist characterizations of a 'traditional Muslim' society.

of how social structures and systems produced CRSV in conflict, nor did it attempt to do so. This key failure to address patriarchal systems and structures obscures CRSV as a gender-based crime. Moreover, it also obscures other gender-based harms, such as the disproportionate impact of particular means and methods of warfare upon women as members of the civilian population, and how they are part of the collective nature of criminality.

The logic of this concept of identity reduces 'gender' to imagined ideas of the gender identity within a constructed 'ethnic' group, when that idea of the group is at stake in the conflict itself. For example, the earlier direct perpetrator cases, such as *Kunarac*, characterize rape and sexual enslavement as 'ethnicity-based aggression of the Serbs against the Muslim civilians'.<sup>81</sup> It also characterizes victimization in terms of ethnic group belonging, describing the victim group as 'the Muslims, in particular its women and girls'.<sup>82</sup> However, seeing women in such patriarchal terms means that CRSV 'surfaces' as an international crime only where it is characterized as a crime against the nation or ethnic community. Because of this patriarchal interpretation, CRSV is not understood as a gender-based crime. Instead, it reduces gendered violence to ethnic persecution. Because of this logic, for example, the judgment in *Karadžić* reduces the discussion of sexual violence to descriptions of specific incidents of sexual violence that establish ethnic persecution, but do not acknowledge their specific gender dimensions, such as women being disproportionately affected by rape and (sexual) enslavement.<sup>83</sup>

This privileging of ethnicity occurs because women are seen as carrying 'the "burden of representation" ... of the collectivity's identity and future destiny',<sup>84</sup> including their roles as cultural and biological reproducers of their given 'ethnic community'.<sup>85</sup> As such, the construction of victims and perpetrators through ethnic identity carries with it heteronormative ideas, apparent in the emphasis in the *Krstić* and *Karadžić* judgments on the 'severe procreative implications' of the killing of men, rather than, for example, the violation of the reproductive rights of women themselves.<sup>86</sup> Consequently, rape is also framed through ideas of ethnic heteronormativity. For example, judgments typically evidence discriminatory intent of sexual violence by referring to statements by perpetrators as to their intention to impregnate their victims

<sup>81</sup> *Kunarac et al*, Trial Judgment (n 39) [592].

<sup>82</sup> *ibid* [654].

<sup>83</sup> *Karadžić* (n 38) [2506].

<sup>84</sup> Mibenge, *Sex and International Tribunals* (n 56) 82.

<sup>85</sup> Nira Yuval Davis, 'National Projects and Gender Relations' (2003) 40(1) *Narodna Umjetnost* 9, 18.

<sup>86</sup> *Karadžić* (n 38) [552], [5569]. See also Baig and others, 'Contextualizing Sexual Violence' (n 63) 215.

to create perpetrator group children.<sup>87</sup> They also frame rape through a heteronormative prism, by understanding rape as sexual intercourse between men and women without consent, and not considering how other sexualities (lesbian, gay, bisexual) might be targeted or expressed in these acts.<sup>88</sup> These ideas of ethnicity presume the heterosexual reproduction of the ethnic group, and so reject other sexualities from communal belonging. Within this frame, women are seen only as sexual and reproductive bodies, rather than as political or social actors. As in IHL, these ideas of ethnic identity focus upon ‘women’s sexual and reproductive capacities, and on harms committed by opposing forces.’<sup>89</sup> However, this heteronormative idea of ethnicity has the effect of positioning women as ethnic subjects with sexual and reproductive roles, rather than as political subjects with human rights, or as social subjects with economic, political, and social roles in their society.

While this concept of identity reifies women’s reproductive roles, crucially it also misses the integral gender component of these crimes. For example, the *Kvočka et al* judgment describes a typical detention situation in which women were detained because of their perceived membership of an ethnic group.<sup>90</sup> However, it does not address the power that perpetrators exercised over these women, or how the exercise of this power was gendered and sexual, insofar as it ranged from forced domestic labour to rape.<sup>91</sup> In other cases, such as *Kunarac*, this gendered component included targeting specific females, such as children under the age of consent.<sup>92</sup> This identity model fails to engage with gender as a structural category, that is, as a product of hierarchical power relations between men and women. Because this model reduces gender to gender identity within ethnic patriarchal identity, it does not engage with gender as a system of power. Accordingly, the identity model in the ICTY jurisprudence cannot provide an analysis of the gendered (and heteronormative) dynamics of harm, power, and social position of perpetrators and/or victims. It also does not engage with how war itself produces ‘gender’ as patriarchal and heteronormative categories of identity, such as militarized perpetrators and feminized victims.

<sup>87</sup> *Brđanin* (n 55) [10], [11]; *Prosecutor v Milan Lukić and Sredoje Lukić* (Judgment) IT-98-32/1-T (20 July 2009) [695].

<sup>88</sup> As evidenced by the failure to charge penetrative male rape as such: See Valerie Oosterveld, ‘Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity’ (2014) 10 *Journal of International Law and International Relations* 107, 110–12.

<sup>89</sup> Charlesworth and Chinkin, *Boundaries* (n 23) 334.

<sup>90</sup> *Kvočka et al*, Trial Judgment (n 39) [21].

<sup>91</sup> *ibid.* Examples of this gendered labour include cleaning and serving food. Similar examples can be found in the *Kunarac et al*, Trial Judgment (n 39) and *Karadžić* (n 38) cases.

<sup>92</sup> *Kunarac et al*, Trial Judgment (n 39) [42]. This issue was recognized as an aggravating circumstance in sentencing, but was not recognized in the characterization of the crime.

Accordingly, it cannot provide an analysis of the wider ideological and political context of the conflict that is necessary to build a gender analysis of collective criminality itself.<sup>93</sup>

The problematic approach to 'gender' in the identity component raises the question of whether it is possible to understand sexual violence as a gender-based crime within this frame. Patriarchal norms have historically shaped the narrative of war (and ICL) and the application of the concept of identity in the ICTY jurisprudence reproduces this problematic framing in relation to crimes of sexual violence. The jurisprudence views sexual violence as the only crime that happens to women in war. It 'sees' this violence against women only when they have been targeted by the perpetrator as members of an opposing ethnic group, and so can only 'see' them as homogenous members of that group.<sup>94</sup> This frame only makes women visible as victims of violence through crimes seen as 'sexual', and by recognizing those crimes through patriarchal and heteronormative ideas of ethnic identity. As a consequence, this ideological structure makes the profoundly gendered nature of sexual violence invisible. It hides the process of the 'gendering' of entire 'ethnic' groups, both in terms of targeting of men and women in the 'enemy' group, and of the invisibility of war-time rape within the 'non-enemy' group.

The problems of this concept of identity are not resolved by simply shifting the privileging of 'ethnic' identity, and adding or substituting another category of identity, namely, 'women'. As we can see in the context of the ICTY, simply adding gender identity, i.e. 'women', to prosecutions does not shift the patriarchal frame. For example, women are highly visible as victim-witnesses to sexual violence, but are under-represented as witnesses to other crimes committed in the conflict.<sup>95</sup> This presents women as passive objects of the war. In contrast, men are highly visible as active agents of the conflict (as perpetrators, victims, and witnesses of all crimes), while the sexual violence against them is recognized as political war violence.<sup>96</sup>

<sup>93</sup> The ICTY judgments do provide an historical account of the conflict, but this is framed through ideas of ethnic conflict.

<sup>94</sup> See Buss, 'Knowing Women' (n 49). Note that the OTP attempted to bring forward arguments on gender as a ground for discrimination, but these were not considered by the Court: *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (Appeal Judgment) IT-96-23 & IT-96-23/1-A (12 June 2002) [141] fn 192.

<sup>95</sup> See Brammertz and Jarvis, *Prosecuting Conflict-Related Violence* (n 22) 57, 79.

<sup>96</sup> On gendered patterns of charging and witnessing, see Campbell, 'The Gender of Justice' (n 13); Gabi Mischkowski and Gorana Mlinarević, 'And That It Does Not Happen to Anyone Anywhere in the World: The Trouble with Rape Trials' (Medica Mondiale 2009) <[www.medicamondiale.org/fileadmin/redaktion/5\\_Service/Mediathek/Dokumente/English/Documentations\\_studies/medica\\_mondiale\\_and\\_that\\_it\\_does\\_not\\_happen\\_to\\_anyone\\_anywhere\\_in\\_the\\_world\\_english\\_complete\\_version\\_dec\\_2009.pdf](http://www.medicamondiale.org/fileadmin/redaktion/5_Service/Mediathek/Dokumente/English/Documentations_studies/medica_mondiale_and_that_it_does_not_happen_to_anyone_anywhere_in_the_world_english_complete_version_dec_2009.pdf)> accessed 5 April 2021.

This patriarchal framing can also be seen in charging patterns. An important example of such a charging pattern is that where CRSV is made visible, it appears as numerated charges of CRSV against women, while CRSV against men disappears under umbrella charges. In this gendering process, CRSV is ‘feminized’ and devalued, and as such, is still understood as a lesser crime. While having enumerated charges for both CRSV against men and against women is an important condition for the analysis of the gendered patterns and structures of war, it still does not capture how CRSV is a gender-based crime. This is because it does not capture the different gendered patterns of victimization and of perpetration and the gendered power relations that underlie them. This problem derives from the very concept of identity itself, which constructs women as a homogenous group that is ‘penetrable’ (‘rape-able’), in opposition to ‘proper’ men (who are not). Our analysis of the identity component within the international criminal justice paradigm shows why ‘instead of simply studying identity and identity politics, and especially—instead of studying them as given, fixed, essential properties of *some*(!) women and men, we should approach them as products of social histories and power relationships.’<sup>97</sup> To develop such an approach requires a feminist gender analysis of conflict, criminality, and victimization.

### **E. Building Feminist Gender Analysis for International Criminal Justice**

The ICTY conducted its CRSV prosecutions within an existing legal framework shaped by individualist masculine and heterosexual norms. Because the ICTY utilized a paradigm based on the individual and identity, it further entrenched these patriarchal norms. As a result, it produced a problematic understanding of sexual violence that is reflected in the doctrinal underdevelopment of rape as a gender-based crime. At the same time, it overemphasized ‘ethnicity’ as the primary condition of the recognition of sexual violence under international law.

The struggles with ‘gender’ in international criminal justice that we have described were shaped by the historical period in which the ICTY was established and operated. It is this historical and geopolitical context from which the international criminal justice paradigm emerges, and which shapes its understanding of gender and ethnicity through ideas of the individual and identity.

<sup>97</sup> Žarkov, ‘Intersectionality’ (n 11) 227.

This historical period is marked by the increasing influence of neoliberal ideology, with its focus on identity and the individual, in international law and international relations in the 1990s.<sup>98</sup> The influence of neoliberal ideologies spread globally in the context of the new post-Cold War and post-socialist politics, and the rise of so-called Western hegemonic power. The hallmarks of contemporary neoliberalism are the 'primacy of individual action and responsibility', and a rejection of the state, 'society', and political economy.<sup>99</sup> Thus, contemporary neoliberalism hides structural oppression, and instead places responsibility upon the individual. Moreover, neoliberalism privileges identity, understood as a form of belonging to a culture, rather than as an effect of political and economic structures.<sup>100</sup> Nancy Fraser argues that this 'identity model' has emerged in contemporary politics since the end of the Cold War. For Fraser, the identity model understands justice through the recognition of identity, belonging, and culture, rather than through political and economic structures.<sup>101</sup> In this model, justice claims are understood as a form of identity politics, based in individual claims arising from membership of a group having unequal status.<sup>102</sup> These ideas also framed the perception of the successor states of Yugoslavia as post-socialist countries, which were in transition from socialism to neoliberal economies and from an ethnic war to multi-ethnic 'peace'. That understanding of Yugoslavia also included the important prism of the Dayton Peace Agreement of 1995, with its 'ethnic' settlement of Bosnia into three constituent 'peoples'.<sup>103</sup>

The identity politics of neoliberal ideologies at the international level also reified certain feminist ideas concerning the necessity of the recognition of gender.<sup>104</sup> Through these neoliberal ideas of rights, earlier feminist arguments concerning women's rights as human rights became increasingly framed through neoliberalism, reducing the understanding of gender to fixed and essential identities of individuals (rather than being understood as a historical and social category). This neoliberal framework shaped the legal problem of CRSV in international criminal justice. However, as our analysis shows,

<sup>98</sup> On the influence of neoliberalism, and its impact on feminist politics, at the international level, see Charlesworth, Chinkin, and Wright, 'Feminist Approaches' (n 1) 29.

<sup>99</sup> Pierre Minn, 'Humanitarianism after the Cold War' in Marian Burchardt and Gal Kirn, *In Beyond Neoliberalism* (Palgrave Macmillan 2017) 201, 208.

<sup>100</sup> Nancy Fraser 'Rethinking Recognition' (2000) 3 *New Left Review* 107, 108.

<sup>101</sup> *ibid.*

<sup>102</sup> Nancy Fraser, *Fortunes of Feminism* (Verso 2013) 4–5 (hereafter Fraser, *Fortunes*).

<sup>103</sup> UNSC, 'General Framework Agreement for Peace in Bosnia and Herzegovina' (30 November 1995) UN Doc A/50/79C. See also Women Organizing for Change in Syria and Bosnia and Herzegovina, 'Feminist (Re)Interpretation of the Dayton Peace Agreement' <<https://wilpf.org/wp-content/uploads/2018/04/Feminist-Reinterpretation-Dayton-Peace-Accords.pdf>> accessed 1 February 2021.

<sup>104</sup> Fraser, *Fortunes* (n 102).

criminality and victimization are not reducible to the individual and to identity as such. If we are to capture the criminality of CRSV, then it is necessary to understand the relationships between patriarchal heteronormative structures (such as military, police, and economic organizations) and social stratifications (such as gender, sexuality, class, ethnicity, race, and age). These relationships are made invisible by the neoliberal shaping of international criminal justice as individual and identity, and this invisibility traps us in a heteronormative and patriarchal framework. Ultimately, this paradigm of international criminal justice obscures how gendered systems of power and domination, together with gendered structural inequalities and political economies, shape sexual violence, gender, and armed conflict as such.

Now that neoliberalism is in crisis, as Nancy Fraser describes, this allows the possibility of reflecting on these ideological assumptions and building other frameworks.<sup>105</sup> To escape the neoliberal international criminal justice paradigm requires building a feminist gender analysis. A feminist gender analysis emphasizes social systems and structures, rather than identity and individualism. A structural analysis of gender-based crimes requires developing a concept of gender as a dynamic system of ideas and relationships in different sites and through different types of power.<sup>106</sup> Building this feminist gender analysis involves dealing with a number of challenges.

The first of these challenges involves moving the focus from sexual violence to further developing our understanding of gender-based crimes. This involves both reconceptualizing sexual violence as a gender-based crime, as well as further developing our understanding of gender-based crimes as such. The current understanding of how sexual violence is a gender-based crime is significantly underdeveloped. International human rights standards recognize that structural gendered inequalities are contributory causes of these crimes, and that they represent violations of fundamental rights of women, which reinforce and deepen gender inequalities in post-conflict contexts.<sup>107</sup> However, the gender component of international crimes has yet to be fully explored.

At the level of prosecutions, more fully developed models of 'gender analysis' are required to capture different patterns of sexual violence in a given conflict, and to socially and legally contextualize sexual violence within that conflict. This challenge includes developing a fuller understanding of gender norms (that is, norms of masculinity and femininity), and how their relationship to

<sup>105</sup> *ibid* 12.

<sup>106</sup> Cynthia Enloe, *The Big Push* (University of California Press 2017).

<sup>107</sup> See CEDAW, 'GR19' (n 9); CEDAW, 'General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations' (1 November 2013) UN Doc CEDAW/C/GC/30.



power in particular societies and conflicts produces particular forms and patterns of conflict-related sexual violence. Simply adding male victims of sexual violence or female perpetrators to the groups of persons to be protected or prosecuted does not provide an adequate basis for the development of such a 'gender analysis'.<sup>108</sup> Such additions do not shift the patriarchal frame of international criminal justice, but instead remain within its heteronormative, patriarchal, and ethno-nationalist boundaries. Part of the challenge in developing a 'gender analysis' is that it should include an analysis of the power dynamics of sexuality that does not reinforce existing social identities and hierarchies of 'masculinity' and 'femininity', with their attached meanings of embodiment and social roles.

The second challenge is how to develop more adequate legal concepts of gender-based crimes as such. This involves addressing how to incorporate 'gender' into the protective and penal regimes of IHL and ICL. This, in turn, requires a more thorough consideration of different aspects of 'gender' in these regimes. We suggest distinguishing between (1) gender elements of 'core crimes',<sup>109</sup> (2) gendered international crimes, and (3) gender-based crimes. The first category concerns gender elements of existing core crimes. This involves developing the gender dimension of international crimes, so that they can capture where those crimes affect both men and women, but in different ways. For example, this would mean elaborating how attacks directed towards women—and not only men—on the basis of their gender can be an element of genocide, as suggested by numerous feminist scholars.<sup>110</sup> The second category concerns gendered international crimes, which can capture the disproportionate gendered effect of conflict on groups of persons, and requires developing the criminalization of other distinctive harms experienced by women in war. For example, this would mean capturing the disproportionate impact of particular means and methods of warfare upon women as members of the civilian population, such as the disproportionate impact of siege upon women.<sup>111</sup> The third category concerns gender-based harms in conflict. This is the targeting of

<sup>108</sup> See Campbell, 'Producing Knowledge' (n 3).

<sup>109</sup> 'The "core" crimes set out in the International Criminal Court's Rome Statute—the crime of genocide, war crimes, crimes against humanity, and aggression—are overwhelmingly assumed to be the most important international crimes.' See Christine Schwöbel-Patel, 'The Core Crimes of International Criminal Law' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020).

<sup>110</sup> See eg Valerie Oosterveld, 'Prosecution of Gender-Based Acts of Genocide under International Law' in Samuel Totten (ed), *Plight and Fate of Women During and Following Genocide* (Transaction Publishers 2009) 205.

<sup>111</sup> Judith Gardam, 'The Silence in the Rules That Regulate Women During the Times of Armed Conflict' in Fionnuala Ní Aoláin and others (eds), *The Oxford Handbook of Gender and Conflict* (OUP 2017).

persons on the basis of gender, such as forced domestic labour, forced mobilization, forced pregnancy, forced marriage, or persecution on the basis of sexuality. To develop adequate legal concepts of gender-based crimes in all three categories requires developing models of gender-based harms that recognize gender as a social structure and process. Because the legal concepts of gender-based crimes require significant development, it is not sufficient to implement existing legal frameworks, contrary to the position of the International Committee of the Red Cross (ICRC).<sup>112</sup> While implementation is crucial, we need to move beyond existing legal norms, whether protective or penal, and create new obligations under international law.

The third challenge involves further developing our existing models of ‘gender analysis.’ To date, ‘gender analysis’ has been typically focused upon gender representation and gender policies in courts, understood as the ‘consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities’ in prosecutorial practice.<sup>113</sup> This is a necessary, but not sufficient, step. The next crucial step is developing models of the organizational and systemic criminality of gender-based crimes, and the gendered structures that produce them. Only then can we identify how crimes against men and women take different forms—that is, provide a gendered analysis of conflict—and how justice mechanisms address these different patterns of harms—that is, provide a gendered analysis of prosecutions. Without having an adequate gender analysis of conflict, it is not possible to see gendered patterns of criminality, whether in relation to (1) existing crimes, (2) criminality that is not captured by existing norms, or (3) the connection of gender crimes to other crimes. Without a gender analysis of prosecutions, it is not possible to see gendered patterns of justice, and to examine whether existing prosecutions adequately capture the gendered harms of war. Our outline of these challenges is intended to be indicative, rather than conclusive. We intend it to indicate future directions in building feminist approaches to gender-based crimes, and to generate wider discussions in this area. This work can only be fully realized as part of collective feminist efforts to change ICL.

<sup>112</sup> ICRC, ‘Resolutions of the 32nd International Conference of the Red Cross and Red Crescent (2015)’ (2016) 900 International Review of the Red Cross 1389.

<sup>113</sup> See Louise Chappell, *The Politics of Gender Justice at The International Criminal Court: Legacies and Legitimacy* (OUP 2016); ‘Policy Paper on Sexual and Gender-Based Crimes’ (n 24).