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A Gendered Lens for Genocide Prevention

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CHAPTER 5

Sixty Years of Failing to Prosecute Sexual Crimes: From Raphaël Lemkin at Nuremberg to *Lubanga* at the International Criminal Court

Douglas Irvin-Erickson

For advocates of greater legal protections against sexual and gender-based crimes, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in the 1990s were watershed moments in international law.[1] More than a decade later, the International Criminal Court (ICC) was likewise welcomed for its potential to expand legal protections against sexual crimes committed in mass atrocity settings. In many respects, however, the ICC has failed to meet even the most basic of these expectations.[2] In the ICC trial of Thomas Lubanga Dyilo, the defendant was cleared of charges of sexual crimes by the trial chambers even though scholars and human rights advocates widely consider him to have facilitated mass rape.

The trial demonstrates that the prosecution of sexual crimes has not been hindered by juridical constraints or restrictive precedents.[3] Rather,

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the prosecution of these crimes has been hindered because of the way courts, prosecutors, and even the scholars who study mass atrocities conceptualize sexual- and gender-based crimes. Patricia Davis has argued that the ICTY and ICTR were ineffective in obtaining convictions of perpetrators, especially leaders and high-level military personnel, for the thousands who were sexually assaulted as a part of these conflicts. The most important reason for this failure, Davis contends, was the lack of funding for the courts and the prosecution, the limited cooperation of host countries, and the unwillingness of witnesses to testify. Davis also points to political barriers to prosecuting sexual violence in international criminal tribunals, including a lack of political will to prosecute rape when other atrocities are also alleged, and controversies that arise over changing court procedures, office structures, and policies for prosecuting sexual violence.[4]

These biases against sexual violence are longstanding traditions within international law, at least since the International Military Tribunal (IMT) in Nuremberg after the Second World War. To unpack the conceptual blind spots that have prevented the successful prosecution of sexual crimes, I turn to the writings of Raphaël Lemkin, the jurist who coined the word genocide and lobbied the IMT prosecutors to prosecute German Nazi defendants for sexual crimes as acts of genocide.[5]

Sexual crimes are now an explicit part of the mandates of international criminal courts, and continue to be a growing component of global human rights discourses.[6] Nevertheless, the way sexual crimes are conceptualized within the context of mass atrocities and war crimes has not changed significantly in the last 70 years. For this reason, there are many lessons to be learned from Lemkin's failed attempt to prosecute acts consistent with sexual crimes at the IMT, when he argued that these acts were a fundamental aspect of the German war effort but the laws of war were unprepared to deal with them. Lemkin had essentially discovered a principle in the late 1940s that would not be dealt with in international law until the end of the twentieth century: that acts consistent with sexual crimes committed against individuals were often part of the overarching social, political, or military framework of mass atrocities.[7]

I understand "atrocity crimes" to be a broad concept encompassing genocide, crimes against humanity, and war crimes.[8] "Sexual crimes" is defined in this chapter to align with the crimes under the jurisdiction of the ICC, as outlined in the Rome Statute of the ICC, encompassing rape, enforced prostitution, and sexual violence.[9] A sexual crime is not limited

to acts of physical violence, and can include non-physical acts. I take "gender-based crimes" to signify acts committed against people because of their sex or socially constructed gender roles.[10] The terms "sexual crimes," "sexual violence," and "gender-based crimes" did not exist during Lemkin's lifetime. For this reason, I will employ the phrase "acts consistent with sexual crimes" to signify acts Lemkin describes that would now fall under the rubric of sexual crimes. The phrase "acts consistent with sexual crimes" is advantageous because there is no crime of "sexual crime" or "sexual violence" under international law—rather these terms are descriptions of other acts that may or may not be outlawed. Nevertheless, it is clear that Lemkin's focus on documenting "forced sterilizations," "forced abortions," "the abduction of children," and the German encouragement of "forced impregnation" (i.e. rape) "to compel... women to bear children for your country" are consistent with acts that are now called sexual crimes.[11]

Lemkin in the 1940s saw the laws of war as being out of step with the changing nature of armed conflict. The laws of war did not recognize that war crimes could be committed by state actors against civilian populations of the state, he argued. Nor did the laws of war recognize that armed groups were strategically committing crimes against individuals as a means of targeting entire groups, he continued, and they certainly did not recognize that acts consistent with sexual crimes were being committed for the purpose of advancing the larger goals in a conflict.[12] The laws of war were silent on sexual crimes, referring only to prohibitions on violating family honor.[13] Consequently, when it came to prosecuting acts consistent with sexual crimes under the rubric of war crimes, the two elements that make up criminal liability in common law traditions and modern international law—the *actus reus* (the criminal act of the defendant) and the *mens rea* (the defendant's guilty mind, where he or she knowingly or intentionally committed the *actus reus*) evaporated. Not only would prosecutors have to show that a high-level defendant either committed or directly ordered sexual crimes to establish the *mens rea*, but it was likely that an international criminal tribunal would not consider sexual crimes to be war crimes in the first place. Therefore, to prosecute acts consistent with sexual crimes under international criminal law, Lemkin argued, it had to be shown that these acts were fundamental aspects of larger criminal enterprises.[14] This would lower the evidentiary standards necessary for prosecuting sexual crimes, which are difficult to prove on an individual level, let alone within the context of armed conflict.

It would also allow a prosecutor in an international criminal court to hold leaders responsible for acts consistent with sexual crimes, Lemkin argued, without having to demonstrate that acts such as rape were war crimes, and without having to prove that individual defendants intentionally perpetrated these acts upon the victims.

For any war crimes prosecution, Lemkin insisted that prosecutors show the corporate nature of the crimes in order to hold individuals accountable for their role in perpetrating crimes that could have been committed only through the willful cooperation of many people.[15] Acts consistent with sexual crimes, Lemkin believed, should not be seen as incidental, but integral to larger conflicts. This would allow sexual crimes to be prosecuted as war crimes by virtue of the fact that they were committed to advance the larger goals of a party in conflict. As such, I argue that the primary hurdle to prosecuting sexual crimes—from the IMT to the international courts that emerged in the late 1990s—were not juridical constraints or restrictive precedents. Rather, I contend, had Lemkin's understanding of the connection between sexual crimes and mass atrocities been applied in the *Lubanga* case before the ICC—as Lemkin had sought at the IMT—then the defendant could have been prosecuted for sexual crimes. In other words, I am arguing in this chapter that the failure to prosecute acts consistent with sexual crimes is more a question of attitude—more a question of perceptions and biases about the relationship between sexual violence and conflict—than the law.

At the IMT, the prosecution decided not to charge German defendants for rape even though rape and other acts consistent with sexual crimes figured heavily in the testimony presented at the trial.[16] The same was true with the *Lubanga* case at the ICC—where a great deal of the testimony would have supported charging the defendants with rape. Yet, the prosecutors at the ICC were not being negligent and forgetting to press these charges. For charges of acts consistent with sexual crimes, as for any other crime, the prosecution must show a causal link between the accused and the crimes. Historically, however, international criminal courts have tended to require higher levels of proof in cases of sexual crimes than in other types of crimes. For other types of crimes against humanity and war crimes, the threshold for establishing a direct causal link between the accused and the act is much lower, oftentimes constituted simply by showing that the defendant was in a position of authority over those who committed the acts. In these instances, all that is required to demonstrate the mental element of criminal liability is that the defendant must have known that the crime was going to occur as a result of his or her

actions or inaction as a superior in the chain of command. For sexual crimes, on the other hand, the ICTR and ICTY required evidence of a superior's direct knowledge of his or her subordinate's actions in the form of physical evidence or specific orders, which must be established with more than the kinds of circumstantial evidence and witness testimony allowed for other types of offences.[17] This bias in evidentiary standards is compounded by the fact that collecting physical evidence of sexual crimes, especially rape, is difficult for medical, scientific, and social reasons.[18] To overcome these evidentiary biases for sexual crimes (which are not explicit in the law, but rather inferred) investigators and prosecutors are either forced to conduct more thorough investigations and analysis, or they have to present these crimes with a "broader context which makes clear that the sexual violence is an integral part of the organized war effort rather than mere 'incidental' or 'opportunistic' incidents."[19] The prosecution in *Lubanga* chose not to pursue charges of rape and other sexual crimes in favor of other charges that would require lower standards of proof and were therefore more likely to result in a conviction.

In *Lubanga*, the prosecution had to deal with the reality that the physical evidence of rape would have been nearly impossible to gather in western Democratic Republic of Congo. The prosecution also ran headlong into the second hurdle Lemkin outlined, as the trial chamber struck down the attempt to characterize sexual crimes as an aspect of the war crimes for which the defendant was charged. The trial chamber in *Lubanga* ruled that the rape and sexual enslavement of children was not a fundamental aspect of the war crime of using child soldiers in hostilities. The next section of this chapter presents a brief account of Lemkin's legal theory on acts consistent with sexual crimes and war crimes prosecutions. Afterwards I examine the *Lubanga* case, and I conclude by suggesting that other cases underway at the ICC are likely to produce conclusions similar to the outcome of *Lubanga* unless the prosecution is better able to focus on the defendants' role in facilitating a collective criminal program in which sexual crimes were intrinsic to the conflict.

Lemkin on Sexual Crimes

The assistant US prosecutor Sidney Alderman at the IMT remembered Lemkin as nearly impossible to work with, insisting at all times that the other jurists use his concept of genocide until they had no choice but to remove his name from committee rosters and keep him around for

"encyclopaedic" purposes only.[20] Lemkin's value to the IMT, Alderman recalled, was derived from his book *Axis Rule in Occupied Europe*, which was one of the three basic sources used by the jurists at Nuremberg to understand the Axis government and Nazi war crimes.[21] Although the prosecution at Nuremberg used the term "genocide" in their submissions to the IMT, it did not appear in the final judgment of October 1946. Just as the prosecutors at the IMT avoided charging defendants with genocide, so too did they avoid prosecuting Nazi rape and acts consistent with sexual crimes—which Lemkin also lobbied for doing.

Despite the witness testimony presented at the IMT about Nazi rape, Holocaust scholars did not begin to investigate acts consistent with sexual crimes committed by German soldiers until the late 1980s.[22] Legal historians, in turn, have only recently begun to revisit Lemkin's tenure at Nuremberg.[23] Lemkin's personal papers reveal that he wanted IMT prosecutors to charge German officials who implemented policies that led to sexual crimes in occupied territories, and he believed that his concept of genocide was the ideal vehicle for prosecuting acts consistent with sexual crimes. In a letter to David Fyfe, the UK prosecutor who famously cross-examined Hermann Göring, Lemkin pleaded with his sympathetic colleague to act upon their conversations and urge the Nuremberg judges to include "forced sterilizations," "forced abortions," "the abduction of children," and the use of rape "to compel... women to bear children for your country" under the category of acts of genocide.[24]

Lemkin's belief that these acts should be listed as acts of genocide followed from his analysis of the Nazi genocide in *Axis Rule in Occupied Europe*, where he wrote that one of the most effective techniques of genocide was a patchwork of laws across German occupied Europe that legalized the forced marriage of supposedly racially desirable women with German soldiers, encouraged the "forced impregnation" of these women by German soldiers in occupied countries, and banned interracial marriages.[25] Lemkin also identified decrees and regulations separating men and women of supposedly inferior races to prevent them from reproducing, making it illegal for women of approved racial groups in Northern Europe to resist the sexual demands of German soldiers—in effect, legalizing rape when the sexual act would have produced desirable children according to Nazi race ideology.[26] There were also laws and decrees rewarding German soldiers for having illegitimate children, as well as laws that subsidized women in occupied countries who were forcibly impregnated.[27]

Although the 1899 and 1907 Hague Conventions did not state that rape and sexual assault were war crimes, these crimes were considered crimes under customary international law and referred to under euphemisms of protecting "family honor and rights."[28] The euphemistic language was the beginning of tradition in international law that essentialized gender roles and conceptualized prohibitions on acts consistent with sexual- and gender-based crimes as protections of a woman's dignity, not individual rights.[29] Even the Geneva Convention Additional Protocols of 1977 focused on protecting women as expectant and nursing mothers, not as individuals.[30] Rape was indeed listed under the Control Council Law No. 10, signed by the Allies in 1945 to try Nazi war criminals who were not brought up on charges at the IMT.[31] However, the charters of the Nuremberg and Tokyo tribunals made no reference to sexual crimes, even though a great deal of evidence of sexual crimes was brought to both tribunals.[32] In the Tokyo trials, rape was mentioned in the charges, but only indirectly as Japanese commanders were found guilty of allowing soldiers under their command to commit rape.[33] Lemkin's proposals at Nuremberg to use his conception of genocide as a way of bringing what he called forced impregnations, forced abortions, and forced marriage under the purview of international criminal law would have placed him at the vanguard of international law. It must be noted, however, that it was not the violation of the individual rights of the victim that made sexual crimes international crimes in Lemkin's mind—rather it was their use within the context of armed conflict to achieve certain ends. Nevertheless, Lemkin had managed to find a way to criminalize acts consistent with sexual crimes without making reference to an assumption that preserving women's traditional gender roles was necessary for preserving the well-being of society, or peace.

In *Axis Rule in Occupied Europe*, Lemkin defined genocide as "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."[34] Genocide, moreover, had two phases: "One, the destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor."[35] Article 2 of the UN Genocide Convention restricted the kinds of groups that could be legally destroyed, defining genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its

physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." The UN Genocide Convention, however, was drafted in a highly political context, and does not reflect Lemkin's own understanding of what genocide was, as a crime or an act. Importantly, Lemkin did not intended genocide to be a crime of destroying a certain set of narrowly defined social groups, but rather saw genocide as social and political processes of destroying nations. He defined a nation as "a family of mind," not a concrete, primordial, organic entity that could be objectively defined.[36] And, Lemkin very much thought of the UN Genocide Convention not as a group rights document that bestowed groups with rights, but rather a prohibition on the kinds of violence and oppression that occurred when people assumed that individuals could be reduced to a single cultural group, and then set out to destroy those groups.[37]

Lemkin called race "a fiction," defined nations as social and mental constructions, and rejected the idea that either had a biological determinate.[38] Moreover, Lemkin did not believe that human groups, such as nations or religions, were organic, trans-historical entities. Rather, he believed that human groups were constantly changing, that individuals would often hold membership in many nations at once, and that this dynamism was a fundamental good. Contrastingly, genocide, Lemkin believed, was committed by people who thought in communitarian and nationalistic terms and saw groups as eternal, believed that membership in groups was mutually exclusive, and sought to destroy groups in society accordingly.[39] Within this framework, Lemkin believed that each collective (and individual) perpetrator of genocide would define the group to be destroyed according to their own ideologies and beliefs and assumptions about human societies.[40] Sexual crimes could therefore take on different forms and encompass different acts, becoming genocidal when the acts were connected to an attempt to destroy an imagined group—a "family of mind"—according to the perpetrator's understanding of that group.

In the conflict of the Second World War, Lemkin wrote, "the nation, not the state, is the predominant factor" because Nazi ideology thought that "the nation provides the biological element of the state." Consequently, Lemkin argued, the Germans did not intend to wage war on states and armies, but on populations, using genocide to destroy "enemy nations" in occupied territories as "a new technique of occupation aimed at winning the peace even though the war itself is lost."[41] Since Nazi ideology thought of nations as being biologically constituted

through race, Lemkin wrote, there was a biological logic to the Axis genocide. Following this logic, Lemkin documented Axis policies that sought to lower birth rates of people whose bloodline was undesirable, while promoting the reproduction of those who were biologically more favorable. He pointed out the Nazi regime thought of these measures as humane solutions to solving their so-called nationalities question, quoting Hitler as saying "we shall have to develop a technique of depopulation... to remove millions of an inferior race that breeds like vermin!... I shall simply take systematic measures to dam their great natural fertility that are systematical and comparatively painless, or at any rate bloodless."[42]

The acts consistent with sexual crimes that Lemkin outlined were not committed by unsupervised soldiers during the war, he argued. Nor were they uncoordinated or haphazard. Instead, German occupying authorities enforced the sexual and gendered laws and regulations that were designed to advance the Nazi's genocidal goals, creating a social and political framework across Germany and occupied Europe that facilitated and authorized acts consistent with sexual crimes against individuals of targeted populations, without any individual official having to give direct orders.[43] The sexual crimes were therefore not autogenous, in the sense that the acts of violence occurred because the genocidal program created the conditions that allowed them to occur. Quite the opposite, the sexual crimes committed within occupied Europe during the war were a fundamental part of the German program of genocide—just as much as the notorious camps and ghettos. The genocide, and all the acts that were intended to result in the destruction of so-called enemy nations, were part of the German war effort and the larger structure of armed conflict, Lemkin argued. As such, these acts consistent with sexual crimes, in Lemkin's words, were a "technique of genocide."[44]

In terms of contemporary prosecutions under international law, Lemkin's positions have two implications. First, that sexual crimes should be seen as weapons of war or acts of genocide—as established by the ICTR—not as secondary offenses that occur because more serious atrocities create conditions that allow for the commission of these acts.[45] It also means that sexual crimes should not be prosecuted as genocide simply when the act is done with the intention of destroying a group, but rather because they constitute a violation of individual rights that is integral to the criminal act of genocide, or other mass atrocity. Secondly, Lemkin argued that an individual who committed an act consistent with sexual crimes within, and in conjunction with, other war crimes could be prosecuted for war crimes while, simultaneously, the leaders who conducted and perpetrated the war crimes could be

charged for sexual crimes.[46] The principle recognizes that individuals' participation in war crimes, and the specific intent of different individuals involved in the same act, might vary, but the sum total of the collective act could not have been possible without the participation of many people who each undertook different actions that in-and-of themselves might not have been considered crimes.[47] Thus all individuals who were responsible for contributing to the collective act can be held responsible for the actions of others because, without each other's participation, none of the atrocities could have been committed.

Lemkin's belief that war crimes, crimes against humanity, and genocide were social processes led him to believe that the best way to successfully prosecute them was through the doctrine of joint criminal enterprise—or criminal conspiracy laws—that were normally used to prosecute corporations and organized crime.[48] From a sociological perspective, adapting the principle of joint criminal enterprise to explain violence and human action simply does not hold, for it assumes that all participants in collective violence join and act willingly with a prior, uniform knowledge of the criminal intentions of the enterprise they are joining.[49] As a prosecution strategy, however, it was advantageous Lemkin wrote because crimes against humanity and genocide were committed by many individuals, each of whom committed different acts, and had their own motives and intentions. There was also a related advantage for prosecutions of sexual crimes where prosecutors face arbitrary biases in the level of evidence required to substantiate a charge. As legal scholars have recently pointed out, the doctrine of joint criminal enterprise allows international courts to place greater emphasis on indirect and circumstantial evidence that is often allowed for other types of crimes, without having to meet the highly restrictive requirement of showing that a defendant held clear prior intent to commit a war crime, crime against humanity, or genocide before he or she acted.[50] With Lemkin's conceptualization of sexual crimes and war crimes, a defendant could be liable for someone else's sexual crimes. In *Lubanga*, this would have meant that rape could have been prosecuted within the context of the crimes for which the defendant was ultimately convicted.

Lubanga: Sexual Crimes Before the ICC

In the *Lubanga* case, the first case brought before the ICC, charges were brought against Thomas Lubanga Dyilo under Article 8 of the ICC Statute, war crimes. Human rights organizations had widely documented

Lubanga's sex crimes against child soldiers, who were also used as porters, guards, and slaves.[51] Although the prosecution referred to sexual crimes in its opening and closing submissions, it did not request to charge Lubanga with the war crime of rape and sexual slavery.[52] Lubanga, the commander of the Patriotic Forces for the Liberation of the Congo militia, and founder and president of the Union of Congolese Patriots (UPC), was charged and convicted of conscripting and actively using child soldiers in hostilities in the Democratic Republic of Congo. As accounts of sexual crimes emerged in witness testimony, legal representatives of the victims requested in May 2009 that the trial chamber amend the charges to include acts consistent with sexual crimes in its consideration of the charge of conscripting and enlisting children and using them to participate actively in hostilities.[53] Although the chambers found that the evidence of rape and sex slavery could be considered in sentencing and reparations, the request to consider sexual crimes within the scope of the crime of using children to participate in hostilities was denied. The chambers noted that the prosecution intentionally did not include rape and sexual enslavement in the charges.[54]

Legal scholars have blamed the prosecution for the failure to bring justice for Lubanga's role in perpetrating the rape and sexual enslavement of child soldiers, highlighting the prosecution's over-reliance on open source evidence and evidence obtained through confidentiality agreements, their failure to supervise the use of intermediaries in obtaining evidence, and the inadequacy of their field investigations into sexual crimes.[55] Placing the blame for the failure to prosecute rape squarely on the prosecution, however, obfuscates the structural challenges at work in international criminal tribunals beyond this single case. From the perspective of the prosecution, it was more important to bring charges against Lubanga that were more likely to result in a quick conviction than to charge him for all of the crimes he was accused of committing, which would weaken, or delay, the case against him. As the former prosecutor Luis Moreno-Ocampo explained in an interview, he feared that Lubanga would be released by the Congolese authorities unless the ICC issued charges swiftly: "I knew to arrest Lubanga I had to move my case fast. So, I had strong evidence about child soldiers. I was not ready to prove the connection between Lubanga and some of the killings and rapes."[56] Moreover, the prosecution also feared that introducing charges of sexual crimes in the middle of the trial would jeopardize any potential conviction, and submitted to the chambers that including charges of sexual crimes

during the trial would cause unfairness to the accused if he was tried and convicted on this basis.[57] For these reasons, the prosecution moved forward without bringing charges against Lubanga for sexual crimes committed within the context of enlisting and conscripting children.[58]

The decision not to recharacterize the facts was met with outrage by many civil society groups.[59] Observers argued that considering rape and sexual slavery during the sentencing and reparations—and not within the content of the charges—"absorbs" these crimes into a "cluster of violence" associated with armed conflict and thereby diminishes their significance.[60] Much of these sentiments were echoed in the dissenting opinion of Judge Odio-Benito, who wrote:

> By failing to deliberately include within the legal concept of "use to participate actively in the hostilities" the sexual violence and other ill-treatment suffered by girls and boys, the Majority of the Chamber is making this critical aspect of the crime invisible. Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group.[61]

Referring to the language of Article 8 of the ICC statue on war crimes ("conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities"), Odio-Benito added that it was "necessary and a duty of the Chamber to include sexual violence within the legal concept of 'use to participate actively in the hostilities'."[62] Sexual violence "is an intrinsic element of the criminal conduct of 'use to participate actively in the hostilities'," the judge wrote,[63] because "the support provided by the child to the combatants exposed him or her to real danger as a target," and because more often harm is "inflicted by the armed group that recruited the child illegally."[64] In Odio-Benito's opinion, the chamber had essentially ruled that the rape and sexual enslavement that Lubanga was responsible for occurred incidentally within the scope of his larger program of forcibly recruiting child soldiers, and was not a fundamental or integral part of the program of hostilities Lubanga was found to have committed.

Article 30 of the ICC Statue outlines the *mens rea* of the crimes under the court's jurisdiction as having two components, intent and knowledge. For the purposes of statute, a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; and (b) in relation

to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Knowledge is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[65] An approach to determining the *mens rea*—the mental element, or state of mind, of criminal responsibility—based on specific intent will inevitably focus on the individual perpetrator's motives in committing offenses, oftentimes regardless of the wider context in which the individual acts. In contrast to the requirements of specific intent, a knowledge-based approach to determining the *mens rea* implied by Article 30 (b) requires that the defendant know the consequences of his or her actions before acting. The knowledge-based approach therefore leads to greater emphasis on the policies and actions of states and organized groups that the individual either led or willingly joined.

The tendency—from policymakers and jurists, to academics—is to interpret sexual crimes as occurring because of organizational anarchy, so that commanders are responsible for sexual crimes only in so far as they did a poor job of preventing their soldiers from committing these acts.[66] The view inherently casts sexual crimes as incidental occurrences, and undermines the basis for establishing the defendant's *mens rea* through intent and knowledge.[67] If sexual crimes are incidental or opportunistic, then a commander cannot know in advance that those under his or her command would commit sexual crimes against child soldiers. In the *Lubanga* case, this would mean that Lubanga, even as the person in authority who knowingly conscripted child soldiers, would not be criminally liable for sexual crimes against child soldiers. However, if acts consistent with sexual crimes were understood as integral to the organized activity of using child soldiers in hostilities, then it could be argued that Lubanga, as the President and Commander-in-Chief of the UPC, would have known that sexual crimes were a purposeful and integral aspect to the UPC's program of using child soldiers, thus establishing the *mens rea* of Lubanga's criminal liability for sexual crimes.

The chamber's ruling in the *Lubanga* case established the grounds that the sexual crimes Lubanga was accused of were criminal acts that occurred during the commission of the larger overarching criminal act of recruiting and using child soldiers, but was not an integral part of the crime of using child soldiers in hostilities. This notion that sexual crimes were distinct and incidental acts, separate from the overarching structure of the use of child soldiers in hostilities, was concretized by the chamber's determination that sexual crimes could not be introduced as the object of the trial because

these acts were covered under distinct crimes outlined in the ICC Statue, which the defendants were purposefully not charged with.[68] While the *actus reus* of Lubanga's sexual crimes were clearly acknowledged when the chamber ruled that these crimes could influence sentencing and reparations, Lubanga's criminal liability for committing mass rape and using child soldiers as sex slaves evaporated.

Sexual crimes carry consequences that ripple beyond the violation of the individual rights of the victims. When sexual crimes are used as a means of committing other war crimes or mass atrocities, then the purpose of sexual crimes is not only to victimize an individual, but to bring about desired social and political ends through the victimization of individuals. Acts consistent with sexual crimes, therefore, can be a fundamental aspect of armed conflict. The purpose of sexual crimes, in this regard, is more than the victimization of the individual victim, but a tool for achieving wider goals in a conflict context, or even the transformation of societies and political bodies through violence (and trauma) inflicted upon individuals. While international criminal courts should prosecute sexual crimes as separate offenses, and not simply collapse these crimes into facets of other types of crimes, courts should also be able to recognize that sexual crimes constitute a fundamental component of other types of organized hostilities.

In the *Lubanga* case, witnesses and expert testimony could have been used to support the conclusion that acts consistent with sexual crimes were integral components of the program of recruiting and using child soldiers for hostilities.[69] In the words of Elisabeth Schauer, who submitted expert testimony to the court, "child war survivors" in conflict settings across the world have to cope with repeated traumatic life events, exposure to combat, shelling and other life-threatening events, acts of abuse such as torture or rape, violent death of a parent or friend, witnessing loved ones being tortured or injured, separation from family, being abducted or held in detention, insufficient adult care, lack of safe drinking water and food, inadequate shelter, explosive devices and dangerous building ruins in proximity, marching or being transported in crowded vehicles over long distances, and spending months in transit camps.[70] As Moreno-Ocampo characterized this after the trial, "Lubanga instrumentalized sexual violations to subject child soldiers of both sexes to his will, while making the children tools to further his own violent ends."[71]

Around the world, Schauer continued in her testimony, commanders commit sexual crimes against child soldiers to control the children. But,

they also recruit children for the purpose of raping them—along with using them as messengers, porters, cooks, or to lay and clear mines.[72] This notion that the girls were taken as child soldiers specifically so commanders could rape them was supported by witness testimony. As Witness 38 told the court, "Yes, there were girls and children. They were to be bodyguards, but the girls were used, in fact, to prepare food and for sexual services for the commanders. They use girls more for—for this reason, as if they were their women, their wives."[73] In the words of Witness 299, "the girl child soldiers only had two jobs, to carry bags and be the 'wives' of the commanders."[74] The testimony of others made clear that the victims had no choice when the commanders demanded sex,[75] and that new recruits were systematically raped upon conscription.[76] The testimony from these witnesses on the sexual crimes perpetrated by the UPC forces under Lubanga's command is in keeping with what scholars have found around the world, that sex labor is part of the role girl soldiers, and boy soldiers, play in the functioning of armed groups.[77] The testimony from these witnesses also indicates that rape and sex slavery were clearly within the scope of what UPC commanders thought the purpose of having child soldiers was within the scope of what it meant for child soldiers to actively participate in hostilities. But the argument also could have been made that commanders intentionally used sexual crimes against child soldiers in order to advance other objectives, fracturing the social life of the communities from which the girls came, perpetuating conditions conducive to their rule and their ability to forcibly recruit more children. Indeed, witnesses testified to this effect. Once the girls became pregnant, they were sent back to their villages by commanders who knew the social consequences of what would happen when the girls returned home.[78] The chambers heard evidence that child soldiers who show symptoms of the trauma spectrum are stigmatized by family and community members when they return home. For girls who were raped, social isolation was not simply a function of trauma, but rather that girls and women who had sexual relations with soldiers are stigmatized and ostracized, regardless of whether the sex was voluntary or not. Children born to women who were raped are considered illegitimate and are seen as bringing shame to the mother. The mother's shame is seen as the family's, and the family's the community's, forcing the victims of sexual crimes into homelessness and even exile.[79] Across conflict settings around the world, and especially in northeast DRC, these social consequences of sexual crimes are functional, aiding the exploitation of civilian populations by armed groups,[80]

and advancing the larger objectives of the armed groups who use child soldiers.[81] Understood in these terms, sexual crimes against child soldiers are very much integral to the "hostilities" that child soldiers are intended to be used for—they are taken so that they can be raped, but also because their trauma and shame can be instrumentalized within the context of the conflict.

In *Lubanga*, the prosecution would have been more successful in prosecuting acts consistent with sexual crimes if the courts had incorporated an understanding of these crimes that reflected Lemkin's thinking, namely his insistence that crimes consistent with sexual violence be prosecuted as fundamental parts of larger criminal programs, committed with the same common purpose within the context of armed conflict as other actions for which defendants are also charged. This would have called for the understanding that sexual crimes against child soldiers were within the purview of what the leaders of armed groups thought the purpose of using child soldiers was—something that was beyond the ability of the prosecutor's office to control.

Conclusion: The Failures of Justice

The failure of international law in general to bring charges against defendants for sexual crimes —in several cases at the ICC to the Cambodian Khmer Rouge Tribunal—can be seen as a denial of justice.[82] The consequences of overlooking sexual crimes range from undermining the local legitimacy of international courts, to potentially strengthening traditions of impunity that prohibit the law from working as a deterrent to sexual crimes.[83] This, in turn, can also reify norms in societies around the entire world that sexual- and gender-based crimes and violence are not as problematic as other kinds of violence or crimes.

Beyond the narrow expectation of legalism and retributive justice, *Lubanga* raises important questions about how sexual crimes are considered and treated in the social and political contexts of countries around the world, and in global society and politics.[84] The rulings help to establish a precedent that recognizes acts consistent with sexual crimes as secondary offenses that, while unfortunate and brutal, are incidental to other more serious things. Legal procedure and justice will always serve social and political ends which cannot be intuited through the procedure of courts and trials themselves, so there is no way to predict the sociological consequences of the rulings of trial chambers.[85] Still, it is possible to critique

the courts from the standpoint of the principles and values they use to legitimize themselves. By not bringing justice directly for acts of sexual crimes committed within the context of mass atrocities—in the cases of rape, sexual slavery, sexual torture, and forced marriages discussed in this chapter—the ruling of the ICC reifies longstanding prejudices that sexual crimes are not serious violations of the rights of individuals. These are the same prejudices that have made these same offenses over the last century the "least condemned war crime," legally, socially, and politically.[86]

Counter-intuitively, the recent retreat from prosecuting sexual crimes at the ICC within the scope of war crimes, crimes against humanity, and genocide has occurred even though sexual- and gender-based crimes have become increasingly explicit within the mandate of international courts and the general public discourse surrounding international law. As a result, sexual crimes have become one of the most discussed, yet marginalized, areas of war crimes prosecutions in international law. The historical irony, of course, is that Lemkin's most important early supporters of the UN Genocide Convention were women's groups, women's NGOs, and women delegates at the UN who supported the Genocide Convention because Lemkin insisted that a law against genocide could bring acts consistent with sexual crimes under the purview of international humanitarian law for the first time in history, while advancing an individual rights-based approach international law.[87]

In terms of international law as a practice, it must be remembered that the prosecution of acts consistent with sexual crimes has been hindered both by juridical constraints or restrictive precedents, and because of the way these acts are conceptualized and thought about. As I have attempted to show in this chapter, the prosecution of rape in *Lubanga* failed because sexual crimes were interpreted as incidental attacks on individual child soldiers by individual soldiers, and not a systematic and strategic aspect of the UPC's larger program of using child soldiers to engage in hostilities, a war crime. If trial chambers and courts are demanding higher levels of evidentiary standards for sexual violence (as opposed to other war crimes) because they are intuiting this principle in the law, rather than reading the principle in the law explicitly, then the legal standards for prosecuting sexual violence are arbitrary. Changing these standards, therefore, would require changes in the attitudes and sentiments—indeed, the norms—of courts and court officials.

Beyond *Lubanga,* Lemkin's ideas shed light on possible paths toward the successful prosecutions of acts consistent with sexual crimes, integrating the

seemingly disparate acts committed against individuals into an overarching structure of violent conflict, while working to lower the requirements for proving criminal intent that have prevented leaders of states and armed groups from being prosecuted for these crimes. Likewise, Lemkin's thoughts on using the doctrine of joint criminal enterprise to prosecute sexual crimes would allow for the prosecution of the leaders of armed groups and states that employ rape and other forms of sexual crimes as a "technique of genocide" or any other war crime—to borrow Lemkin's words—regardless of whether or not they issued direct orders to subordinates to commit rape.

Notes

1. Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Leiden: Martinus Nijhoff Publishers, 1997); Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles," *Berkeley Journal of International Law* 21: 3 (2003); Alex Obote-Odora, "Rape and Sexual Violence in International Law: ICTR Contribution," *New England Journal of International and Comparative Law* 12: 1 (2005); Stephanie K. Wood, "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda," *Columbia Journal of Gender and Law* 13: 2 (2004).
2. Niamh Hayes, "Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court," in *Ashgate Companion to International Criminal Law: Critical Perspectives,* eds., N. Hayes, Y. McDermott, and W.A. Schabas (Aldershot: Ashgate, 2013).
3. The ICTR established that rape is an act of genocide. See *Prosecutor v. Jean-Paul Akayesu* (Judgment) ICTR Case No. ICTR-96-4-T (September 2, 1998).
4. Patricia H. Davis, "The Politics of Prosecuting Rape as a War Crime," *The International Lawyer* 34: 4 (2000).
5. Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, (Philadelphia: University of Pennsylvania Press, 2017), 148–150.
6. Article 7 of the Rome Statue of the ICC was the first international instrument to name sexual violence as crimes against humanity committed by either states or non-state actors. See Rome Statute of the International Criminal Court, Article 7(g)(a) (July 17, 1998): "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."

7. Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000), 158.
8. David Scheffer, "Genocide and Atrocity Crimes," *Genocide Studies and Prevention: An International Journal* 1: 3 (2006).
9. Namely, the Rome Statute of the ICC Articles 7(1)(g), 8(2)(b)(xxii), and 8 (2)(e)(vi).
10. Gender is defined by Article 7(3) of the Rome Statute of the ICC, and refers the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys.
11. Raphaël Lemkin, "Raphael Lemkin to the Right Honorable David Maxwell Fyfe," Raphael Lemkin Collection, P-154, American Jewish Historical Society (New York, NY (AJHS). Box 1, Folder 18, August 26, 1946), 1–2.
12. Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace, 1944), 81–86.
13. Cherif Bassiouni, *Crimes Against Humanity in International Law* (Cambridge: Cambridge University Press, 1999), 348. See also Article 46 of the 1907 Hague Convention.
14. Irvin-Erickson, *Raphaël Lemkin*, 144–146.
15. Ibid.
16. *Trial of the Major War Criminal Before the International Military Tribunal, November 14, 1945 to October 1, 1946* (Nuremberg: Nürnberg International Military Tribunal, 1947). See Vol. 2, at p. 139; Vol. 6, at p. 211–14, 404. On this point, see Askin, "Prosecuting Wartime Rape," 295 n. 36, and n. 37 (on witness testimony of sexual violence and rape before the Nuremberg Tribunal and Tokyo Tribunal).
17. Susana SáCouto and Katherine Cleary, "Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court," *American University Journal of Gender, Social Policy and the Law* 17:2 (2009), 358.
18. Jaimie Morse, "Documenting Mass Rape: Medical Evidence Collection Techniques as Humanitarian Technology," *Genocide Studies and Prevention: An International Journal* 8: 3 (2014).
19. SáCouto and Cleary, "Importance of Effective Investigation," 358.
20. Ibid.
21. Ibid.
22. For a review, see John Hunt, "Out of Respect for Life: Nazi Abortion Policy in the Eastern Occupied Territories," *Journal of Genocide Research* 1: 3 (1999). Also see Myrna Goldenberg, "'From a World Beyond': Women in the Holocaust," *Feminist Studies* 22: 3 (1996).

23. Hilary Earl, "Prosecuting Genocide Before the Genocide Convention: Raphael Lemkin and the Nuremberg Trials, 1945-1949," *Journal of Genocide Research* 15: 3 (2013); Alexa Stiller, "Semantics of Extermination: The Use of the New Term of Genocide in the Nuremberg Trials and the Genesis of a Master Narrative," in *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography,* eds., K. C. Priemel and A. Stiller (Oxford: Berghahn Books, 2012).
24. Lemkin, "Raphael Lemkin," 1–2.
25. Lemkin, *Axis Rule*, ix, xiv, 87, 213, 504.
26. Ibid. 86, 474 (see Order of the Reich Commissioner for the Occupied Netherlands Territories Concerning Marriages of the Male Persons of German Nationality in the Occupied Netherlands Territories, and Related Matters, February 28, 1941), and at 553 (see Order Concerning the Granting of a Child Subsidies to Germans in the Government General, March 10, 1942).
27. Ibid. 504 (see, Order Concerning the Subsiding of Children Begotten by Members of the German Armed Forces in Occupied Territories, July 28, 1942).
28. Bassiouni, *Crimes Against Humanity*, 348. See also Article 46 of the 1907 Hague Convention.
29. Judith Gardam, "Women and the Law of Armed Conflict: Why the Silence?" *International and Comparative Law Quarterly* 46: 1 (1997).
30. For a critical assessment, see ibid.
31. Control Council Law No. 10, Article II(1)(c). The 1949 Geneva Conventions outlawed rape, but it was not until 1969 that international law substantially dealt with sexual violence, when the UN established the Commission on the Status of Women.
32. Askin, *War Crimes Against Women.* On Japanese war crimes and violence against women, see United Nations, Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, *Preliminary Report on Violence Against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/1995/42 (November 22, 1994), §288–290.
33. Bassiouni, *Crimes Against Humanity*, 80, 125, and 186.
34. Lemkin, *Axis Rule*, 79.
35. Ibid. On Lemkin and genocide as a colonial practice, see A. Dirk Moses, "Empire, Colony, Genocide: Keywords and the Philosophy of History," in *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. A. Dirk Moses. New York: Berghahn Books, 2008.
36. Douglas Irvin-Erickson, "Genocide, the 'Family of Mind' and the Romantic Signature of Raphael Lemkin," *Journal of Genocide Research* 15: 3 (2013).
37. Irvin-Erickson, *Raphaël Lemkin*, 3.

38. Raphaël Lemkin, "Introduction to the Study of Genocide: The Concept of Genocide in Sociology," Raphael Lemkin Papers, Manuscript Collection 1730 (Manuscript and Archives Division, New York Public Library: New York, undated), Reel 3, Box 2, Folder 3.
39. Irvin-Erickson, "Genocide," 27.
40. Lemkin, *Axis Rule*, 83.
41. Ibid., 81.
42. Ibid., 86.
43. See Irvin-Erickson, *Raphaël Lemkin.* The argument is set forth in chapters 3 and 4.
44. Lemkin, *Axis Rule*, 88-89.
45. The International Criminal Tribunal for Rwanda decision that "rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide" was made in *Akayesu* (Case NO. ICTR-96-4-T, September 2, 1998), which is reiterated in Articles 3 and 4 of United Nations Security Council Resolution 1820 (2008).
46. Irvin-Erickson, *Raphaël Lemkin*, 145–146.
47. See Lemkin, *Axis Rule*, especially Chapter 9, on genocide, where he asserts several times that genocide is a social and political program that develops its own rationale, but that each individual participates in genocide for his or her own particular reasons.
48. Lemkin, *Axis Rule*, 23. The Nuremberg tribunal is now famous for exporting this aspect of US domestic law to prosecute the Nazis as a criminal association. Throughout the scholarly literature, the idea of charging the Nazis with criminal conspiracy is attributed to Bernays and Stimson, who had successfully prosecuted the American Sugar Refining Company under these laws. See Smith (1981). However, this was an innovation Lemkin helped formulate to some degree: the principle of charging the Nazis under the joint criminal enterprise doctrine was outlined explicitly in *Axis Rule in Occupied Europe*, which was the first time the prosecutorial strategy ever appeared in print, in English.
49. Lemkin knew that the principle of joint criminal enterprise was a tactic for criminal prosecution, and could not be substantiated as a sociological theory of action. See Irvin-Erickson, *Raphaël Lemkin*, especially Chapter 5.
50. See Rebecca L. Haffajee, "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory," *Harvard Journal of Law and Gender* 29: 1 (2006).
51. Human Rights Watch, "The War Within the War: Sexual Violence Against Women and Girls in Eastern Congo," (2002); The Redress Trust, "Victims, Perpetrators or Heroes?: Child Soldiers Before the International Criminal Court" (September 2006). For an important counter argument, see Sangkul

Kim, *A Collective Theory of Genocidal Intent* (The Hague: T.M.C. Asser Press, 2016), 171-221.

52. Rome Statute of the International Criminal Court Article 8(2)(a)(xxvi) (July 17, 1998) ("Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.") See, *Prosecutor v Lubanga* (Open Session Hearing Transcript) Case No. ICC-01/04-01/06 (January 26, 2009), T-107-ENG at page 11, line 17 to page 12, line 22. And see *Prosecutor v Lubanga* (Closing Statements Transcript) Case No. ICC-01/04-01/06 (August 25, 2011), T-356-ENG, page 9, lines 9–13 and, lines 22–25; page 52, line 16.
53. Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, Case No. ICC-01/04-01/06 (May 22, 2009), 1891-tENG.
54. *Prosecutor v Lubanga* (Judgement, Trial Chamber I) Case No. ICC-01/04-01/06 (March 14, 2012), §630.
55. Hayes, "Sisyphus Wept."
56. Interview with Luis Moreno-Ocampo in, Pamela Yates (Director). *The Reckoning: The Battle for the International Criminal Court* [Motion picture on DVD]. United States: Skylight Pictures, 2009.
57. *Prosecutor v Lubanga*, 48.
58. Luis Moreno-Ocampo, "The Place of Violence in the Strategy of the ICC Prosecutor," in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, eds., A de Brouwer, C. Ku, R Römkens, and L. van den Herik (Cambridge: Intersentia, 2013), 154.
59. Open Letter from Women's Initiatives for Gender Justice to Mr. Luis Moreno-Ocampo (September 20, 2006) http://www.icc-cpi.int/iccdocs/doc/doc252017.PDF.
60. Sienna Merope, "Recharacterizing the *Lubanga* Case: Regulation 55 and the Consequences for Gender Justice at the ICC," *Criminal Law Forum* 22: 3 (2011), 324.
61. *Prosecutor v Lubanga* (Separate and Dissenting Opinion of Judge Odio Benito) Case No. ICC-01/04-01/06 (March 14, 2012), §16.
62. Ibid. §17.
63. Ibid. §20.
64. Ibid. §18.
65. Rome Statue of the International Criminal Court, 2002, Article 30.
66. Gerald Schneider, Lilli Banholzer, and LauraAlbarracin, "Ordered Rape: A Principle-Agent Analysis of Wartime Sexual Violence in the DR Congo," *Violence Against Women* 21: 11 (2015).
67. Establishing criminal intent, as opposed to criminal knowledge, would require demonstrating that the sexual violence that seemed to have occurred incidentally was orchestrated intentionally by commanders without issuing any direct orders. It is increasingly clear that sexual violence committed in times of armed combat is not incidental, but "ordered" by commanders through the use of direct or indirect sanctions and rewards. See ibid.
68. Kai Ambos, "The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues," *International Criminal Law Review* 12: 2 (2012).
69. See the following witness testimony in *Prosecutor v Lubanga*: Witness 7: ICC-01/04-01/06-T-148-ENG; Witness 8: ICC-01/04-01/06-T-138-ENG; Witness 10: ICC-01/04-01/06-T-144-ENG; Witness 11: ICC-01/04-01/06-T-138-ENG; Witness 16: ICC-01/04-01/06-T-191-Red2-ENG; Witness 17: ICC-01/04-01/06-T-154-ENG; Witness 31: ICC-01/04-01/06-T-202-ENG; Witness 38: ICC-01/04-01/06-T-114-ENG; Witness 46: ICC-01/04-01/06-T-207-ENG; Witness 55: ICC-01/04-01/06-T-178-Red-ENG; Witness 89: ICC-01/04-01/06-T-196-ENG; Witness 213: ICC-01/04-01/06-T-133-ENG; Witness 294: ICC-01/04-01/06-T-151-ENG; Witness 298: ICC-01/04-01/06-T-123-ENG; Witness 299: ICC-01/04-01/06-T-122-ENG.
70. Expert Report of Ms Schauer (CHM-00001), The Psychological Impact of Child Soldiering, ICC-01/04-01/06-1729-Anxl (EVD-CHM-00001), 2. Available from http://www.icc-cpi.int/iccdocs/doc/doc636752.pdf.
71. Moreno-Ocampo, "The Place of Violence," 154.
72. Child soldiers are used in at least 15 countries in the world: Afghanistan, Burma (Myanmar), Central African Republic, Chad, Colombia, Democratic Republic of Congo, India, Iraq, Occupied Palestinian Territories, Philippines, Somalia, Sri Lanka, Sudan, Thailand, and Uganda. Expert Report of Ms Schauer (CHM-00001), The Psychological Impact of Child Soldiering, ICC-01/04-01/06-1729-Anxl (EVD-CHM-00001), 3–6.
73. Witness 38: ICC-01/04-01/06-T-114-ENG, page 22, lines 16–19.
74. Witness 299: ICC-01/04-01/06-T-122-ENG, page 26, lines 23–25.
75. Witness 7: ICC-01/04-01/06-T-148-ENG, page 49, lines 14–22.
76. Witness 16: ICC-01/04-01/06-T-191-Red2-ENG, page 15, lines 19–22.
77. Susan McKay and Dyan Mazurana, *Where are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War* (Montreal: Montreal Institute on Rights and Democracy, 2004); Vivi Stavrou, *Breaking the Silence: Girls Forcibly Involved in The Armed Struggle in Angola* (Christian Children's Fund and Canadian International Development Agency, 2005); Beth Verhey, *Reaching the Girls: Study on Girls Association with Armed Forces and Groups in the DRC* (Fairfield, CT: Save the Children UK, CARE, IFESH, and IRC, 2004).
78. Witness 89: ICC-01/04-01/06-T-196-ENG, p. 7, lines 23-24; see also page 8, lines 2-16.

79. Expert Report of Ms Schauer (CHM-00001), The Psychological Impact of Child Soldiering, ICC-01/04-01/06-1729-Anxl (EVD-CHM-00001), 28. See also Dossa et al. (2014).
80. Sara Meger, "Rape of the Congo: Understanding Sexual Violence in the Conflict in the Democratic Republic of Congo," *Journal of Contemporary African Studies* 28: 2 (2010).
81. Jill Trenholm et al., "The Global, the Ethnic and the Gendered War: Women and Rape in Eastern Democratic Republic of Congo," *Gender, Place and Culture: A Journal of Feminist Geography* (2015).
82. Carsten Stahn, "Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment," *Journal of International Criminal Justice* 12: 4 (2014).
83. Rosemary Grey, "Sexual Violence Against Child Soldiers: The Limits and Potential of International Criminal Law," *International Feminist Journal of Politics* 16: 4 (2014).
84. The question of the purpose of international courts beyond legalism and retributive justice is taken from Judith Shklar, *Legalism: Law, Morals, and Political Trials* (2nd edn., Cambridge, MA: Harvard University Press, 1986).
85. Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961).
86. Special Rapporteur on Violence Against Women, *Preliminary Report*, §263.
87. Raphaël Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Freize (New Haven: Yale University Press, 2013), 125. In his autobiography, Lemkin made clear that the UN Genocide Convention could never have succeeded politically in the UN if it were not for the support of the UN women's organizations.

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