# Gender-Based Violence Crimes in Conflict: A Discourse Analysis of International Justice Mechanisms

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## Abstract

Since the 1990s, international justice mechanisms have implemented numerous procedural adjustments in order to achieve a degree of inclusivity for gender-based violence crimes. Irrespective of these changes, justice for gender-based violence crimes in conflict continues to be limited despite the widespread nature of this crime. I note this pattern in three key international courts: The International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court. My discourse analysis of fifteen cases from these three courts examines how the courts engage with gender-based violence. Their engagement reveals that gender and race power structures inherently function within international gender-based violence justice, delineating the possibilities for gendered and racialized crimes. I find that gender inclusivity provisions continue to be ineffective due to these structures and theorise that for the successful future of gender-based violence justice, structural change is necessary. My paper initially exposes these structures and then discusses their implications, providing a final analytical summary that details the necessary changes within international justice for gender-based violence survivors to experience effective judicial processes.

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*Table 1: Abbreviations*

| ***Abbreviation*** | ***Explanation*** |
|---|---|
| *DRC* | *Democratic Republic of Congo* |
| *FPLC* | *Forces Patriotiques pour la Libération du Congo/Patriotic Forces for the Liberation of Congo* |
| *ICC* | *International Criminal Court* |
| *ICTR* | *International Criminal Court for Rwanda* |
| *ICTY* | *International Criminal Court for the former Yugoslavia* |
| *MLC* | *Mouvement de Libération du Congo/ Movement for the Liberation of the Congo* |
| *PMF* | *Personnel Militaire Féminin/ Female Soldiers* |
| *RDF* | *Rwanda Defence Force* |
| *UPC* | *Union des Patrotes Congolais/ Union of Congolese Patriots* |
| *WID* | *Women in Development* |
| *WWII* | *World War II* |

Table of Contents

# Figures

# Chapter One: Introduction

Gender-based violence has consistently plagued conflict, with historical analysis noting numerous cases within ancient battles, the World Wars and throughout the armed conflicts, quantified at greater than 248, that have occurred since the end of World War II (WII) (Brownmiller, 2013, p.103; Nebesar, 1998, p.149; Tol, Stavrou, Green et al., 2013, p.1). Whilst gender-based violence is a historical weapon of war, what is a relatively new phenomenon is the recognition of this violence as an international crime that deserves judicial redress. This is a development from previous narratives of gender-based violence that positioned it as an unavoidable by-product of conflict or 1800's understandings which sought to criminalise it due to its impact on the victim's family honour (Manjoo & McRaith, 2010, p. 19).

The reframing of gender-based violence as an international crime with deeply personal impacts and consequently warranting prosecution, largely followed the end of WWII. Prompted by WWII's far-reaching civilian violence, nations collectively formulated standards of human rights to hold WWII crimes to; The Geneva Conventions. Pursuant to these new standards, the international community founded numerous ad hoc and permanent justice mechanisms to address convention violations, however earlier conventions did not include gender-based violence. Accordingly, initial justice mechanisms confronted gender-based violence through the broader prosecution of human rights violations; but feminist analysis soon indicated the need for more specific redress. As a result, justice mechanisms since the 1990s explicitly incorporate gender-based violence within their scopes, with most states now recognising the necessity of international justice for gender-based violence crimes.

Whilst this is a significant improvement, injustices continue to impact the prosecution of these specific crimes, compared to other atrocity crimes. Rashida Manjoo and Calleigh McRaith state that although "rape is one of the most widely used type of violation against women and girls, it remains the least condemned war crime" (Manjoo & McRaith, 2010, p.14). The continuing injustices that undermine gains made by the international community necessitate a study of the conditions that allow this incongruity. Critical scholars argue that despite movements forward, justice mechanisms can never truly foster redress as the structures of justice for gender-based violence crimes are inherently racialized and gendered. My thesis evaluates this claim through the analysis of gendered and racialized power in gender-based violence cases at the International Criminal Tribunal for the former Yugoslavia (ICTY); the International Criminal Court for Rwanda (ICTR); and the International Criminal Court (ICC).

Throughout this thesis, I develop the argument that the inability of the courts to enable justice for survivors of gender-based violence in conflict is deeply engrained in the discourses and practices that are intended to provide redress for gendered and racialized human rights violations. In the remainder of this chapter, I introduce what gender and race, outlining my philosophical approach to these identity categories. I then address the history of the courts I examine, summarising the fifteen cases under analysis. Following this, in Chapter 2, I discuss what scholars have uncovered about gendered and racialized power in international law and institutions as well as the contribution I plan to make. I then define my methodology, discourse analysis, in Chapter 3. From Chapter 4-6 I analyse each court separately, presenting my findings after conducting discourse analysis across the fifteen

cases. I provide a final analytical overview in Chapter 7 including the future direction for gender-based violence justice.

## Gender & Race

Different understandings of identity categories impact provisions of justice for gender-based violence. Identity categories are systems of recognition that operate throughout society, such as gender and race. Philosophical approaches conceptualise identity categories differently. A naturalist philosophy understands social categories as determined by biology and hence essential to an individual's being, with bodies naturally characterised by limited traits (male/female, black/white) (Bradley, 2013, p.18; Chadderton, 2013, p.40; Grosz, 2011, p.88; Nicholson, 2008, pp.13-14). These essentialist philosophies stand in opposition to many feminist understandings of identity categories (Beauvoir, 1949, pp.35-36; Bradley, 2013, p.16; Butler, 2004, p.1; Chodorow, 2012, p.45; Nicholson, 2008, p.34; Sjoberg& Tickner,2011, pp.4-6; Weedon, 1987, pp. 64-65). Instead, a demarcation was made between gender and sex, with Ann Oakley identifying gender as culturally defined and sex as biological (Oakley, 1972, p.158). Michel Foucault (1980a, pp.78-79) developed these understandings in The History of Sexuality. Foucault found that as history progressed, sexuality changed with the labelling of sexuality transitioning as well as conversational approaches to sex. Whilst sexuality has always been apparent; these changes led Foucault to conclude that sexuality was a social construct.

Following on from Foucauldian philosophy, other scholars began to consider that all systems of identification were socially constructed (Brickwell, 2006, p.94; Chadderton, 2013, pp.40-41; Locher & Prügl, 2001, p.112; Onuf, 1989, p.19; Price & Reus-Smit, 1998, pp.266-267;

Wendt, 1992, pp.397-398). Furthermore, Derrida analysed social identifications and concluded that categories defined in binaries are oppressive due to the limits they place on individual action, such as behaving in a masculine or feminine fashion (Derrida, 1982, pp.166-167). Post-structuralism proceeds from an anti-essentialist approach which refuses to accept identity categories as fixed or binary, arguing that this approach leads to oppression. Rather, post-structuralism stresses the importance of understanding identities as fluid and constituted through discourse (Chadderton, 2013, p.40; Kristeva, 1941, p.5; Alexander & Knowles, 2005, pp.2-3). Due to the abundance of different discourses, there emerges an abundance of identities (Weedon, 1987, p.21; Butler, 2004, p.1). My understandings of gender and race follow post-structural philosophy.

*Gender*

The work of Judith Butler is influential to my gender understanding. Butler collapses the categories of gender and sex with her argument that gender is the means by which sex is produced (Butler, 1990, p.10). Hence, gender is an enacting force, with the body an indicator of how cultural meanings (gender) assigns sex. Similar to Butler, I do not understand gender as fixed or binary, instead I engage with a theory of gender that recognises gender restrictions but does not take them as true. Restrictive understandings of gender often equate biological sex to gender, arguing that an individual's sex determines gender. I theorise that these understandings contribute to the unsuccessful pursuit of justice for gender-based violence as they ignore the complexities of gender (Bourdieu, 1998, pp.9 – 12; Roof, 2016, pp.8-11).

Gender emerges through social discourse. Consequently, to conceptualise one's gender, is "outside oneself, beyond oneself in a sociality that has no single author" (Butler,2004, p.1). Power is intrinsic to this process as it is a productive force that solidifies social categories, including gender constructions (Jorgensen & Phillips, 2002, p.10). Society creates representations of gender within discourse, which power structures then confirm as definitive. This is important to my analysis as I argue that the operations of power create representations positioned as true in the discourse of gender-based violence. These representations delineate acceptable parameters for gendered identities, including gendered crimes.

*Race*

Race is a product of society, with research leading to scientific consensus that 'race' is a social construct (Lingaas, 2015, p.486; Lopez, 1994, p.7). The fluidity of gender extends to race, many scholars abandoning the view that subjects can be homogenous with a racial essence (Noble, 2005, pp.132-133; Fuss, 1989, pp.73-74; Williams, 1998, p.74). The deconstruction of race is controversial due to the lived impact of race and thus, to deconstruct race threatens making racial oppression invisible (Chadderton, 2013, p.47; Hesse-Biber, 2012, pp.68-69). However Butler's framing of race addresses these issues. She articulates that the "deconstruction of identity does not serve as the deconstruction of politics, rather it establishes as political the very terms through which the identity is articulated" (Butler, 1990, p.203). Butler develops a framework which understands race as produced through society, with identities products of institutions, practices and discourse (Butler, 2004, p.39). As a result, historical and social situations are key when considering race, including class. Individuals have choice within this frame but this choice is limited by

their subjugation (Butler, 1997, pp.10-13). Butler conceptualises race as socially constructed but concurrently socially perceived as an essential aspect of identity which leads to the different entitlement of rights (Butler, 2004, p.2,13).

Race and gender are important to consider together. As Floya Anthias (2015, p.3) states, the view that social processes can be separated must be dismantled, including the idea that "class, race and other social categories can be understood without looking at how they interrelate." The operation of power creates representations of race and racial privilege that are then accepted as true. In this way, power produces systems of disadvantage through both race and gender. Therefore "gender is inflected by race and race inflected by gender, that is, they can be seen as mutually constitutive in terms of experience and practice" (Anthias, 2015, p.8). Race and gender are intimately connected, with many victims experiencing marginalisation according to both identity categories. Centralising this connection, my study utilises an analytical framework that questions how gendered and racialized power influences gender-based violence justice at the ICTY, ICTR and ICC.

## International Human Rights Law: The Geneva Conventions

To understand how the realm of international law fosters gendered and racialized power, I first consider the history of international human rights, beginning with the Geneva Conventions. The 1949 Geneva Conventions are a set of articles dictating the acceptable rules of war. The conventions aim to protect civilians' rights within their own states as well as from other states (Nebesar, 1998, pp.148). The Geneva Conventions influenced post-conflict justice for situations of large scale civilian violence through the establishment of acceptable rules within conflict, not previously operating in the international realm. Judicial

instruments following the Geneva Conventions intend to uphold their rulings on international human rights violations but the ICTY's Mucić et al. case reveals that the earlier Geneva Conventions do not directly reference gender-based violence (*Prosecutor v. Mucić et al.,* 1998, p.52). This is true of the first Geneva Conventions but later conventions, such as the Fourth Geneva Convention and Additional Protocols introduced in 1977, explicitly forbid wartime rape (Sellers, 2008, p.8). In line with these established conventions, the United Nations formed the International Criminal Tribunal for the former Yugoslavia in 1993.

*International Criminal Tribunal for the former Yugoslavia*

The Geneva Conventions were highly influential for the ICTY, with these protocols mentioned in Article 2 of the court's statute (*Statute of the International Criminal Tribunal for the former Yugoslavia*, 1993, p.5). The ICTY prosecuted war crimes that occurred during the conflict in the Balkans. The former Yugoslavia was a cluster of previously separate states created in the aftermath of WWII. The 1990's conflict began as nationalist groups fought to obtain independence through military means. Serb-dominated Yugoslavian and Bosnian armies targeted minority ethnic groups, mainly of Muslim denomination. Research estimates that over one million Bosnian Muslims and Croats experienced violence as part of a campaign of ethnic cleansing (United Nations, 2020a). Serbs were also targeted. In response to this systematic violence, the United Nations established the ICTY to bring the perpetrators to justice and give voice to the traumatic experiences of victims.

*International Criminal Tribunal for Rwanda*

The United Nations established the ICTR in 1995 to achieve justice for victims of the 1994 Rwandan Genocide (United Nations, 2020b). In Rwanda, there are three social groups: the

Hutu, Tutsi and Twa. The distinctions between these groups were solidified by colonial power, with colonisers preferencing the Tutsi population over the two other groups. After the formal end of colonialism, the tensions between nationalist Hutu and Tutsi groups continued, culminating in a four year civil war in which mass killings and gender-based violence ensued (Carney, 2012, p.194). Paul Magnarella summarises: "having recently created an international criminal tribunal for humanitarian law violations in the European States of the former Yugoslavia, the Security Council decided it could do no less for African Rwanda" (Magnarella, 1994, p.421).

*International Criminal Court*

After the efforts towards international justice at the ICTY and ICTR, the United Nations sought to create a permanent court that would prosecute human rights violations globally. In 2002, the United Nations established the International Criminal Court. This court does not respond to a specific conflict; rather, it holds international jurisdiction over human rights violations (United Nations, 2020c). The ICC has responded to numerous gender-based violence crimes, however its prosecution rate for these crimes remains low, like the ICTY and ICTR. Across the three courts, I examine fifteen gender-based violence cases in order to answer to these injustices. These cases are summarised below:

*Table 2: Case Summaries*

| ICTY | |
|---|---|
| **Case** | **Summary** |
| Furundžija | Anto Furundžija was a local commander of a defence unit called the Jokers. This group engaged in violent activities against the Muslim population in the Lašva Valley. This was the first case at the ICTY that sought to prosecute only on charges of sexual violence. The established gender-based violence definitions set important precedents.<br>Charge: Individual criminal responsibility: torture: outrages upon personal dignity including rape; violations of the laws or customs of war (*Prosecutor v. Furundžija*, 1998). |
| Kunarac et al. | This case indicted three individuals; Dragoljub Kunarac, Radomir Kovač and Zoran Vukovic for their participation in the Foča tactical unit which engaged in an armed campaign against Muslim forces. This case is significant as it establishes sexual enslavement and rape as crimes against humanity.<br>Charge:<br>Kunarac: Individual criminal responsibility: torture, rape and enslavement: crimes against humanity; torture and rape: violations of the laws or customs of war.<br>Kovač: Individual criminal responsibility: rape and outrages upon personal dignity: violations of the laws or customs of war; enslavement and rape: crimes against humanity.<br>Vukovic: Individual criminal responsibility of: torture and rape: violations of the laws or customs of war; crimes against humanity (*Prosecutor v. Kunarac et al*., 2001). |
| Mucić et al. | This case dealt with four individuals; Zdravko Mucić, Hazim Delić, Esad Landžo and Zejnil Delalić for their actions in the Čelebići Prison Camp where they were authorities. Military operations established this prison camp to house detained members of the Serb population. The acts committed in this case led to the recognition of rape as a form of torture.<br>Charge:<br>Mucić: Superior criminal responsibility: wilfully causing great suffering or serious injury; unlawful confinement of civilians; wilful killings; torture; inhuman treatment: grave breaches of the Geneva Conventions; murders: cruel treatment, torture, violations of the laws or customs of war.<br>Delić: Individual criminal responsibility with: wilful killings; torture; wilfully causing great suffering or serious injury; inhuman treatment; grave breaches of the Geneva Conventions; murders, torture, cruel treatment, violations of the laws or customs of war. |

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|---|---|
| | Landžo: Individual criminal responsibility with: wilful killing; torture; wilfully causing great suffering or serious injury: grave breaches of the Geneva Conventions; murder: torture, cruel treatment, violations of the laws or customs of war.<br>The ICTY acquitted Delalić of all charges (*Prosecutor v. Mucić et al.,* 1998). |
| Nikolić | The ICTY indicted Nikolić for his management of the Sušica detention camp in Eastern Bosnia and Herzegovina. It detained both Muslim and non- Serb individuals. Nikolić entered a guilty plea for his crimes. The systematic nature of the gender-based violence in this case is significant.<br>Charge: Individual criminal responsibility: persecutions on political, racial and religious grounds; murder; rape and torture: crimes against humanity (*Prosecutor v. Nikolić*, 2003). |
| Plavšić | Biljana Plavšic was a leading Bosnian Serb political figure during the conflict. This case examines any aid or encouragement she gave to armed forces, discussing her criminal responsibility due to her failure to prevent human rights violations despite her political standing. This case indicts a female. Any differences in her judgement assists in deducing gender structures.<br>Charge: Individual criminal responsibility: persecutions on political, racial and religious grounds: crimes against humanity. (*Prosecutor v. Plavšić*, 2003). |
| **ICTR** | |
| Akayesu | Jean Paul Akayesu was the bourgmestre of Taba commune. The bourgmestre held executive function within this prefect, including the maintenance of public order. The ICTR charged him according to acts committed in this area. This case established the definition of rape as "a physical invasion of a sexual nature under circumstances which are coercive." (United Nations, 2010) This definition led the movement away from victim blaming defences.<br>Charge: Genocide; crime against humanity: extermination, direct and public incitement to commit genocide; crimes against humanity: 3 counts of murder; crime against humanity: torture; crime against humanity: rape; crime against humanity: other inhumane acts (*Prosecutor v. Akayesu*, 1998). |
| Gacumbitsi | Sylvestre Gacumbitsi served as bourgmestre for the Rusumo Commune. Gacumbitsi distributed machetes to the Hutu population. He then instructed the police and the Hutus to kill all Tutsis in the region for reward. In this case, rape was confirmed as an act of genocide. This had significant implications for framing gender-based violence crimes alongside non-gendered crimes.<br>Charge: Genocide; complicity in genocide; extermination as a crime against humanity; murder as a crime against humanity; rape as a crime against humanity (*Prosecutor v. Gacumbtsi*, 2004). |

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| Muvunyi | Tharcisse Muvunyi was a lieutenant-colonel in the Rwandan Army during the 1994 genocide. Muvunyi utilised his position to violate international human rights law. This case found the defendant guilty of genocide for murder but not for rape. It is important to deduce what made these conditions possible.<br>Charge: Genocide; direct and public incitement to commit genocide; crimes against humanity: other inhumane acts (*Prosecutor v. Muvunyi*, 2006). |
| Nyiramasuhuko et al. | This case is against Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonese Nteziryayo, Joseph Kanyabashi and Élie Ndayambaje. These individuals form part of the interim government in the Butare Prefecture. Nyiramasuhuko held the position of Minister of Family and Women's Development. Ntahobali was her son and a manger of a local hotel. Nsabimana served as prefect of Butare in 1994. Nteziryayo held a position on the National Olympics Committee and was president of the Athletics Federation of Rwanda. Kanyabashi was the bourgmestre of the Ngoma commune in Butare. Ndayambaje engaged in management duties in the Butare, including a commercial centre. Together, these individuals formed an alliance that encouraged violence against the Tutsi population. This case indicts a woman. It is important to analyse any procedural differences.<br>Charge:<br>Nyiramasuhuko: Conspiracy to commit genocide; genocide; rape as a crime against humanity; extermination and persecution as crimes against humanity; 2 counts of serious violations of Article 3 Common to the Geneva conventions and of Additional Protocol II.<br>Ntahobali: Committing, ordering and aiding and abetting genocide, extermination, persecution as crimes against humanity; violence to life, health and physical or mental well-being of persons; committing and ordering rape as a crime against humanity.<br>Nsabimana: Aiding and abetting genocide; crimes against humanity; violation of Article 3 to the Geneva Conventions.<br>Nteziryayo: Committing direct and public incitement to commit genocide.<br>Kanyabashi: Genocide; direct and public incitement to commit genocide; extermination, persecution as crimes against humanity and violations of Article 3.<br>Ndayambaje: Genocide; direct and public incitement to commit genocide; extermination and persecution as crimes against humanity and serious violations of Article 3 (*Prosecutor v. Nyiramasuhuko et al.*, 2011). |
| Renzaho | Tharcisse Renzaho was the prefect of Kigali-Ville prefecture in 1994 and a colonel in the Rwandan army. The Chamber charged him with human rights violations responsibility due to his position. This case was first referred to the Gacaca courts. I analyse the alternative judicial processes of this case. |

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|---|---|
| | Charge: Genocide; crimes against humanity: murder; crimes against humanity: rape; serious violations of Article 3 Geneva conventions and Additional Protocol II (*Prosecutor v. Renzaho*, 2009). |
| **ICC** | |
| Bemba | Jean-Pierre Bemba was a military commander with control over the Mouvement de liberation du Congo (MLC). He holds responsibility for war crimes committed by these troops in the DRC. This case first stood as a landmark prosecution for sexual violence crimes yet the ICC acquitted him of all charges.<br>Charge: War crimes: murder, rape and pillaging and crimes against humanity: murder and rape (*Prosecutor v. Bemba*, 2016). |
| Gbagbo and Blé Goudé | Charles Blé Goudé and Laurent Gbagbo were political partners in Côte d'Ivoire. The ICC charged them with the violence that occurred at a women's demonstration that opposed their agendas. The ICC accused both defendants of rape but the Chamber recently acquitted them. My analysis assesses the acquittal proceedings to view if any power structures influenced this decision.<br>Charge:<br>Gbagbo: Crimes against humanity: murder, rape, other inhumane acts.<br>Blé Goudé: Four charges of crimes against humanity (*Prosecutor v. Gbagbo and Blé Goudé*, 2019). |
| Lubanga Dyilo | Thomas Lubanga Dyilo was a founding member of the Union des Patriotes Congolais; UPC. The ICC charged him with responsibility for the crimes committed by this movement, including the conscription of children. This was the first judgement delivered at the ICC. There were allegations of gender-based violence crimes but the ICC did not prosecute these charges. An analysis of case documents is important to reveal why this occurred.<br>Charge: War crime of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities (*Prosecutor v. Lubanga*, 2012). |
| Mbarushimana | Callixte Mbarushimana held authority over the Rwandan forces (RDF). These forces engaged in an armed conflict in the DRC. The ICC charged Mbarushimana for the violence committed by his forces. This case encouraged victim participation however the Chamber continues not to hold Mbarushimana criminally responsible for sexual violence crimes.<br>Charge: There was not sufficient evidence to charge him with war crimes. The ICC released him from their custody (*Prosecutor v. Mbarushimana*, 2011). |
| Ntaganda | Bosco Ntaganda was the Deputy Chief of the Staff and commander of operations of the Forces Patriotiques pour la Libération du Congo (FPLC). This was a branch of the UPC forces. Both forces engaged in an armed conflict in the DRC territory. The ICC accused Ntaganda of a multitude of different sexual violence charges which exhibits the reach of gender-based violence provisions in the ICC. |

| | |
|---|---|
| | Charge: Crimes against humanity: murder and attempted murder, rape, sexual slavery, persecution, forcible transfer, deportation; war crimes: murder and attempted murder, intentionally directing attacks against civilians, rape, sexual slavery, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, intentionally directing attacks against protected objects and destroying the adversary's property (*Prosecutor v. Ntaganda*, 2019). |

# Chapter 2: Existing Research on Justice for Gender-Based Violence Crimes in Conflict

The existing research on gender-based violence justice is founded on feminist interventions into international law. I introduce how research is divided between early and more recent interventions and then discuss the impact of feminist interventions at an institutional level, exploring the gender justice debates surrounding the ICTY, ICTR and ICC. The traumatic impact of gender-based violence prompted the development of alternative judicial processes for crimes affecting marginalised groups. I discuss the arguments made for these approaches, examining the positive and negative aspects of these processes. My exploration of existing research reveals what prior scholarship has shown about the treatment of gender and race in international law and institutions.

## Feminist International Law

### *Early Feminist Interventions*

Early feminist interventions in international law theorise that the application of law can occur in the same way to both women and men. Accordingly, early feminist interventions aim to achieve equality through the equitable application of existing legal doctrines (Charlesworth & Chinkin, 2000, p.38; Mibenge, 2013, p.159). However, criticisms of this approach argue that the achievement of women's equality will not occur by treating women and men the same (Conte, Davidson & Burchill, 2004, p.5; Heathcote, 2019, pp.3-4; Richardson & Sandland, 2000, pp.1-2). Earlier interventions do not seek to revolutionise legal doctrines into inclusive arenas, rather scholarship focuses on a particular type of women that can access masculinised law. In this way, it does not address how the concerns

of women differ according to intersecting oppressions. Later scholarship focuses on how earlier interventions lack a transformation of the legal system, opting to adopt the current system that, later feminist interventions argue, is intrinsically biased (Charlesworth & Chinkin, 2000, p.45; Charlesworth, Chinkin & Wright, 1999, p.1; Heathcote, 2019, p.7).

*Later Feminist Interventions*

Later interventions argue that equality is only achievable through changes within law and for this reason, the transformation of international law is a necessity. Scholars evidence this through legal analysis that exposes exclusionary structures (Lockett, 2008, p.371; Otto, 2015, pp.302-305). Hilary Charlesworth's and Christine Chinkin's attention to language shows how the construction of law filters out the experiences of women (Charlesworth & Chinkin, 2000, p.308). Alice Edwards further exposes the invisibility of women through a reading of international law that searches for indicators of gender exclusion, finding that only 4 of the 8 core human rights treaties utilise feminine pronouns (Edwards, 2011, p.62).

Later feminist interventions also theorise that human rights are exclusionary, Dianne Otto, stating "the new human rights imperative is selective about the promotion of rights" (Otto, 2001, p.52), often ignoring economic and social rights. Rights prioritisation encourages the attainment of some rights before others, without the consideration that human rights are dependent on context (Day, 2000, p.3; O'Rourke, 2020, p.83). Economic rights are considered 'second generation' but, due to the disproportionate impact of poverty, these rights are crucial for the survival of non-Western women (O'Rourke, 2020, p.84). The prioritisation of human rights, through 'generations' disregards the experience of women in developing nations. This realisation led later feminist scholars to conclude that law excludes

on the basis of gender as well as race (Albertyn, 2011, pp.139-140; Seron, 1996, p.195; Williams, 1997, pp.231-232). Thus, feminist interventions began to explore how law additionally prioritises race when addressing gender.

*Feminism and Post-Colonial Law*

Feminist analysis posits that women inherit international law in which Western ideals are central (Aoláin, Haynes, & Cahn, 2011, p.224; Bhatnagar, 2016, para.1; Mutua, 2000, p.842; Romany, 1996, p.857). Feminist readings which investigate this form of exclusion frame the movement of feminist international law into its most recent stage, which is inclusive of third-world women (Charlesworth & Chinkin, 2000, p.46; Chowdhry, 2004, p.230; Wing, 1997, pp.2-3). Anne Orford examines the transference of Western coercion into international law, confirming the connection between international law and colonialism (Orford, 2003, p.43-44). Building on this and on broader post-colonial theory, later feminist readings investigate how imperialism is a racialized marginalisation many women experience along with gendered oppression (Bimbi, 2014, p.278; Crenshaw, 1991, p.1242; Crooms, 1997, p.620; Gandhi, 1998, p.5). From this development, feminist scholarship argues that holistic applications of law cannot occur and instead encourages the establishment of indivisible law that recognises interlocking oppressions (Conte, Davidson & Burchill, 2004, p.288; Crooms, 1997, pp.625-626; Day, 2000, p.12; Orford, 2003, pp.69-71; Otto, 2001, p.54; Winston, 1999, p.23). In opposition to earlier scholarship, later feminist legal scholarship calls for a transformation of law, in which the recognition of contextual oppressions exists (Edwards, 2011, pp.84-86; Orford, 2011, p.212; Otto, 2006, p.356).

## Race and Gender Justice within International Institutions

Language and rights prioritisation within international law reproduces hierarchies that lead to the exclusion of women and cultures. Feminist judicial scholarship evaluated these claims within the institutions in which international law inform, finding that women are the paradigmatic alien subjects of international law and as a consequence, international institutions (Romany, 1993, p.87). Feminist analysis prompted actors to consider the impact of exclusionary law for institutions and so more recent bodies, such as the ICC, reflect gender concerns more effectively.

The Rome Statute of the ICC has gender inclusive definitions and provisions for gender-based crimes (*Rome Statute of the International Criminal Court*, 1998). This is gender justice; in which representations are inclusive and consideration for gender-based violence crime occurs (Chappell, 2014, p.183). Louise Chappell and Georgina Waylen investigated the implementation of this informing law, discovering that the achievement of gender justice at the institutional level has been inconsistent due to gender legacies (Chappell & Waylen, 2013, p.612). Gender legacies are informal rules within institutions that produce certain possibilities, often exclusionary (Chappell, 2016, p.190). Catherine O'Rourke supports Chappell's argument, stating that the ICC's application of inclusive provisions has been disappointing due to the existence of informal norms which dictate the successful implementation of formal processes (O'Rourke, 2020, p.68) and so, even institutions with inclusive legal doctrines remain oppressive due to restrictive social norms. The literature exploring three major judicial mechanisms (the ICTY, ICTR and ICC) expands on this.

*International Criminal Tribunal for the former Yugoslavia*

The ICTY was the earliest judicial recognition of gender-based violence crimes internationally (Campanaro, 2001, pp.2569-2570). This tribunal, established in 1993, was also the first international judicial mechanism to recognise rape as a crime against humanity, with Article 5 of the tribunal's statute listing this (Goldstone & Dehon, 2003, p.136). These developments led to the unprecedented 'Foča' indictment, which charged perpetrators solely for crimes of sexual violence (*Prosecutor v. Kunarac et al*., 2001).

Despite these achievements, feminist scholarship reveals that gender biases continue to be visible. The first of these is gender exclusion, demonstrated in the ICTY Statute's 'crimes against humanity' definitions which omit gendered terms (Nebesar, 1998, p.169). Additionally, Campbell uncovers that the number of gender-based violence cases for women and men is equal (Campbell, 2007, p.423). This over-representation, even with evidence that gender-based violence against women was prevalent, is a result of informal social norms that encourage the dismissal of female cases (Isaac & Jurasz, 2018, p.856; Kesić, 2002, pp.316-317). The ICTY only heard 17 out of 35 reported gender-based violence cases from female victims, confirming this informal norm (Campbell, 2007, p.422). As well as a lack of prosecution, scholars found that the ICTY fails to recognise the gravity of gender-based violence. The ICTY does not consider that gender-based violence constitutes genocide, grave breaches or violations of the customs of war (Campanaro, 2001, p.2576). This lack of recognition had a direct impact on the justice provided to victims, with provisions often not appropriate or gender specific. The impacts of gender-based violence differ from other crimes because of its deeply violating nature; nonetheless the ICTY did not adjust its procedures to acknowledge this. Instead, Amy E. Ray argues, victims had to

masculinise their injuries to fit the ICTY's standards (Ray, 1998, p.799). The identification of biases did not happen in this tribunal and thus the institution's structure is exclusionary.

*International Criminal Tribunal for Rwanda*

The ICTR utilised experiences and critiques from the ICTY to provide better judicial redress, including defining sexual violence with gender neutral language and in terms of war crimes, genocide and crimes against humanity. Scholars argue that the ICTR contributed to greater gender inclusion through its broad definition of rape as "a physical invasion of a sexual nature committed under circumstances which are coercive" (Koomen, 2013, p.257; MacKinnon, 2008, p.102). This definition relieved tensions surrounding consent and victim blaming arguments, which Campbell concludes were detrimental at the ICTY (Campbell, 2007, p.430). Irrespective of this, issues continued due to inadequate reparation procedures. The ICTR lacked reference to victim's 'right to remedy' for violations, Christine Evans' analysis revealing that the ICTR's references to victims is scarce (Evans, 2012, p.90). Whilst the ICTR attempted to improve tribunal processes from the ICTY's shortcomings, it continued to marginalise female victims through its inadequate victim recognition.

*International Criminal Court*

With the criticisms of the ICTY and ICTR in mind, the ICC began operation with the intent to contribute to judicial gender equality. Its first contribution was the listing of various forms of gender-based violence in its statute, classifying gender-based violence crimes as one of the most serious international crimes (Kennym & Malik, 2019, p.105). Its next contribution is in the recognition of victims' right to reparations. Article 75 of the statue establishes a victims' trust fund, operational since 2007, which manages the implementation of programs that

seek to address victim suffering (Evans, 2012,p.105). The ICC is a critical case for the affirmation of victim rights, as it acknowledges victims as stakeholders of justice (Durbach & Chappell, 2014, p.546). In this way, the ICC contributes to judicial equality through its recognition of victims and their need for reparations; processes which are vital for gender-based violence due to its traumatic impact.

Regardless of these gains, the ICC is controversial, as many of the issues from previous trials remain. The first of these, Coman Kennym & Nikita Malik argue, is a lack of prosecution, with only one gender prosecution receiving charges and it did not go to trial (Kennym & Malik, 2019, p.117). As well as this, Jocelyn Campanaro's analysis reveals that the ICC fails to recognise the gravity of gender-based violence (Campanaro, 2001, p.2588; Grey, 2019, p.318). The ICC's statute does define gender-based crimes but the final draft does not enumerate these crimes as grave breaches (Campanaro, 2001, p.2588). Rosemary Grey argues that through this, the ICC underestimates the complexity of gender-based violence crimes, only addressing atypical situations rather than structural inequalities (Grey, 2019, p.322). This underestimation leads to the next major issue with the ICC which is that there is a lack of appropriate reparation procedures. A general misunderstanding of the gravity of gender-based violence crimes perpetuates an entrenched misunderstanding of the impacts of this form of violence. This in turn affects the redress women experience. Kennym & Malik (2019, p.181) argue that redress is a major issue due to a lack of enforcement processes combined with the fact that reparations are the responsibility of national state systems. This process disenfranchises victims as it leaves them at the mercy of their domestic legal systems without effective accountability procedures to ensure redress occurs. As a result,

reparations are subject to global inequalities and the discriminatory treatment of victims depending on their nationality ensues.

Exclusions are reoccurring in law and judicial mechanisms. Actors aim to confront these through the encouragement of alternative judicial processes, alongside adjudicated justice, for crimes that impact marginalised groups, such as gender-based violence crimes. Celina Romany (1993, pp.87-88) critiques a judicial framework which allows individuals to exist in an international public sphere whilst failing to assist women in the private national sphere. Romany (1993, p.114) also argues that due to the variety of impacts from gender-based violence crimes, context specific justice is necessary for female victims. The proposal of alternative justice approaches for gender-based violence crimes addresses these arguments.

## Justice for Gendered-Based Violence Crimes

The importance of addressing justice for gender-based violence crimes not only through judicial mechanisms but also through adequate alternative processes is emphasised by many researchers (Aroussi, 2011, p.583; Evans, 2012, p.232; Manjoo & McRaith, 2010, p.44; Rooney & Ní Aoláin, 2018, p.8). They position two such processes as appropriate: reparations and restorative justice.

### *Reparations*

Sahla Aroussi examines how wartime sexual violence is met with silence and inaction due to the perceived complexities in providing redress for gender-based violence crimes (Aroussi, 2011, p.577). The reparations necessary for gender-based violence crimes entail a break from traditional militaristic approaches directed at the state, the Security Council often

applying sanctions rather than addressing the personalised nature of gender-based violence (Aroussi, 2011, p.577).

Anita Ho and Carol Pavish claim that gender-based violence affects victims' lives in all spheres, being a significant human rights issue due to its lasting impacts on mental health and physical health, including a higher risk of exposure to diseases such as HIV (Ho & Pavlish, 2011, p.93). The World Health Organisation has investigated these claims, finding that gender-based violence is a significant cause of female morbidity and mortality (Heise, 1993, p.79). The incorporation of comprehensive reparation provisions to address these impacts, different from what has historically been, has not occurred. Insufficiencies remain, with a continuing lack of enforcement despite an international Victims and Witnesses Unit at the ICC. The result of these perpetuating problems is the implementation of gender-based violence reparations without effective consideration of multiple issues, including the reported longevity of effects, differing impacts due to contextual oppressions or national capabilities for provision.

*Restorative Justice*

Restorative justice is an approach that encourages a conciliated outcome, aiming to establish reconciliation by including the victim's community as an intrinsic part of the process (Cohen, 2016, p.258). Ellen Pence and Melanie Shepard argue that this is the most effective method to respond to the inadequacies of the adjudicated legal system for gender-based violence crimes (Pence & Shepard, 1999, p.13). Restorative justice is appropriate for gender-based violence due to the social repercussions of these crimes, with many women experiencing social exclusion (Pence, 2012, p.1001). Pence views restorative justice as key

as it begins the process of removing community stigmatisation through its inclusion of both the victim and their society in an arena of reconciliation.

The inclusion of restorative justice in judicial processes is positive but gender sensitive restorative justice is paramount due to the deeply personal and destructive nature of gender-based violence. Barbara Hudson emphasises that justice must be "relational, discursive, rights regarding and reflective" in order for it to be successful, concluding that restorative justice must acknowledge all of these criteria before it can be appropriate for gender-based violence crimes (Hudson, 2003, p.206). Kathleen Daly & Julie Stubbs (2006) also identify potential issues in applying this form of justice to gender-based violence crimes given its capacity to place pressure on victims to relive their trauma in a public way. This, they argue, can have implications for victim safety as well as be a detriment to the mental health of victims who have to testify in front of their abusers in an intimate setting. They do not agree that this form of justice transforms power imbalances, arguing that race and gender biases will continue to be intrinsic in this process (Daly & Stubbs, 2006, pp.11-13).

Attempts to implement restorative justice processes following the Rwandan Genocide evidence the issues Daly & Stubbs raise. The ICTR referred rape cases to the Gacaca Courts in May 2008 (Aoláin et al., 2011, p.170). The initial transfer to these courts was controversial as many victims sought adjudicated justice based on the fact that the ICTR could enact measures to respect their privacy. The possibility of anonymity in this community-based mechanism was unfeasible, leaving many victims feeling betrayed (Haskell, 2011, para.17). The ICTR claimed that the transfer occurred as a large majority of victims were dying of aids and restorative justice would achieve justice in their lifetime, but activists argue restorative

justice was used to complete gender-based violence cases as quickly as possible so that the suppression of this part of history could occur (Haskell, 2011, para.17). The Gacaca courts failed to provide equal justice to all victims which left many survivors feeling disenfranchised with judicial mechanisms at the local and international level (Thomson, 2011, p.386). The Gacaca Court evidence that the avoidance of exclusive power structures is difficult, even at the community level.

## Conclusion & Future Research

Feminist analysis demonstrates that the exclusion of women in law and institutions persists. The failures of adjudicated justice to address all facets of gender-based violence crimes, led to the provision of alternative judicial processes, scholars arguing that alternative processes are crucial for gender-based violence due to the encompassing impacts of these crimes (Evans, 2012, p.3; Ho & Pavlish, 2011, p.97; Hayner, 2001, pp.78-79). However, feminist research demonstrates the systematic failure for gender-based violence justice throughout judicial and quasi-judicial mechanisms, including trials, reparations and restorative justice.

To remedy the issue of inadequate redress for gender-based violence crimes does not solely require better definitions or alternative reparation processes, as Louise Chappell argues (Chappell, 2016, pp.192-193). International courts continue to introduce inclusive gender-based violence provisions but the successful prosecution of these crimes remains disproportionately low. Christine O'Rourke theorises that for justice mechanisms, specifically the ICC, to achieve successful gender-based violence prosecutions, they must examine gender biases (O'Rourke, 2020, p.242). My thesis examines the gender and race biases underpinning the international justice for gender-based violence, theorising that it is

necessary to investigate the conditions that allow inequitable justice for gender-based violence in conflict to occur, for future institutional success. This requires an examination of power, particularly racialized and gendered power. I analyse three judicial mechanisms to reveal how power structures work when addressing gender-based violence. My analysis problematises power through an examination of the courts' discourses and practices, seeking to reveal the implications of these power structures. It is also important not to universalise the experience of women in order to arrive at answers. Therefore, I aim to reveal both race and power structures in the remainder of this research, considering the interrelationship between these structures in the justice system dealing with gender-based violence crimes. In the next chapter, I explain the methods of data collection and analysis that I use in this research.

# Chapter 3: Research Design

I demonstrate that race and gender power structures function throughout judicial mechanisms when addressing gender-based violence crimes, theorising that this analysis is essential in order to explain continuing judicial failures. My research centralises gender and race, employing discourse analysis to reveal power structures within institutional justice.

## Analysis of Gender and Race

The aims of feminism, which examine how experiences differ according to identities, guide my analysis of gender and race (Butler, 1990, p.4; Cameron, 1992, p.77; Charlesworth, 1999, p.382; Daly & Stubbs, 2006, pp.15-16; Wickramasinghe, 2010, p.55). An analysis that incorporates gender assists in revealing power structures as it understands the world as inherently gendered, and the same is true of a lens on race. This assumption allows for the efficient extrapolation of gender and race biases.

Specifically, through post-structural feminism, my analysis conceptualises power as a permeating force (Flax, 1983, p.150; Weedon, 1987, p.113). Power is not an autonomous object but is productive throughout reality (Butler, 1997, pp.20-21). Engaging with a post-structural lens prioritises how power affects social categories, with power producing conditions for gender and race. These conditions privilege certain genders and races over others, creating an inherently androcentric reality where non-Western women are routinely excluded (Smith, 1997, p.334). My research analyses how mechanisms perpetuate an exclusive justice process through their engagement with a discriminatory gender and race narrative.

My analysis understands reality according to exclusionary power structures that produce conditions for marginalised groups. Influenced by this, my understanding of knowledge begins at a place of oppression, as Delphy states "all knowledge which does not take social oppression as its premise, denies it, and as a consequence objectively serves it" (Delphy, 1981, p.73). I also recognise that power fosters relations between oppressions, with identities "a component of complex interrelationships with other systems of identification and hierarchy such as class, race, sexuality, culture and age" (Potter, 1993, p.3). Analysing gender and race through a post-structuralist framework prompts an awareness of how power functions to construct identity categories and the implications of this.

Judith Butler's research on the imposition of power is key to my analysis. Butler discusses how power pervades and produces every decision and every relationship, arguing that "power imposes itself on us and we are weakened by its force. We come to internalise itself on us or accept its terms" (Butler, 1997, p.2). Similarly, Chiseche Salome Mibenge argues that discourse naturalises the experience of gender-based violence for gendered and racialized identities. She argues that in order for jurisprudence to progress, an analysis that investigates this inequity is paramount (Mibenge,2013, p.160). These understandings of power imposition and discourse naturalisation are important to my thesis. My analysis positions that justice mechanisms engage with the discursive naturalisation of gender and race inequalities. To reveal these inequalities requires an analysis of power that unveils patterns and vectors of exclusion. The best strategy to reveal these exclusions is discourse analysis.

## Discourse Analysis

Michel Foucault summarises discourse as "institutionalised patterns of knowledge that become manifest in disciplinary structures and operate by the connection of knowledge and power" (quote inYazdannik, Yousefy, & Mohammadi, 2017, p.4). Power frames objects in certain ways that in turn creates conditions of action for these objects (Epstein, 2008, p.10). Discourse analysis explores the framing of these objects. My discourse analysis examines how race and gender power structures affect the framing of gender-based violence in international justice mechanisms. Discourse analysis reveals power structures, yet there are different approaches to discourse analysis influenced by understandings of reality and truth (Howarth, 2000, pp.130-133; Wickramasinghe, 2010, p.49).

### *Reality and Truth*

Scholars imagine reality differently and this affects the discourse analysis they undertake (Dunn & Neumann, 2016, pp.21-27; Phillips & Hardy, 2002, pp.21-22). Critical discourse analysts argue that a reality exists outside of discourse (Fairclough, 2013, p.179; Lazar, 2005, pp.8-9). Adversely, my discourse analysis positions that social reality does not exist outside of discourse; rather discourse creates and is created by social situations, institutions and structures (Herzog, 2016, pp.68-69; Weedon, 1997, p.108). Synonymous to my understanding of discourse, is my understanding of power. I align with Foucauldian conceptualisations which position power as productive. Power constitutes representations and opportunities for these representations (Foucault, 1969, p.54). Power is no longer operative in one direction, but it circulates throughout the social order; "Power is exerted rather than owned; it is not the acquired or preserved privilege of the dominant class but the overall effect of its strategic positioning" (Deleuze, 1986, pp.32-33 translation in Epstein,

2008, p.3). My understanding of power and discourse inform the tools I use and the boundaries of my analysis.

As critical theorists believe that reality can exist outside discourse, they also position that truth is attainable (Luke, 1995, p.19; Fairclough, 1993, p.137-138). Conversely, I understand that there is no objective truth. Instead, there are consequences of believing in an objective truth; truth effects (Foucault, 1980b, p.112; Heath-Kelly, 2016, p.63; Nietzsche, translated by Diethe, 1994, p.88; Vucetic, 2011, p.1296). My examination of justice engages with truth effects as the belief that justice is objective and consequently equally attainable, has implications for gender-based violence justice. This is evident throughout the problematic prosecutions of gender-based violence. My understandings of power and truth lead to the use of post-structural discourse analysis. This form of discourse analysis focuses on power structures within discourse and conditions produced by discourse (Agermuller, 2014, pp.10-12; Weedon, 1997, p.195).

*Post-Structural Discourse Analysis*

Post-structural discourse analysis centralises three core concepts; reproduction, representation and relegitimization of meaning (Shepherd, 2008, p.24; Weldes, Laffey, Gusterson & Duvall, 1999, pp.14-15). Representations are how culture, linguistics and society constructs objects within discourse. Relegitimization is the acceptance of these representations as true, acting to change the meaning of representations and encourages different expectations of "how to act, what to say and what not to say" (Jorgensen & Phillips, 2002, p.41). Roxanne Doty's use of post-structural discourse analysis is central to my analysis. The tools Doty use, which reflect key post-structuralist concepts, are

presupposition, predication and subject positioning (discussed below). Milliken states policy analysis, such as Doty's, is important to show how discourse is operational in government and international organisations (Milliken, 1999, p.232). I draw on Doty's use of discourse analysis and apply her tools to my data.

Deconstruction is also an important tool of post-structuralist discourse analysis as it investigates concepts believed to be stable. To deconstruct texts reveals how power works within them to create binary oppositions (Griffin, 2013, p.211). Through this revelation of power, it becomes accessible to collapse the binaries power creates. The deconstruction of binaries makes discourse analysis useful for gender analysis as society often conceptualises gender according to binaries.

Additionally, post-structuralist truth effects assist in examining understandings of gender and race. How gender and race is understood, impacts how society addresses gendered and racialized issues. I question the truth that courts accept about gender and race. Certain truths about gender and race can naturalise inequality, such as accepting gender as a binary concept with only masculine/feminine attributes. Discourse analysis allows for the extrapolation of these effects from texts as it "'questions the whole scholarly objective bias of linguistics and how assumptions and practices of linguistics are implicated in patriarchal ideology and oppression" (Cameron, 1992, p.16).

I use discourse analysis in my research to investigate the institutionalised patterns of race and gender within justice. I analyse how the creation of meanings pertaining to gender-based violence crimes occur. Post-structural discourse analysis is an effective method as it

requires critical interpretation to reveal power structures. At the same time, it centralises the permeation of power throughout reality as a constraining and productive force (Laclau & Mouffe, 1985, pp.118-119). The result of this centralisation is numerous analytical tools that are useful in revealing a variety of power structures.

## Research Design

I utilise discourse analysis within a case study research design, analysing three major judicial mechanisms that address gender-based crimes in conflict. These mechanisms are the International Criminal Tribunal for former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.

### *Case Study Selection*

Through my examination of these three courts, considered milestones for the achievement of gender-based violence justice, I aim to uncover patterns of exclusion for both race and gender (Evans, 2012, p.132; Kennym & Malik, 2019, p.54; MacKinnon, 2008, p.102). Context is essential in my analysis due to the impact context has had on gender-based violence inclusions, each court developing out of the previous one's precedents. A case study design facilitates this contextual study (Harrison, Birks, Franklin , & Mills, 2017, p.30).

Further, these courts largely form the discourse of international justice for gender-based violence crimes in conflict, with the three courts central to international definitions of gender- based violence (Aoláin et al., 2011, pp.158-160; Campanaro, 2001, pp.2578,2584 &2591; Chappell, 2010, p.491; Goldstone & Dehon, 2003, pp.121-122; Manjoo & McRaith,

2010, p.21). This research design allows for the most accurate analysis of how gender and race power structures function in international justice mechanisms.

My research design is a 3-part case study, with each section addressing one judicial mechanism. Additionally, I utilise an embedded case study design (Yin, 2014, p.53). My embedded subunits of analysis are the 5 cases I examine from each judicial mechanism. The data I have chosen is appropriate as the cases show a range of differences including dates of prosecution, prosecution issues, prosecutors and defendants. My wide selection narrows the risk of generalising court issues to a select few cases.

*My Discourse Analysis*

I utilise four tools of discourse analysis. I develop questions within my tools to assist in the deduction of power structures. These tools are:

Double Reading

Double reading is an analytical tool developed by Derrida to deconstruct texts (Derrida, 1976, pp.157-164). This tool entails reading a text twice. My first reading acts to identify more simplistic representations of gender and race whilst my second reading exercises an investigative approach. I analyse the implications of established representations with an aim to deduce binaries. This tool is useful as a large proportion of my data is legal, institutional documents. More than one reading becomes crucial to analyse the legal language within these documents. My first deconstructive question is:

- *What binaries exist within the text? What power structures do these binaries indicate?*

Presupposition

Presupposition, predication and subject positioning function intrinsically together to reveal power structures within discourse (Doty, 1993, p.306). Presupposition is background knowledge. Presupposition reveals the constructions that exist for a certain type of reality to appear true, focusing on an examination of how discourse naturalises representations (Doty, 1993, p.306). The question I answer to initiate my analysis of presupposition is:

- *What does the data consider 'natural' or 'true'? What evidences this?*

Predication

Predication is how a text conceptualises an object. This occurs through the use of adverbs and adjectives, known as predicates (Doty, 1993, p.306). Predication establishes the given attributes for certain objects and subjects. These predicates indicate intrinsic power constructions that allow for representations to appear accurate. Predication largely rests on textual analysis. In order to reveal predicates, I answer this question in my research:

- *What predicates are used when referring to gender-based violence and women? Do these predicates indicate any gender or race presupposed knowledge?*

An example of how I conduct part of my predicate analysis is in Table 3 (following an example provided by Doty, 1993, p.311).

*Table 3: Predicate Analysis: The Akayesu Judgement*

| Gender-based/sexual violence | Women/Girls | Rape |
|---|---|---|
| *Allegations*<br>*Prejudiced*<br>*Remedy*<br>*Unfounded*<br>*Immaterial*<br>*Different*<br>*Explicit* | *Them*<br>*Beautiful*<br>*Mistresses* | *Encouraged* |

Subject Positioning

Subject positioning is my final analytical tool. This tool investigates the constructed position of objects within discourse and how representations function to prescribe where objects or subjects now fit within discourse (Doty, 1993, p.306). I answer this question in regard to subject positioning:

- *Where are gender-based violence crimes positioned in the data? Are they positioned in a place of power or in a place of subordination?*

These tools will reveal common representations. The reappearing representations indicate how power structures are functioning. Thus, the final question to analyse commonalities is:

- *What are the race and gender constructions throughout all documents? What conditions do they produce, if any?*

I employ these tools of discourse analysis throughout my thesis. I organise each court analysis according to gender power structures and then race power structures. At the end of each chapter I explore how the cases in one court are similar or different, providing a final analytical summary.

My research analyses the main mechanisms of international justice for gender-based violence crimes in conflict. A broad analysis across numerous cases and courts is appropriate in order to demonstrate the permeation of power. My analysis reveals that the lack of redress for gender-based violence crimes is not an atypical situation but exists systemically. This explains why the achievement of justice for gender-based violence continues to be limited despite developments in international justice. To progress this argument in the following chapter, I begin my analysis at the ICTY, investigating how this court engages with gender and race power structures.

# Chapter Four: The International Criminal Tribunal for the former Yugoslavia

The ICTY's treatment of gender-based violence and its victims indicates gendered and classist power structures. I first demonstrate this through an examination of the ICTY's gender exclusions. I then discuss how the ICTY constructs gender-based violence and women, with the ICTY's representations of gender-based violence and its victims indicative of functioning power structures. After this, I analyse the court's treatment of gender-based violence victims. Its poor treatment demonstrates how the ICTY prioritises identities according to gendered power. In the second section of this chapter, I discuss race power structures. To begin my discussion of race, I first address class and the impact this has on individual identities. Within this section, I show how an individual's identity shapes their understanding of truth whilst the ICTY's institutional understanding of truth indicates what identities it attaches value to. The differential value of identities at the ICTY affects the justice for gender-based violence.

## Part One: Gender

*Gender Exclusions*

The ICTY Statute establishes the scope of this tribunal. The tribunal prosecutes both male and female perpetrators, evident in the case against Plavšić, but the language utilised in many parts of the statute is exclusively masculine:

> shall be entitled to be assisted by counsel of his own choice.
>
> preparation of his defence … to be tried in his presence.. to defend himself in person or through legal assistance of his own choosing .. assigned to him without

payment by him (*Statute of the International Criminal Tribunal for the former Yugoslavia*, 1993, p.11, p.12).

These exclusions continue throughout the ICTY, with the Furundžija case utilising male pronouns when defining aiding and abetting: "If he is aware that one of a number of crimes…he has intended to facilitate the commission of that crime and is guilty as an aider and abettor" (*Prosecutor v. Furundžija*, 1998, p.94). This definition excludes female perpetrators, such as Plavšić, from proceedings and positions women in a place of subordination as Ann Sagan notes that linguistic exclusions indicate the "insiders and outsiders of the international community" (Sagan, 2010, p.9). Whilst exclusionary linguistics is significant in showing the prioritisation of genders, the construction of women throughout the cases distinctly emphasises how gender power structures function.

*The Tribunal's Understanding of Female Identities*

The tribunal's understanding of women is best summarised in the Chamber's statement in the Kunarac et al. case: "During this period, the women had no control whatsoever over their lives and choices" (*Prosecutor v. Kunarac et al*., 2001, p.28). The ICTY understands women within the Balkan conflict as inherently victims, this statement creating a representation in which victims lack agency. I understand agency as the access to an identity in which an individual may speak, desire and function freely (Davies, 1991, p.51). Although it is undeniable that women were victims of gender-based violence in this conflict, the framing of their identities as lacking control or choice is problematic. As Raewyn Connell theorises, society values differently the attributes assigned to male and female, with men being seen as inherently strong and self-sufficient. This, she claims, is hegemonic masculinity. Femininity occupies the opposing space, with dependency and delicacy considered feminine

attributes (Connell, 1987, pp.187-188). With these associations, society gives women a position in which to exist, with Franca Bimbi stating, “what is due to women such as masculine protection and what women must offer in the form of care, gifts or the sale of their bodies” (Bimbi, 2014, p.292). The Chamber engages with these representations through the claim that women had no control or choice within the conflict. As Mibenge argues, narratives of gender-based violence require victims be disempowered (Mibenge, 2013, p.159). Legal mechanisms encourage this through the inherent vulnerability they impose on victims. The result of this subject positioning is that it becomes difficult to consider that many women did have to make a choice for their survival, viewed in FWS-87’s relationship with Radomir Kovač in the Kunarac et al. trial:

> FWS-87 and Radomir Kovač..were in love with each other and that FWS-87 stayed with him of her own free will..
>
> FWS-87, whom he introduced as his girlfriend… According to the witness, that evening FWS-87 behaved “beautifully, wonderfully, nicely”, “like all of us”, and danced (*Prosecutor v. Kunarac et al*., 2001, p.61, p.62).

Further, the predicates used in the Kunarac et al. trial to describe women are reminiscent of this subject positioning. In order to form a narrative of engrained victimhood, the Chamber often terms women or children ‘girls.’ Robin Lakoff’s feminist linguistic analysis examines the differences between language used for women compared to men, arguing that linguistic imbalances often bring into focus real-world imbalances. She analyses the common substitute for woman: girl. She states that a man past the age of adolescence is hardly referred to as a boy whereas women of all ages are girls. This substitute has connotations of youth, immaturity and irresponsibility (Lakoff, 1975, p.56). The utilisation of this language

contributes to the representation of women as lacking agency. Through this association, the ICTY enables a simplistic discourse of gender-based violence.

*The ICTY's Definition of Gender-Based Violence*

As outlined in the Mucić et al. case, the crime of rape was not well defined in the international realm at the time of this tribunal (*Prosecutor v. Mucić et al*., 1998, p.52). The Plavšić case understands that rape is widespread yet it does not detail it when citing the gravity of Plavšić's offences (*Prosecutor v. Plavšić*, 2003, p.10). Evidently, the ICTY excludes gender-based violence, which continues in the Nikolić case where the Chamber states it will consider the:

> despair of men and women who were separated from their loved ones, the terror experienced by those who watched fellow detainees die and the agony experienced by those who did not perish immediately but died slowly of injuries and exposure (*Prosecutor v. Nikolić*, 2003, p.45).

The impact of gender-based violence is not valued and so the Nikolić case does not communicate it.

As with feminine pronouns in the statute, the proceedings exclude gender-based violence. Additionally, the Chamber simplifies gender-based violence with the Furundžija case limiting gender-based violence to rape:

> the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced penetration (*Prosecutor v. Furundžija*, 1998, p.70).

This limitation discounts the experiences of many victims. As Jennie Burnet discusses, it is important not to obscure the complexity of sexual encounters in conflict (Burnet, 2012, p.98). Many of the women during this conflict were of a low socio-economic background and this positioning has an impact on their choices. Research has shown that often women exercise their sexual agency as a means of survival including economic survival (Anthias, 2013, p.168; Burnet, 2012, p.97; MacKenzie, 2012, p.2). The Kunarac et al. case communicates this survival technique as well as the disparity between the Chamber's construction of gender-based violence and the experience of Witness D.B:

> Kunarac's Testimony
>
> [H]e stayed in one of the rooms where, he claimed, D.B. soon joined him. Kunarac said that D.B. took the initiative, unbuttoning his clothes and kissing him. They eventually had sexual intercourse which, Kunarac said, was completely unexpected for him.....I had sex against my will.. without having a desire for sex.. I cannot say that I was raped. She did not use any kind of force but she did everything (*Prosecutor v. Kunarac et al*., 2001, p.58).
>
> Witness D.B's Testimony
>
> After these events, "Gaga" told her to have a shower because his commander was coming, and he threatened to kill her if she did not satisfy the commander's desires … she felt terribly humiliated because she had to take an active part in the events, which she did out of fear because of "Gaga's" threats earlier on; she had the impression that the accused knew that she was not acting of her own free will, but admitted after a question by Defence counsel that she was not sure if there would have been intercourse, had it not been for her taking some kind of initiative (*Prosecutor v. Kunarac et al*., 2001, p.84).

The simplification of gender-based violence discredits the experience of D.B. There are two major issues that affect how these cases understand gender-based violence. The first is that if a participant is 'active' in the violence, then it cannot constitute gender-based violence. The presupposition that women are passive builds this understanding; if they express agency, then they must not be victims. The second issue with these understandings is that sexual intercourse equates to gender-based violence. The conflation of sex with gender-based violence is problematic as it discounts the violent nature of gender-based violence. The issues this encourages is clear in the Mucić et al. trial, where the Chamber states the prior sexual actions of the victims, later redacting these facts but confirming that it will consider this information (*Prosecutor v. Mucić*, 1998, p.30). Underlying both of these understandings is what Malesela Monte and Mphoto Mogoboya term rape myths. Rape myths are understandings rooted in simplistic understandings of women and their sexuality (Monte & Mogoboya, 2018, p.11039). These understandings are part of a greater narrative of gender inequality that limits women to certain attributes and dismisses any experiences oppositional to these attributes. The ICTY's simplistic understandings lead to the inequitable treatment of victims. In the next section I explore how narratives of gender inequality contribute to the ICTY's exclusion and marginalisation of gender-based violence victims.

*A Court not Designed for Gender-based Violence Victims*

The ICTY does not equitably address gender-based violence, apparent in the court's construction of women, gender-based violence and its treatment of gender-based violence victims. The Chamber's treatment of gender-based violence victims indicates what identities it caters to and hence what gender power structures are in operation. The Furundžija case

considers Witness A "contaminated and affected.. not scientifically reliable" (*Prosecutor v. Furundžija*, 1998, p.23), due to the trauma she suffered. As a result of this claim, the Chamber discusses the admissibility of her psychologist report. Following the receipt of this report, the Defence requests the exclusion of her testimony. Whilst the Chamber denies this motion, the Defence continues to build a case on the fact that the Witness has PTSD which renders "her memory unreliable" (*Prosecutor v.Furundžija*, 1998, p.18) Witness D contradicts Witness A, however the Chamber considers Witness' D recount of events, as a male spectator, more reliable than the victim who suffered the abuse. I question the impact that Witness A's constructed unreliability has on rulings, with the Prosecution not seeking to modify the indictment following her testimony that the accused was also present during rapes in the large room.

The experience of Witness A contrasts the experience of Witness SU-032 in the case of Nikolić. In this case, Witness SU-032 recounts what happened to her and the impact this has had on her life in detail:

> I felt miserable, degraded. I wanted to be a good mother, the best I could. I wanted my child to grow up in a beautiful family, but that couldn't be any more. I felt humiliated as a woman and as a mother by the very fact that I was there in that camp in that situation (*Prosecutor v. Nikolić*, 2003, p.51).

The differential treatment in this case is influenced by the guilty plea that Nikolić submits, with this plea creating space for the witness to share her experience, rather than be interrogated according to the standards of the other cases. Lesley Jeffries argues that court proceedings do not accommodate for expressions of grief or trauma (Jeffries, 2016, p.174). This argument is also relevant to the Mucić et al. case as the Chamber questions the

credibility of Ms Ćećez. In this case, Ms Ćećez makes corrections to her previous statements and following this, the trial focuses on her inconsistencies (*Prosecutor v. Mucić et al*., 1998, p.328-330). Research establishes that gender-based violence leads to serious psychological issues such as depression, anxiety, PTSD and memory loss (Jeffries, 2016, p.168; Manjoo & McRaith, 2010, pp.12-13). Whilst investigating inconsistencies is a judicial technique in deducing the 'truth,' this form of investigation is unsuitable for gender-based violence crimes.

Gregory Mateosian theorises that inconsistencies may not arise from a lie but rather are often the product of multiple factors including culture, grammar, ideology and social interaction (Matoesian, 2001, p.157). Mateosian states that courts assume a sameness of individuals and hence points to a need for the sameness of stories, although identities within the Chamber are different (Matoesian, 2001, p.5). Identities are a collection of characteristics, largely formed through race, gender and experience (Isaac & Jurasz, 2018, p.854). As discussed before, even if Witness A and Witness D were both in the room when the crime occurred, their perspectives are different due to their life experiences and therefore they will have different versions of events. The version of events that courts accept is governed by patriarchal ideals (Matoesian, 2001, p.40). The prioritisation of one version of events over another, dependent on the dominating identity, is clearly seen in the case of Witness A and Witness D.

The Chamber caters to certain identities and experiences. This is visible in the Kunarac et al. case when the court requests Witness FWS-87 quantify the number of times they experienced rape (*Prosecutor v. Kunarac et al.*, 2001, p.33). The Chamber then questions the

credibility of Witness FWS-87 when she has trouble remembering exact dates. Jelke Boesten criticises judicial focus on very specific details as this focus regulates victims by controlling the aspects of their experiences that they can re-tell (Boesten, 2014, p.75). The ICTY's quantitative emphasis reveals power dynamics within the Chamber that subordinate women through the regulation of their experiences. This power imbalance is indicative of functioning gender power structures that do not consider the traumatic impacts of gender-based violence. As a result of these power structures, the narrative of gender-based violence justice is inherently marginalising. Prior to the trial, the Chamber engages in presuppositions of gender-based violence. Once the trial begins, it interrogates victims according to judicial processes that do not consider psychological impacts. The implications of this is the international continuation of a form of justice that fosters inequality for gender-based violence.

## Part Two: Race

A court that only effectively considers certain identities also indicates racialized power structures. Class is intimately connected to race, with essentially perceived racial understandings often predetermining the position (class) of individuals in society. Correspondingly, class significantly influences an individual's worldview due to how it determines the resources available to people. Many of the victims at the ICTY were of a low economic class which has an impact on how they understand proceedings. As explored previously, the court emphasises dates and times but this is not accessible to all victims. Diana Eades' study of the linguistics used in a trial against three young Aboriginal boys evidences how institutional talk can be exclusive. Institutional talk is linguistic habits developed within certain types of work (Eades, 2008, p.150). Whilst institutional talk is

indicative of certain employment, it is also utilised as a form of manipulation within questioning. The utilisation of this talk excludes witnesses and in some cases confuses them. Examples of exclusionary linguistics includes long sentences, repetition, quantitative focuses and legal jargon. The victims of gender-based violence were "poor, ill-educated, rural women from patriarchal communities in [the] former Yugoslavia" (Jeffries, 2016, p. 155). The use of courtroom talk entrenches power imbalances and as Eades discusses, the key variable in influencing witness speech style was power dynamics (Eades, 2008, p.3). The victims of gender-based violence experienced a power dynamic within conflict, with many violated by male perpetrators of high political standing. This dynamic continues in the courtroom, contributing to the revictimization of these women. The lack of consideration for gender-based violence shows that the court does not value lower-class victims.

*Truth at the ICTY*

Similar to how the Chamber presupposes that witnesses can understand institutional talk, it also presupposes that victims understand the meaning of truth in the same way, with the Furundžija case stating "cognisant of its duty to search for the truth and applying the interests of justice test inherent to its power" (*Prosecutor v. Furundžija*, 1998, p.28). However, the ICTY Statute does not define what the boundaries of truth are. Truth is not an objective instrument. Foucault explores truth as produced by systems of power, concluding that truth or what someone believes to be true, is heavily influenced by power dynamics (Foucault, 1969, pp.222-224). The Chamber's hierarchy of identities is shown in what 'truth' it prioritises. In the Nikolić case the 'truth' of the accused utilises highly emotive language:

> Nikolić has helped further a process of reconciliation. He has guided the international community closer to the truth… Nikolić was an ordinary man leading

> an ordinary life… well-liked… friendly.. he found himself effectively in the wrong place at the wrong time.. some positive aspects in his behaviour which the Trial Chamber will not hesitate to mention.. he allowed the baby to have that pillow.. the Accused would often get milk from a neighbour and receive food that was sometimes brought to the camp… the Trial Chamber is convinced that a substantial reduction of the sentence is warranted" (*Prosecutor v. Nikolić*, 2003, pp.66-67).

The Chamber emphasises how a guilty plea creates space for the victims to share their traumatic experiences willingly rather than under the pressures of cross examination. The Chamber, in spite of this, then focuses on how the accused fosters reconciliation in its opening lines (*Prosecutor v. Nikolić*, 2003, p.66). The emotive language used, as well as dissolution of responsibility with the line "in the wrong place at the wrong time" indicates how the court engages in an accused centred trial rather than victim centred justice. This engagement with the 'truth' of the accused reveals a prioritisation of identities. As Foucault positions, truth is unattainable, however what the tribunal accepts as true evidences power structures, seen in the Nikolić case (Foucault, 1969, p.223).

Individual understandings of truth differ as numerous factors impact understandings of truth, including cultural differences and social positioning (Vucetic, 2011, pp.1298-1299). The judicial standard of truth is different to how witnesses understand truth due to differing aims. Whilst the victims utilised the tribunal as a space for relief, the judicial aim of the Chamber was to establish objective, certifiable facts. As a result of this, the truth that victims communicate is often framed as inadequate, evident in the repeated inconsistencies the Defence establishes.

Culture is a large influence on truth and storytelling, with storytelling intimately connected to language. As Diana Eades explores, judicial courts create a narrative of storytelling in which they assume stories are always told in the same way, but sociolinguistic research shows this is not the case (Eades, 2008, pp.156-157). Developments in identities have an impact on how an individual retells a story. The ICTY occurred years after the events, for that reason it is acceptable that victims' perspectives have changed along with their stories. As well as this, cultural unfamiliarity can dictate what witnesses feels comfortable to share. As the witnesses were from a low socio-economic status, the formality of the tribunal is foreign. Further, truth is dependent on context. Conversely, the truth of the tribunal is heavily dependent on decontextualizing a story and re-constituting it numerous times (Matoesian, 2001, p.6). Truth is heavily influenced by external factors, particularly culture and class. The limited ability for the tribunal to examine these factors and accommodate the truth of these victims reveals the priorities of the ICTY. The emphasis placed on truth without consideration for victims limits the experience of justice.

The tribunal states in the Nikolić case that "truth and justice should foster a sense of reconciliation" (*Prosecutor v. Dragan Nikolić*, 2003, p.31). In the Plavšić case, Dr. Alex Boraine testifies that victims should be at the centre of the reconciliation processes (*Prosecutor v. Plavšić*, 2003, p.24). The lack of sensitivity in the treatment of gender-based violence victims suggests otherwise. It is clear that gendered and classist power structures function throughout the justice for gender-based violence crimes of the former Yugoslavia. The ICTY engages in a form of justice which does not acknowledge the impact of race, class and language. Alike to gender power structures, race power structures at the ICTY delineate truth through its prioritisation of identities. The internationalisation of justice encourages

the acceptance of one form of truth and one form of identity. As a result, justice excludes differing identities, including gendered and racialized identities at the ICTY. Consequently, the justice for gender-based violence begins in a place of subordination which continues at the ICTR.

# Chapter Five: The International Criminal Tribunal for Rwanda

The ICTR prosecutes human rights violations from the Rwandan Genocide, yet its strategy models the ICTY which is a European based court (*Statute of the International Tribunal for Rwanda*, 1994, p.55). The European bias of this court has implications for proceedings. In this chapter, I explore how race affects the prosecution of gender-based violence. First, I assess the treatment of gender-based violence victims throughout the tribunal, then analysing the ICTR's linguistic framing of gender-based violence. In the second section, I discuss the connections between gender-based violence and race, arguing that the ICTR upholds a standard of justice rooted in colonial history, evidenced throughout its cases. Gender-based violence proceedings at this tribunal show how gender and race power structures function concurrently throughout judicial practices and discourse.

## Part One: Gender

The ICTR Statute limits gender-based violence to rape, like the ICTY. In addition to this limited scope, the 1998 Akayesu case finds that there is no commonly accepted definition of rape in international law (*Prosecutor v. Akayesu*, 1998, para.596). Clearly, from the beginning of proceedings, gender-based violence is not coherently understood.

### *Treatment of Victims*

The Akayesu case defines rape, which the Chamber references throughout the cases. Whilst the broad Akayesu definition represents greater gender inclusivity, the ICTR's treatment of victims contradicts this gain. Later in the Akayesu case, the Chamber authorises the accused to cross examine the witnesses. This authorisation communicates a disregard for the

traumatic experiences of the witnesses under the command of the accused (*Prosecutor v. Akayesu*, 1998, para.19). Sue Lees discusses how trials can resurface similar feelings to those of the attack for gender-based violence victims. She terms this experience of reliving the attack under the scrutiny of law as "judicial rape" (Lees, 1993, p.14). Judicial rape, she states, can retraumatise victims as "you are obliged to relive the whole life-threatening experience, face to face with the man who assaulted you... brings back the horror of the attack" (Lees, 1993, p.15). The authorisation of cross examination by Akayesu is reminiscent of Lees' concept and is dismissive of the victims' experiences.

The ICTR attempts to recognise the sensitivities of gender-based violence with numerous gender inclusive provisions. One of these provisions is that the Chamber does not require corroboration for gender-based violence crimes. The Chamber states:

> The provisions of this Rule, which apply only to cases of testimony by victims of sexual assault…. no corroboration shall be required (*Prosecutor v. Akayesu*, 1998, p.40).
>
> The Trial Chamber shall not require corroboration of the evidence of a victim of sexual violence (*Prosecutor v. Muvunyi*, 2006, p.3).
>
> The Chamber recalls that in cases of sexual assault, pursuant to Rule 96 i of the Rules, the Chamber shall not require corroboration of the victim's evidence (*Prosecutor v. Nyiramasuhuko et al*., 2011, p.37).

Despite this, the treatment of witness testimony in the Nyiramasuhuko et al. case is problematic. The Chamber states that when dealing with Witness TN, it will exercise caution in its analysis of her testimony. It also states this about Witness SX but then claims that Witness SX is more believable as a consequence of Witness TB's corroborating testimony.

This similarly continues with Witness QY and Witness SS (*Prosecutor v. Nyiramasuhuko et al.*, 2011, p.278, 294). Whilst their testimonies do not require corroboration, when the Chamber notes corroboration, it describes the testimonies as more believable. This pattern suggests that gender-based violence does need corroboration. The provision that excuses corroboration for gender-based violence crimes recognises that often the only evidence for gender-based violence during conflict is victim testimony. However, the ICTR's pattern of indirect corroboration encourages the framing of gender-based violence victims as unreliable. The implications of this association is that the Chamber does not escape the interpretative marginalisation that impact many other rape trials, where the courts frame victims as unreliable or mistaken in their memory. This has a traumatising impact on victims and affects the justice they experience.

It is apparent that human testimony is largely the only evidence possible for gender-based violence crimes in conflict. Due to the evidence available for gender-based violence crimes, the Chamber establishes that the Defence cannot challenge the experiences of rape victims, Witness JJ, OO, KK NN and PP in the Akayesu case (*Prosecutor v. Jean-Paul Akayesu*, 1998, para.453). Regardless of this provision, the language the Defence utilises to describe human testimony does question their experiences. The Akayesu Defence utilises emotive predicates in order to discredit the testimony of the witnesses:

> the *fragility of human testimony* as opposed to documentary evidence… charges of offences of sexual violence, the Defence argued, were *added under the pressure of public opinion* and were not *credibly supported* by the evidence….Witness J's account, for example, of living in a tree for one week after her family were killed

> and her sister raped, while several months pregnant, was simply not credible but rather the *product of fantasy* (*Prosecutor v. Akayesu*, 1998, pp.19-20).

These predicates create the impression that the human testimony of gender-based violence victims is inherently falsifiable. As well as this, the Defence focuses on whether the accused had the authority to stop the rapes. The trial manipulates linguistics so that the Defence does challenge the rapes but from a perspective of deciphering the accused's authority. The actions of the Defence and Prosecutor do not align with the introduced provisions that attempt to recognise the sensitivities of gender-based violence. Rather, these actions suggests a disregard for gender-based violence crimes. The Chamber continues to operate according to standards that do not consider traumatic crimes with sensitive evidence. The ICTR's insensitive treatment of gender-based violence indicates that it functions according to exclusive practices formulated prior to the recognition of gender-based violence as a serious international crime.

Preconceived ideas of feminine reliability are also apparent in the Nyiramasuhuko case. The Chamber states that it values substantial detail. The Chamber appreciates Witness TA's substantial detail in her testimony but during her cross examination, the Chamber notes inconsistencies:

> The Chamber recalls some apparent inconsistencies in the testimony of Witness TA in relation to her prior statement. Witness TA stated in testimony that she had not been raped anally. However, she was cross-examined on a prior statement in which she stated that she was raped in her anus as well as her vagina (*Prosectuor v. Nyiramasuhuko et al*., 2011, p.650).

Throughout the testimony of gender-based violence victims, the Chamber requires graphic descriptions. In the Muvunyi case the Prosecution prompts Witness QY to recall in detail the events that occurred to her:

> One got on me, the other one spread my legs apart, and the other took to one side and took one of my legs, and the other took the other leg...One of the soldiers got on me, and they took turns and then they left…When asked by the Prosecutor to explain what she meant by "they took turns", QY replied: each of them introduced his sexual organ into mine… About three weeks after this incident, Witness QY said she was raped again by a soldier in the back courtyard of the prefecture Office (*Prosecutor v. Muvunyi, 2006*, p.98).

As Deborah Cameron and Tamar Holoshitz discuss, this is a pattern throughout tribunals (Holoshitz & Cameron, 2014, pp.174-175). Susana SáCouto and Katherine Clearly concur, with their research revealing that courts tend to require higher evidentiary standards for gender-based violence crimes (SáCouto & Clearly, 2009, p.350). This phenomenon reflects the feminine unreliability narrative. Feminist scholarship reveals that society often frames women as emotional, hysterical and consequentially unreliable. This narrative has been used to subordinate women and dismiss their stories (Baaz & Stern, 2011, pp.573-580; Lees, 1993, p.28; Showalter, 1993, p.25; Tickner, 2014, p.145). The ICTR's requirement of graphic descriptions for gender-based violence crimes is in line with this narrative and hence evidence of gender biases.

As well as this, Cameron and Holoshitz argue that graphic descriptions deny women individuality (Holoshitz & Cameron, 2014, pp.176-177). Rather, graphic descriptions enforce the physicality of the crime without consideration of the emotional trauma of the

experience. The impact that rape has on individuals is clearly communicated in the Akayesu case:

> She said her mother begged the men, who were armed with bludgeons and machetes, to kill her daughters rather than rape them in front of her, and the man replied that the "principle was to make them suffer" and the girls were then raped (*Prosecutor v. Akayesu*, 1998, p.111).

The ICTR's gender inclusive provisions do not translate at the tribunals. Whilst these provisions are in place to encourage gender inclusivity, practices at the ICTR continue to exclude and marginalise gender-based violence crimes.

*Gender-Based Violence Framing*

The lack of sensitivities at the ICTR gives insight into how the Chamber values gender-based violence victims. As well as this, the court constructs identities for the victims. The Renzaho case states that "women who avoided rape were fortunate given its prevalence" (*Prosecutor v. Renzaho*, 2009, p.180). This sentence suggests that the crime of rape was avoidable, equating the crime with the actions of women. The Chamber's placement of criminal responsibility onto the victims exists throughout the cases. Michelle Aldridge and June Luchjenbroers argue that the language used to describe sexual violence crimes disempowers women (Aldridge & Luchjenbroers, 2007, p.88). Aldridge and Luchjenbroers give the following examples "plea after women raped in alleyway" and "women is raped and thrown in stream" (Aldridge & Luchjenbroers, 2007, p.88). This linguistic structure is problematic as it does not locate the perpetrator within the sentence. Rather, the sentences locate the victim in close proximity to the criminal act, which, they argue, indicates the location of blame. This sentence structure frequently appears at the ICTR, with many

gender-based violence experiences detailed in terms of the victim's actions opposed to those of the perpetrator.

*Table 4: ICTR's Linguistic Framing of Gender-Based Violence*

| Case | Language used to frame gender-based violence |
|---|---|
| Renzaho | "Tutsi women and girls were raped throughout Kigali-Ville by persons under Renzaho's control"<br>"At the same time and in the same room, her sister was raped"<br>"The witness heard from other women at Sainte Famille that they were subjected to sexual attacks and was aware that some subsequently died"<br>"Witness AWO testified that she was repeatedly raped in the ruins of her home"<br>"The witness was raped on a daily basis for nearly eight weeks"<br>"Her sister and Tutsi neighbour were also raped repeatedly there"<br>(*Prosecutor v. Renzaho*, 2009, pp.175, 179, 184, 185, 187). |
| Akayesu | "Many women were forced to endure multiple acts of sexual violence."<br>"young girls were raped at the bureau communal"<br>"Witness H, a Tutsi woman, testified that she herself was raped in a sorghum field and that, other Tutsi women being raped"<br>"In the cultural centre, according to Witness JJ, they were raped"<br>"She was raped twice by one man"<br>"approximately ten girls and women and they were raped..She was raped again, two times"<br>"Witness JJ testified that she could not count the total number of times she was raped"<br>(*Prosecutor v. Akayesu*, 1998, pp.7, 107, 109). |
| Muvunyi | "Many women and girls were raped and sexually violated in these locations or were taken by force or coerced to other locations, where they were raped and subjected to acts of sexual violence by Interahamwe and soldiers from the Ngoma Camp"<br>"However, the girls returned in tears and Witness YAK heard from another refugee that the girls were raped by the ESO soldiers"<br>(*Prosecutor v. Muvunyi*, 2006, pp.95, 100). |

> [T]he way we think about social roles has an impact on the lexical choices we make about persons who fulfil those roles…It is therefore of particular importance that we recognise how socially held views of women's conduct already predispose women to fail in court, in cases dealing with crimes of a sexual nature (Aldridge & Luchjenbroers, 2007, p.90).

This quote from Aldridge and Luchjenbroers is relevant throughout the cases at the ICTR. When describing gender-based violence, women are within the linguistic structure yet their

perpetrators rarely appear. Deborah Cameron and Tamar Holoshitz take issue with the fact that 'women/woman' is the most utilised phrase within reports of sexual violence, as it emphasises the attention given to victim responsibility rather than perpetrators (Holoshitz & Cameron, 2014, p.170). The ICTR engages with an overutilization of the term 'women/woman' and with this, the tribunal's linguistic framing carves out a position of indirect responsibility for victims. The implications of this subject positioning is that gender-based violence cases become predisposed to bias as a result of gender inequalities. Language is representative of greater social disenfranchisement and the language utilised at the ICTR indicates that justice does not escape gender biases. This, to a degree, explains the low number of gender-based violence prosecutions at the ICTR, despite the widespread nature of this crime.

## Part Two: Race

*Relationship between Language and Race*

Linguistics at the ICTR also demonstrate race power structures. As seen in the ICTR Statute, the tribunal's working languages are English and French, though the tribunal recognises that most victims and witnesses speak Kinyarwanda, a dialect of native Rwandans. With these working languages, the ICTR positions victims in a place of subordination as the Akayesu case states that the translation of oral testimony from Kinyarwanda into one of the official languages was a great challenge (*Prosecutor v. Akayesu*, 1998, para.145). Whilst the Chamber permits witnesses to speak in Kinyarwanda, translations do not always accurately convey meaning. This is relevant for Rwandan gender-based violence victims due to the connection between linguistics and culture. There are four terms in Kinyarwanda, used interchangeably, that the trial understands as rape:

1. *Gusambanya*: "to bring a person to commit adultery or fornication".
2. *Kurungora*: "to have sexual intercourse with a woman". This term is used regardless of whether the woman is married or not, and regardless of whether she gives consent or not.
3. *Kuryamana*: "to share a bed" or "to have sexual intercourse", depending on the context. It seems similar to the colloquial usage in English and in French of the term "to sleep with".
4. *Gufata ku ngufu*: "to take anything by force" and also "to rape". The context in which these terms are used is critical to an understanding of their meaning and their translation (*Prosecutor v. Akayesu*, 1998, p.45).

As stated by the tribunal, context is essential in understandings these terms. Michael Agar coins the term “languaculture” which summarises the inseparability of language and culture (Agar, 1993, p.28). Celia Roberts agrees, stating that communication requires culture (Roberts, 1998, p.109). John Gumperz enforces this through an examination of discourse. Gumperz uncovers many presuppositions within language that require cultural understanding (Gumperz, 1982, p.3, 153, 172). These presuppositions exist throughout the gender-based violence cases. This is first evident in the Muvunyi case; when discussing gender-based violence, the accused utilises a Rwandan proverb stating that the Tutsi girls “should die elsewhere because they could poison their Hutu husbands” (*Prosecutor v. Muvunyi*, 2006, p.51). The utilisation of culturally specific proverbs indicates the intimate connection between Rwanda’s language and culture. As well as this, in the Nyiramasuhuko et al. case witnesses often utilise double speak. Double speak is a Rwandan practice in which words have hidden meanings, such as for “enemy” or “inyenzi” (*Prosecutor v.*

*Nyiramasuhuko et al.*, 2011, p.98). With double speak, the true meaning of the word is hard to deduce unless Rwandan and in the situation at the time. Accordingly, when retelling a conversation using double speak, the Chamber often has trouble establishing the intention of sentences. It is indisputable that a degree of cultural understanding is essential in order to understand testimonies.

Deborah Tannen states that "the big five" affect conversational style: geographic or regional background, ethnicity, age, class and gender (Tannen, 2004, p.162). The ICTR established the Gacaca Courts, community-based courts that trial Rwandan perpetrators. This structure recognises "the big five" through its community-based approach to justice. Despite this, the cases at the ICTR make minimal mentions to the Gacaca court proceedings. Rather, the ICTR references other national judicial systems. When the ICTR does reference the Gacaca courts, it is often to state that the Gacaca courts trialled the accused, who is being re-tried at the ICTR. For example, in the Renzaho case, it is mentioned that the Gacaca proceedings summoned Renzaho but he was re-tried at the ICTR (*Prosecutor v. Renzaho*, 2009, p.128). The lack of mention to the Gacaca courts suggests that the ICTR views these proceedings as judicially inadequate. This results in the differing of Rwandan community-based mechanisms. The othering of cultures positions non-Western cultures as inherently different. This approach is reminiscent of colonial framing, which views non-Western cultures as primitive (Anthias, 2013, p.155). The lack of reference to Rwanda's community justice and instead European based justice, is the imposition of Western ideals on a culture that has a culturally specific language as well as a history of colonial subordination. The othering of non-Western cultures often creates representations of gender-based violence as inherent to marginalised communities, due to their primitive identities (Anghie, 2005, p.4).

Mibenge confirms this, stating that justice makes gender-based violence and Third World victims synonymous (Mibenge, 2013, p.158). As Dianne Otto argues the internationalisation of law has really been the universalization of Western standards (Otto, 2006, p.325). The end of formal colonisation does not demarcate the end of informal colonialism. This is clear in the ICTR's approach to gender-based violence justice.

*Rwanda's Colonial History*

The ICTR's racial bias is also apparent in its construction of Rwanda's history. The recognition of Rwanda's colonial history is crucial for gender-based violence justice. Gendered violence is a structural problem, impacted by inequalities that entrench problematic understandings of gender and women: "Gender violence cannot be separated from intersecting structural inequalities that divide and exploit" (Fluri & Piedalue, 2017, p.539). Due to the history of Rwanda, colonialism has contributed to the structural inequalities that Rwanda experiences. The tribunal's construction and recognition of Rwanda's colonial history is therefore important. Colonial history is significant to the Rwandan genocide, with ethnic groups pitted against each other. Rwanda was a Belgian colony. Prior to colonization, the Hutu, Tutsi and Twa groups existed as social categories rather than ethnic groups (Carney, 2012, p.173). J.J Carney states that "for most scholars the resulting racialist interpretation of Hutu and Tutsi categories poisoned Rwandan society and laid the groundwork for post-colonial ethnic violence…[colonialism] hardening previously fluid lines" (Carney, 2012, p.172). Considering this, the tribunal's construction of Rwanda's colonial history indicates what aspects of history it values and what truth it accepts.

As J.J Carney theorises, most scholars recognise that colonialism solidified racial relations in Rwanda, however not all scholars accept the pre-colonial fluidity of the Hutu/ Tutsi divide or acknowledge the impact of this divide on Rwanda's post-colonial ethnic violence. The Akayesu case references the colonial rule of Belgium. The Chamber summarises that the monarch ruled the country and he chose his representatives from Tutsi nobility: "Thus, there emerged a highly sophisticated political culture which enabled the king to communicate with the people" (*Prosecutor v. Akayesu*, 1998, p.27). This sentence suggests that prior to colonial rule, Rwanda was not highly sophisticated. As discussed previously, this communicates an othering of non-Western culture, encouraging the image of the perpetrator as the racialized male or Black women as sexually deviant (Sagan, 2010, p.9). Be that as it may, the Chamber also states that the choice of Tutsi over Hutu was "born of racial or even racist considerations" as the Tutsi looked more like the colonisers (*Prosecutor v. Akayesu*, 1998, p.27). Additionally, the Nyiramasuhuko et al. case employed experts to give testimony regarding the history of Rwanda (*Prosectuor v. Nyiramasuhuko et al*., 2011, p.96).

In Gacumbitsi, colonial history is again referenced, with the Defence communicating that the ethnic groups date back to the colonial or pre-colonial period (*Prosecutor v. Gacumbtsi*, 2004, p.8). Nonetheless, what is largely missing from the tribunal is the social impact of colonialism on Rwanda. Gendered violence emerges through a matrix of domination. As a result of European understandings, courts locate violence against women in individual terms (Fluri & Piedalue, 2017, p.539). Gendered violence is not understood in terms of broader oppressions, such as colonialism. Khanyisela Moyo states that international law universalises European as neutral (Moyo, 2012, pp.239-240) but these ideals discount the

impact that Rwanda's racial divide had on gender-based violence. In many cases, gender-based violence occurs to exterminate pregnancies as a form of ethnic cleansing:

> Witness TAQ testified that she was heavily pregnant and vomited while one of the attackers was raping her by means of penetration. The witness explained that the attacker asked her if the child she was bearing was a boy or a girl, for he would have disembowelled her in order to kill the child if it was a boy (*Prosecutor v. Gacumbtsi*, 2004, p.52).
>
> Towards the end of her stay there, the witness, who was eight months pregnant, asked one of her attackers to kill her but he refused. Instead he promised to arrange it so that no one else would rape her and stabbed her in the lower abdomen and ankle with a bayonet. As a result of this incident the witness's baby was stillborn (*Prosecutor v. Renzaho*, 2009, p.157).

The ICTR's absent recognition of colonial impact shows that race power structures continue to pervade the tribunal. Colonial recognition is important in order to understand the structural issues that affect women and gender-based violence. If the Chamber does not recognise colonial effects then the othering of non-Western countries continues. The implications of this othering is the naturalisation of violence due to preconceived ideas of non-Western cultures. This naturalisation minimises gender-based violence experiences. Similarly, the lack of cultural recognition universalises gender-based violence as it locates gender-based violence away from the intersecting oppressions that Rwandan victims face. Naturalisation and universalisation have implications for gender-based violence justice as judicial proceedings assess victim impact in determining criminal sentences. A lack of

cultural and colonial recognition minimises the impacts of gender-based violence in non-Western cultures, which leads to inadequate judicial redress.

Whilst the ICTR developed gender inclusive definitions and provisions, the ICTR's judicial practices continue to marginalise gender-based violence. This is due to the engrained nature of gender inequality within international justice. Presuppositions about gender, women and female sexuality structure the justice at the ICTR. This is evident through the trial's linguistic framing to describe gender-based violence and its victims. The trial's exclusive linguistic framing also shows race prioritisation. The ICTR disregards the intimate connection between language and race in Rwanda which is significant for gender-based violence justice due to the Kinyarwanda specific terms. The ICTR applies a type of justice that upholds European ideals. By doing this, the ICTR locates gender-based violence away from the colonial history of Rwanda and as a result, the trial ignores the structural nature of gender-based violence. This in turn impacts how the trial provides redress for gender-based violence, focusing on individual justice rather than reparations that address the structural nature of this crime. The ICTR is structured by the operation of race and gender power, which limits justice for gender-based violence.

# Chapter Six: The International Criminal Court

The International Criminal Court followed the ICTY and ICTR. The ICC is a permanent institution that aims to address human rights violations globally. Scholars praise the ICC for its inclusive processes, including its movement towards gender justice (Askin, 2006, pp.19-20; Campanaro, 2001, p.2592; Chappell, 2003, p.20; Mullins, Kauzlarich & Rothe, 2004, pp.293-294; O'Rourke, 2020, pp.45; Sikkink, 2011, pp.119-120). At the same time, the ICC has been heavily criticised for its focus on African states (Grey, 2019, p.322; Sagan, 2010, p.4; Shamsi, 2016, p.87). Since the ICC's beginning in 2002, all the cases have been from the African continent and concern African individuals, except for the situations in Georgia and Bangladesh/Myanmar (Ba, 2020, p.4). According to scholars, the African focus of the ICC is indicative of an international hierarchy in which Western states are not accountable for their violations (Askin, 2006, p.22; Bosco, 2014, p.177). Undoubtedly, race power structures function at the ICC. Further, the disparity between practice and provisions at the ICC is distinct (O'Rourke, 2020, p.12). I argue that gender and race power structures function throughout the ICC when addressing gender-based violence. I first discuss how gender power structures operate through an examination of two binaries: masculine/feminine and victim/soldier. In part two I analyse how these binaries also show race power structures.

## Part One: Gender

The ICC operates on binaries that act as strict dichotomous boundaries for individual identities, actions and experiences (Mibenge, 2013, p.159). Dichotomies allow the ICC to engage with a simplistic narrative of gender-based violence. This narrative is detrimental for

gendered and racialized identities as any experiences that exist outside these confines have difficulty encountering international justice.

*The ICC's Operation on a Masculine/Feminine Binary*

The ICC operates on essentialised ideas of masculinity and femininity. As discussed in Chapter Four, essentialised femininity promotes the idea that women lack agency, with agency being freedom of identity and ability to access choice. The ICC essentialises feminine attributes, constructing an identity for women in which they lack agency, evident in the ICC's 'womenandchildren' articulation (Enloe, 1990, p.25). Cynthia Enloe discusses the category of 'womenandchildren.' This category is common when writing about women, being the grouping of women alongside children. This articulation arises from simplistic understandings of femininity, predominantly that women are in need of protection with little independence, alike to children (Enloe, 1990, p.25). The ICC first engages with this categorisation in the establishment of the ICC Gender and Children's Unit to deal with victims' psychological issues. 'Womenandchildren' categorisation is also within the Mbarushimana case.:

> Witness 561 saw several corpses of civilians, including women and children (*Prosecutor v. Mbarushimana*, 2011, p.68).

The 2019 Ntaganda case continues to ascribe to the 'womenandchildren' narrative:

> women and children were shot dead upon Ntaganda's order (*Prosecutor v. Ntaganda*, 2019, p.54).
>
> bodies were found ... including bodies of women and children (*Prosecutor v. Ntaganda*, 2019, p.199).

> The Lendu fighters included women and children (*Prosecutor v. Ntaganda*, 2019, p.209).
>
> Furthermore, the Chamber found that the Lendu fighters were not uniformly dressed, which made them difficult to identify, and included women and children (*Prosecutor v. Ntaganda*, 2019, p.406).

Regardless of the conflict or year, the 'womenandchildren' categorisation remains prevalent throughout the ICC proceedings. As Enloe argues, the victimisation of women and children together should not occur (Enloe, 2014, p.47). Enloe concludes that this leads to the simplification of women's identities which encourages a simplification of the crimes they experience. This problematic representation indicates informal gender power structures and informal gender structures lead to informal gender rules (O'Rourke, 2013, p.15, p.46). For example, in the Lubanga case, the Chamber denied the addition of new charges under Article 61 (11) of the Rome Statute despite extensive evidence of gender-based violence (*Prosecutor v. Lubanga*, 2012, p.20, pp.286-287). Conversely, in the Katanga and Gbagbo cases, the Chamber investigated or approved requested changes to proceedings (*Prosecutor v. Gbagbo and Blé Goudé*, 2019, p.6; *Prosecutor v. Katanga*, 2014, p.23; O'Rourke, 2020, p.196). This vastly contrasts the experience of gender-based violence in the Lubanga case. O'Rourke notes numerous procedural inconsistencies of ICC regulations, mainly between gendered and non-gendered crimes (O'Rourke, 2020, p.196). Enloe summarises this informal phenomenon, "the women who suffer rape in war time usually remain faceless as well. They merge with the pockmarked landscape; they are on the list of war damage along with gutted houses and mangled rail lines" (Enloe, 2000, p.108).

The ICC's essentialised understandings about gender-based violence and gender is also seen in the Bemba case. The Chamber states that MLC soldiers targeted civilians without regard to age, gender, profession or social status (*Prosecutor v. Bemba*, 2016, p.277). However, gender-based violence targets a person according to their gender. It is a violent act that attempts to obscure the category on which people function in their communities, with many victims later experiencing stigmatisation (MacKinnon, 2013, p.106; Manjoo & McRaith, 2010, p.17). This continues in the Gbagbo and Blé Goudé case (*Prosecutor v. Gbagbo and Blé Goudé*, 2019, p.19). Pro-Gbagbo forces attacked a women's march; yet, the Chamber states that forces did not target individuals based on gender. The ICC does not effectively recognise gender which results in a misrepresentation of gender-based violence. The tribunal assumes that gender-based violence is an isolated attack, rather than a structural crime arising from gender inequalities. This has implications for reconciliation as the ICC encourages the national provision of reparations. This process does not consider that gender-based violence requires specialised reparations due to its structural nature and that not all nations have the same capabilities to provide these necessary reparations. The ICC's presupposed ideas of femininity clearly has implications for judicial redress. The court's problematic understandings of identities is also visible in the victim/soldier binary under which it functions.

*The ICC's Operation on a Victim/Soldier Binary*

Drawing on conceptualisations of masculine and feminine, the ICC operates on a victim/soldier binary. Within this binary, women are presumed to be victims and men are presumed to be soldiers. The ICC minimises complexities within conflicts, especially in DRC cases. Gender-based violence has been one of the most utilised weapons of war in the DRC

since 1991 (Pratt & Werchick, 2004, p.6), enacted against civilians and combatants, with DRC forces recruiting both female and male children as soldiers. Despite evidence indicating this, the ICC describes female child soldiers as "children associated with armed forces or groups" (*Prosecutor v. Lubanga*, 2012, p.114). Christine O'Rourke found that "until relatively recently the term child soldier meant a boy solider" although data has shown that female children make up 40% of these forces (O'Rourke, 2020, p.181). The positioning of male bodies as soldiers and female bodies as victims is a popular representation within conflict discourse (Gallagher, 1998, p.25; Giotis, 2019, p.98; Mackenzie, 2009, pp.255-256; Stachowitsch, 2013, p.158; Wadley, 2009, pp.45-46). This representation is necessary as it is outside feminine presuppositions and what Wadley terms, the construction of warfare as masculine (Wadley, 2009, p.45), to conceptualise that females can have the complexity to be both perpetrators of violence as well as victims of gender-based violence. The ICC's narrow victim/soldier framing, rooted in gendered assumptions, makes numerous victims invisible in proceedings and so inadequate prosecution ensues, seen throughout the Lubanga and Ntaganda cases.

In the Lubanga case, witnesses establish that sexual violence was systematic throughout training camps. Witness P-0055 testifies that female soldiers participated in combat, went out on patrols and undertook the same routine duties as other soldiers (*Prosecutor v. Lubanga*, 2012, p.351). Witness P-00038 confirms this, stating that the girls did everything undertaken by the others and they cooked twice a day (*Prosecutor v. Lubanga*, 2012, p.385). Evidence indicates that female recruits often experienced gender-based violence during their routine duties. Therefore, female child soldiers were active soldiers and victims of gender-based violence. As a result of these accounts international organisations encouraged

the Chamber to consider that "participate actively" should be broad in its application (*Prosecutor v. Lubanga*, 2012, p.282). Even with these arguments, the Lubanga case did not extend its charges or definitions. The ICC does not acknowledge the complexities of tasks completed by female soldiers and consequentially fails to accurately represent them, which impacts the justice for these individuals. As Judge Benito eloquently communicated in her dissenting opinion "the Majority of the Chamber is making this critical aspect of the crime invisible. Invisibility of sexual violence leads to discrimination against victims" (Benito, 2012, p.6).

The case against Ntaganda also articulates that women existed beyond the victim/soldier binary. Witness P-0883 recalls her UPC abduction, training at numerous camps then working as a bodyguard, experiencing sexual violence throughout these operations (*Prosecutor v. Ntaganda*, 2019, p.77). The Chamber continues that female soldiers were:

> recruited, trained and fought in battle the same manner as male recruits and certain female recruits were selected to serve as bodyguards to UPC/FPLC commanders... female members of the UPC/FPLC were regularly raped and subjected to sexual violence… In addition to these conditions, its young female recruits and soldiers were additionally subjected to a continuous exposure to the risk of sexual abuses (*Prosecutor v. Ntaganda*, 2019, pp.180, 372).

Vesna Nikolic-Ristanovic argues that conflicts depend on a discourse that preserves the social order, with society perpetuating a masculine, brave and all male narrative of war in order to conform to gender expectations (Nikolic-Ristanovic, 2002, p.55-56). The ICC reflects this narrative in its representation of soldiers and gender-based violence. The court simplifies gender-based violence through the allocation of identities based on gendered

assumptions. This results in victims, that do not fit into these preconceived roles, experiencing inadequate redress. As the ICC trials mainly African cases, how the ICC understands race is also important. However, the ICC's understandings of race indicate that it marginalises gender-based violence through simplistic representations of both race and gender.

## Part Two: Race

The ICC operates on essentialised racial structures, constructed in accordance with Eurocentric and Western ideals. The five cases I examine are from former colonies: The Democratic Republic of Congo, Rwanda and Côte d'Ivoire. Martti Koskenniemi states that colonial domination does not finish with the end of a formal colony, but rather "operates in the shadow of internationalism and through the instrumentality of international organisation" (Koskenniemi, 2011, p.172). I argue that the ICC's construction of women and gender-based violence upholds Western values, indicative of race power structures.

### *The Racial Operation of the Victim/Soldier Binary*

The ICC's definition of victims is broad and recognises numerous types of suffering. Despite this, the ICC's construction of victims/soldiers is reflective of race power structures. As discussed, women positioned in this binary are inherently victims. As the majority of ICC cases are located in the African continent, the ICC consequentially positions non-Western women as inherently victims. This framing is reminiscent of the historical civilising mission movement which is the idea that non-Western countries are in need of saving by the Western world (Anghie, 2005, p.96). Scholars argue that the ICC is an extension of this movement (Anghie, 2006, p.751; Ba, 2020, p.6; Sagan, 2010, p.10). Anthony Anghie

discusses this idea through an examination of the women in development (WID) movement. The WID movement sought to address gender inequalities through integration of non-Western women into Western development practices. Research criticises this movement for its failure to address the structural inequalities that non-Western women experience (Anghie, 2006, p.750; Hooks, 1997, p.487; Parpart, 1993, p.444). The Lubanga case references a project that reflects Western interventions in African countries:

> D-0032 did not know the "white people" who conducted the registration process… told him and Jean-Paul Bedijo that the white people had not come and they could go home (*Prosecutor v. Lubanga*, 2012, p.224).

The predicate 'white' used to describe the people conducting the registration distances the witness from them, demonstrating the witness' disconnection with these interventions. The ICC imposes universal ideas on gender-based violence victims. These ideas have been developed through international justice mechanisms, rooted in Eurocentric ideals. The result of this is that victims, as evidenced, are distanced from these 'white' processes.

Throughout the Chamber, a disparity between Western and non-Western ideals is apparent. The Chamber's construction of victims discounts the non-Western world. The Ntaganda and Bemba case state similar factors to determine who is a solider or a victim:

> Chambers of the Court have considered various criteria in identifying accused persons and their subordinates, including the position and role of the accused at the time of the charges, the presence in and control of an area by the alleged perpetrators and commanders, the composition of the troops, a person's uniform – including insignia, accessories and headwear – his or her language, and a person's specific behaviour (*Prosecutor v. Ntaganda*, 2019, p.34).

> the Chamber shall consider the relevant facts and specific situation of the victims at the relevant time, including the location of the murders, whether the victims were carrying weapons, and the clothing, age, and gender of the victims (*Prosecutor v. Bemba*, 2016, p.52).

These considering factors follow a Western conception of conflict. As discussed in the Lubanga case, women were active in conflict but not always as combatants. The identification of soldiers as uniformed males excludes the evidence that women were heavily involved in military processes. As well as this, the ICC's construction of African women as victims discounts the experience of these female soldiers. The ICC imposes Western ideas of victim and solider on its cases, which ignores the complexities of conflict. As a result, crimes that exist outside the established binaries also exist outside the scope of the ICC. Kamari Clarke theorises that justice mechanisms engage with binary representations in order to limit the reaches of justice for the African world. This allows for the micromanagement of post-colonial states to continue (Clarke, 2009, p.960). For justice to be achieved, the ICC must legitimise the complexities of gender-based violence and account for all its variations, particularly variations influenced by race.

*Masculine/Feminine Essentialism*

Race influences ideas of masculinity and femininity with Niamh Reilly stating: "no feminist project, academic or practical can be based on an assumption of women as a monolithic group" (Reilly, 2007, p.189). Regardless of this, the ICC applies the same definitions of gendered crime to all of its cases. Whilst universal ideals are central to international human rights law, it is important that this is distinct from essentialising women. An essentialist perspective sees all women as suffering from the same forms of marginalisation, however

race influences subordination. The Ntaganda case questions the delayed reporting of rape. In Western judicial courts, a lapse of time between the crime and reporting can be problematic. The ICC recognises that:

> cultural or communal stigmatisation, shame and fear, as well as the general lack of trust in authorities, were factors which can explain the difficulties faced in coming forward (*Prosecutor v. Ntaganda*, 2019, p.41).

This experience in the Ntaganda case conveys how influential race is in understanding gender-based violence experiences. Further, in Ntaganda, the soldiers refer to Lendu women as "useless wild animals and we can do with them anything we want. They are not humans" (*Prosecutor v. Ntaganda*, 2019, p.290). Evidently, different ethnic groups have different positions in society. In Bemba this is also the case:

> After, P81 had abdominal pains, problems conceiving, and was socially stigmatised, being mocked and called a "Banyamulengué wife". She felt like she was no longer treated as a human being and was called the "Banyamulengué wife"; such stigmatisation in her community left her unemployed and unable to provide for her children (*Prosecutor v. Bemba*, 2016, p.240).

Different races conceptualise women and gender differently, based on ethnic standings, with the Ntaganda case stating the DRC has close to 450 different ethnic groups (Prosecutor v. Ntaganda, 2019, p.10). Irrespective of this, the ICC applies the same definitions throughout its cases which ignores complex social categories.

*Gender-based Violence Essentialism*

The ICC assumes that gender-based violence is a universal term, but gender-based violence is a product of race. The ICC largely prosecutes crimes in African countries yet the ICTY forms its definition of gender-based violence. This is an example of European ideals applied as universal. As Jennie E. Burnet discusses, it is important to clarify categories of rape as they are not uniform across culture, with the Rwandan model of rape not coinciding with European and American model of consent (Burnet, 2012, p.106). Burnet states that the application of universal definitions, without consideration of cultural practices, "detaches the question of female sexual consent from the cultural-historical context and political economy of poverty that structures women's agency and limits their options" (Burnet, 2012, p.112). Throughout the cases, it is apparent that gender-based violence is complex between cultures. In the Bemba case, the translation of rape into English misconstrues the meaning of the crime, using the phrase "to sleep with":

> She followed the shouts and saw "many" armed "Banyamulengués" lined up in two columns in a canal, "waiting [for] their turn" to "sleep with" two girls. P119 was hidden close by, behind thick plants. She saw the soldiers penetrate the girls with their penises… causing him to cry out in Lingala and the soldiers to run away. The girls, who told that they were 12 and 13 years old, were crying and bleeding from their vaginas (*Prosecutor v. Bemba*, 2016, p.228).

This linguistic mis-framing continues in the Ntaganda case with the translated descriptions of gender-based violence victims:

> In the view of the Chamber, the language used by P-0883 to describe her experience, notably the use of the term 'wife' or 'partner', does not undermine the

> fact that she was forced into certain form of sexual conduct (*Prosecutor v. Ntaganda*, 2019, p.83).
>
> The Chamber notes that a number of witnesses, including Mr Ntaganda, refer to both 'escorts' and 'bodyguards' in their testimony, and appear to make, for the most part, no distinction between the two terms. Accordingly, in this Judgment the terms are used interchangeably (*Prosecutor v. Ntaganda*, 2019, p.168).

Furthermore the Mbarushimana case enacts a culturally specific form of gender-based violence:

> The Prosecution describes a practice of torture allegedly performed by the FDLR Lieutenant Mandarine, called gushahura, which consisted of genital mutilation (*Prosecutor v. Mbarushimana*, 2011, p.55).

The assumption that gender-based violence occurs throughout cultures in the same way discounts the experiences of many people. As Dianne Otto argues, justice needs to examine these distinctions, no matter how small they are (Otto, 2007, p.34). The application of one type of gender-based violence to the cases indicates that race power structures function at the ICC to minimise the complexities of this crime.

The ICC developed gender inclusive definitions, drawing on criticisms following the ICTY and ICTR. As a result, this court engages in a degree of gender justice not previously seen at international tribunals. Regardless of these gains, the ICC continues a narrative of justice that marginalises gender-based violence as it operates according to narrow understandings of gender and gender-based violence. The ICC's lack of justice for gender-based violence is a product of these narrow understandings. The ICC does not account for variations in identities, rather it applies the same judicial standards to all individuals, without

consideration of intersecting oppressions. As a consequence, gender-based violence victims marginalised by both race and gender become invisible in judicial proceedings. The ICC represented a critical case for gender justice, with multiple new provisions introduced, nevertheless, the translation of these provisions into practice did not occur due to intrinsic power structures that uphold justice mechanisms when addressing gender-based violence crimes. Whilst the ICC continues to engage with provisions labelled gender just (Bensouda, 2012, p.6; *ICC Office of the Prosecutor*, 2014, p.16), the success of these provisions is limited due to how gendered and racialized power functions within the discourses and practices of international justice mechanisms.

# Chapter Seven: Conclusion

## Key Findings

This thesis has shown that gendered and racialized power structures the discourses and practices that are intended to provide justice for gender-based violence crimes in conflict. In Chapter 2 I introduced feminist interventions in international law and institutions. The majority of feminist researchers conclude that the structures of law, and the institutions in which these laws inform, inherently position gendered and racialized identities in places of disadvantage. In Chapter 2 it was also clear that many scholars acknowledge the ICTY, ICTR and ICC as key mechanisms in the history of gender-based violence justice. From this, I proposed that an investigation of gendered and racialized power within these three key mechanisms is vital in order to reveal why institutional developments continue to be minimal.

In Chapter 3 I addressed the methodology I would use to investigate these claims. I solidified my methodology as post-structural discourse analysis, stating this as the most effective method due to how post-structuralism centralises power, with post-structural discourse analysis seeking to reveal power within narratives.

Throughout Chapter 4, 5 and 6 I presented my findings from the fifteen cases, each chapter examining one court and its corresponding five cases. Utilising my analytical framework on gender and race outlined in Chapter 1, I found that the courts construct an inherently marginalising narrative of gender-based violence. They do this through linguistic framing that indicates a narrow understanding of race and gender. This was central in Chapter 6, as

the ICC simplifies their understandings into dichotomies; victim/soldier, masculine/feminine. Through these perspectives, the courts limit the frame in which gender-based violence can exist. If gender-based violence exists outside of these preconceived frames, then judicial institutions do not adequately address it. The courts reproduce simplistic ideas of gender and race which lead to the reductionist understandings of crimes that gendered and racialized identities experience. They are thus unable to conceptualise complex identities which inhibits how they address gender-based violence.

Chapter 4, at the ICTR, pointed particularly to the racialized powers that operate throughout gender-based violence justice. In Chapter 3, it is clear that the ICTY assumes that all victims understand and experience gender-based violence the same, with this idea also prevalent at the ICTR; however due to the non-Western conflict the ICTR dealt with, this imposition of sameness is particularly harmful for Rwandan victims. Moreover, power structures dictate what experiences justice accepts, with the ICTR prioritising Western understandings. This is also clear in Chapter 6, at the ICC, which interprets each gender-based violence case according to binaries defined in Western terms, including understanding soldiers as uniformed males.

The chronological progression of my thesis, with Chapter 4 addressing the earliest court and Chapter 6, the most recent, presented how the courts are intimately related, which I found to be problematic. Throughout my analysis of the ICTY, ICTR and ICC I see little adaption to culture. International justice engages with similar court structures for drastically different conflicts and crimes. The courts do not adequately adjust their judicial procedures to consider identities marginalised by both race and gender. As a result, victims of gender-

based violence are given a form of justice that does not address their specific needs. The consequence of this is that international mechanisms ineffectively prosecute gender-based violence, creating outcomes which do not foster reconciliation.

As well as narrow framing that limits the parameters of gender-based violence justice, I found on a practical level, that the courts engage with the poor treatment of gender-based violence victims, despite gender inclusive provisions. I correlated this treatment to power structures that predetermine how gender-based violence victims experience justice, irrespective of new provisions. As stated previously, the courts continue to utilise techniques that do not consider the traumatic nature of gender-based violence. This is due to the identities that the courts centralise, which are not identities marginalised by one or multiple oppressions. In summary, my key finding is that gender and race power structures inherently function to limit justice for gender-based violence. These structures influence the disjunction between the widespread nature of gender-based violence in conflict and the low number of successful gender-based violence prosecutions. It is critical to reveal these structures for the successful future achievement of gender-based violence justice.

## The Future of International Justice for Gender-Based Violence

International justice is important in order to address the large-scale human rights violations that occur; howbeit courts do not effectively confront gender and race biases and consequently important variations within gender-based violence crimes are dismissed. This is evident throughout the ICTY, ICTR and ICC which build off one another without recognising the intimate connection between gender-based violence and race. In order for the international justice for gender-based violence to be adequate, courts must address

gender and race power structures concurrently. The future of international justice for gender-based violence has numerous issues it must consider in order for successful judicial rehabilitation to be possible.

*Treatment of Traumatic Crimes*

Throughout the cases, it is apparent that gender-based violence victims experience poor treatment. This includes the framing of victims as unreliable due to their PTSD, or by virtue of their femininity, and even as bearing responsibility for the crimes they survived. International courts need to examine their processes in relation to traumatic crimes. As I have discussed, the impact of gender-based violence crimes on its victims is extensive. International courts must assess if age-old judicial techniques remain suitable for all crimes, especially gendered and racialized crimes. Jelke Boesten emphasises the importance of training legal practitioners on the complexities of psychological issues and the impact this has on victim testimony (Boesten, 2014, p.92). Implementing judicial practices that do not retraumatise victims is crucial for the successful future of gender-based violence justice.

Courts can improve their treatment of traumatic crimes through the examination of linguistics. As I explored at the ICTR, linguistic framing can subordinate victims. Courts need to encourage greater awareness of how discourse perpetuates marginalisation. Boesten says that there is an incompatibility between gender-based violence victim sensitivity and judicial interrogation (Boesten, 2014, p.38). Paul Gready further states that there is a tension between the "duty to ensure their claims about abuses are factually true: the tension between validating the victim and validating the story" (Gready, 2010, p.178). International justice for gender-based violence must implement procedures that consider

these tensions and adjust their procedures accordingly. As discussed throughout my thesis, it is no longer appropriate to apply standards of justice, formulated in male dominated, Eurocentric courts, to all crimes world-wide.

*Gender Inclusive Provisions*

From the ICTY to the ICTR and the ICC, courts reformed the international justice for gender-based violence crimes. They did this through provisions such as gender inclusive pronouns, corroboration not needed for gender-based violence crimes and greater reparation procedures. Whilst these movements are positive, courts need to introduce provisions that address the gender and race power structures that function throughout international justice. Provisions must address the structural nature of gender-based violence as well as the inherent structures of justice that marginalise gendered crimes.

The courts engage with stereotypes about masculinity and femininity. These presuppositions determine how gender-based violence is understood. The resultant gender-based violence narrative is a simplified script (Anderson & Doherty, 2008, pp.20-21). Simplified scripts of gender-based violence delegitimise the experiences of many victims as the script operates on strict boundaries, with little room for complexity, yet, demonstrated throughout all testimonies, is that gender-based violence is complex. As Sharon Marcus discusses, rape is not a fixed reality of women's lives, and female identities are not defined by acts of violation. Marcus questions how rape is enabled by narratives of inequality (Marcus, 1992, p.389). The gender-based violence narrative that courts engage with assumes a sameness of victims due to their violations. The courts assign people a place in which to exist and any identity which diverges from their position remains outside the

court's narrative and consequentially processes. As Marcus summarises, identities emerge into pre-existent scripts yet, this is not exhaustively determinant (Marcus, 1992, p.391). Courts must recognise the conditions that foster the identities of gender-based violence victims as well as the impact that the crime has on gender-based violence victims' identities. International justice should deal with the structural issues that impact each victim. This requires a close examination of race and gender oppressions and rather than dismissing complexities in identities, courts must address all differences. This will require close cultural examinations as well as increased cross-cultural communication. Without this, Andrea Durbach and Louise Chappell substantiate, victims risk returning to the same structural inequalities that impacted their lives previously and during their gender-based violence experience (Durbach & Chappell, 2014, p.548).

## Is International Justice for Gender-Based Violence in Conflict Possible?

Courts must engage with variations in identities to achieve adequate judicial processes for gender-based violence. It is therefore important to discuss if international justice for gender-based violence crimes is possible. Courts should not decontextualize gender-based violence and reconstruct it elsewhere as this crime is heavily dependent on context. Consent is also heavily influenced by context. Gender-based violence is a structural occurrence due to pervasive features of society that dominate and marginalise women. Although there are commonalities in experiences of domination, the marginalisation non-Western women experience is intersectional (Crenshaw, 1991, pp.1243-1244). In this way, they experience domination through both race and gender, as well as class. The justice mechanisms for gender-based violence crimes do not recognise this but rather attempt to provide justice according to one standard of gender-based violence and one type of victim.

The ICC is a global instrument that aims to hold countries accountable for their human rights violations. Whilst it is an issue that the ICC has only prosecuted African countries, I find it more problematic that the ICC applies a universal standard in which to prosecute all crimes and countries. This universal standard is developed from the ICTY and ICTR, European based courts. The ICC targets African countries and holds them to a standard which is really the application of Western ideals. As seen in the Mbarushimana case, perpetrators enacted a culturally specific form of gender-based violence (*Prosecutor v. Mbarushimana*, 2011, p.55). This indicates how complex gender-based violence is and how context defines it. The standard that these tribunals uphold indicates how they value Western culture. In the words of Gatayri Spivak, this risks reproducing a narrative of "white women ... saving brown women from brown men" (quoted in Moyo, 2012, p.266).

It is crucial for the future of gender-based violence justice that judicial mechanisms recognise the power structures that function throughout them. Courts have attempted to achieve gender justice through an approach that changes existing judicial tribunals, including the broadening of definitions and introduction of alternative justice mechanisms. However, like gender-based violence itself, justice for such crimes has structural elements. Power structures pervade justice for gender-based violence crimes. These structures produce positions in which gender-based violence crime and victims can exist, often positions of subordination. The recognition of problematic structures of international justice is vital for gender-based violence victims to experience successful judicial processes.

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