Feminist Engagement with International Criminal Law

Norm Transfer, Complementarity, Rape and Consent

Eithne Dowds

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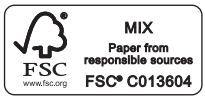

Part I

The Legal and Theoretical Context

1

Rethinking Feminist Engagement with International Criminal Law: An Introduction

Feminist perspectives on international law have developed into a 'flourishing discourse',[1] forming part of what Chappell has conceptualised as the 'international feminist legal project'.[2] International criminal law, in particular, has captured the attention of feminist scholars and practitioners with significant efforts being directed towards securing the criminalisation of sexual and gender-based violence perpetrated against women in times of conflict or mass violence.[3] Yet, this focus has sparked unease in some feminist circles and concern has been raised over the potential reinforcement of longstanding gender tropes, specifically, women as inescapable victims of war, sexually vulnerable and in need of protection.[4] In this regard, international criminal legal feminism has begun to reflect on what feminist intervention has thus far achieved and explore new directions for future engagement.[5]

The overall purpose of this book is to join these conversations by introducing and further developing the feminist strategy of 'norm transfer': the proposal that feminist informed standards created at the level of international

[1] S Kouvo and Z Pearson, 'Introduction' in S Kouvo and Z Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Oxford, Hart Publishing, 2011) 1.

[2] L Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy*, (Oxford, Oxford University Press, 2016) 8.

[3] For early intervention see C Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *European Journal of International Law* 326. For a broad overview on feminism engagement with international criminal law see Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008–09) 30 *Michigan Journal of International Law* 1.

[4] D Nadj, *International Criminal Law and Sexual Violence against Women: The Interpretation of Gender in the Contemporary International Trial* (Oxon, Routledge, 2018); F Ní Aoláin, 'The Gender Politics of Fact-Finding in the Context of the Women, Peace and Security Agenda' in P Alston and S Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford, Oxford University Press, 2016).

[5] Nadj, ibid; K Grewal, 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies' (2015) *Feminist Legal Studies* 149.

criminal law make their way into domestic contexts.[6] The book situates the feminist strategy of norm transfer within the complementarity regime of the International Criminal Court (ICC), the first permanent international criminal court with jurisdiction over war crimes, crimes against humanity and, more recently, the crime of aggression,[7] sub-dividing this process into a tripartite structure. In paying particular attention to the relationship between positive complementarity and norm transfer it is argued that norm transfer provides the opportunity to reflect upon the norms developed at the ICC and to encourage conversations around the contested aspects of these norms as opposed to uncritical acceptance.

By way of example, the book uses the crime of rape as a case study and offers a new perspective on one of the most contentious debates within international and domestic criminal legal feminism: the relationship between the requirements of lack of consent versus a focus on coercion in the definition of this crime. The element of consent, Hurd has suggested, possesses a type of 'moral magic' in which it transforms impermissible sexual activity into permissible sexual activity.[8] However, Schomburg and Peterson, amongst others, have argued that while consent may be relevant in the domestic context its relevance fades in the oppressive contexts that trigger international criminal law.[9] According to these scholars, a focus on coercion, with consent playing a limited role as a defence, is preferable as it contextualises the act and more readily captures the asymmetry of relations that give rise to rape in the first place.[10] Yet, this focus has been criticised for failing to acknowledge the core wrong of rape and female agency in such contexts and for creating a dichotomy between rape in conflict and rape in peace.[11] This disagreement, as to the appropriate role of consent, thus speaks directly to debates on the construction of female identity in international criminal law, as well as debates on the relationship between international and domestic law dealing with this crime.

[6] C O'Rourke, 'International Law and Domestic Gender Justice, or Why Case Studies Matter' in MA Fineman and E Zinsstag (eds), *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice*, Vol 13 (Cambridge, Intersentia, 2013) 15; E Dowds, 'Conceptualising the Role of Consent in the Definition of Rape at The International Criminal Court: A Norm Transfer Perspective' (2018) 20(4) *International Feminist Journal of Politics* 624. The categorisation of 'norm transfer' as a feminist strategy will be unpacked more clearly in ch 2.

[7] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No 92-9227-227-6. See C McDougall, 'Report on the Facilitation on the Activation of the Jurisdiction of the International Criminal Court over the Crime of Aggression (Int'l Crim. Ct.) & Resolution ICC-ASP/16/RES.5 on the Activation of the Jurisdiction of the Court over the Crime of Aggression' (2018) 57(3) *International Legal Materials* 513.

[8] HM Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121.

[9] W Schomburg and I Peterson, 'Genuine Consent to Sexual Violence Under International Criminal Law' (2007) 101 *The American Journal of International Law* 121.

[10] K O'Byrne, 'Beyond Consent: Conceptualising Sexual Assault in International Criminal Law' (2011) 11 *International Criminal Law Review* 495.

[11] K Engle, 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *The American Journal of International Law* 778.

The book has four principled objectives: (i) to introduce the feminist strategy of norm transfer as a new lens to critically explore the treatment of sexual and gender-based crimes, their categorisation and representation, in international and domestic contexts; (ii) to critically analyse the ICC definition of rape, comparing it to the definitions articulated at the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) (together the *ad hoc* tribunals), as well as the different definitional approaches within international human rights and domestic legal regimes; (iii) to disrupt binary thinking in relation to rape as an international crime and rape as a domestic crime by conducting a theoretical investigation into the individual wrong of rape whatever the circumstances in which it is perpetrated; and (iv) to consider how international and domestic approaches to the role of consent in defining the crime of rape might inform one another and draft legislative amendments to the ICC definition, as well as a domestic example, to bring the arguments on norm transfer and rape into practice.

In applying a norm transfer lens to the ICC definition of rape and the question of consent, the book uncovers a more complex and mutually interactive dimension to norm transfer, with the definition(s) of rape constructed in international criminal law having been informed, to varying degrees, by domestic law and practice. Following a doctrinal and theoretical analysis of the different definitional approaches at the international and domestic level, the core argument of the book is that the omission of the absence of consent as an explicit element of the ICC definition of rape is flawed and should be amended to incorporate a context-sensitive element of consent. Despite the need for this amendment, the book recognises the significance of the language of a 'coercive environment' utilised in the ICC definition, and argues that this language could usefully be incorporated into domestic consent-based definitions.

I. KEY TERMS AND SCOPE OF THE STUDY

A number of key terms that will be utilised throughout this study require further explanation. For instance, the reference to a 'feminist legal project' in this book is not meant in a singular sense. Rather, it is more appropriate to speak of 'feminisms'. As noted by Conaghan 'feminist scholarship […] is expressive of significant diversity of thought and derives from a range of different political, cultural, and philosophical traditions'.[12] In this respect, feminism is sometimes described with reference to different genres:[13] such as, 'liberal' feminism

[12] J Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27(3) *Journal of Law and Society* 351, 357.

[13] N Lacey, 'Feminist Legal Theory and the Rights of Women' in K Knop (ed) *Gender and Human Rights* (Oxford, Oxford University Press, 2004) 13–56; H Barnett, *Introduction to Feminist Jurisprudence* (London, Cavendish Publishing Limited, 1998) 3–9.

focused on inclusion and equality; 'radical' feminism seeking exposure of the structural domination of women by men; 'cultural' feminism focused on identifying and rehabilitating qualities associated with women; 'marxist' feminism which explores how women are oppressed with attention to economic and reproductive systems; 'postcolonial' or 'critical race' feminism which pays attention to women's lived histories and positions sex/gender as only one part of their intersecting identities and oppressions; and 'queer' feminism which moves away from dual conceptions of sex and gender, and embraces multiple and fluid sexualities.[14] Although the strands of feminism highlighted above represent different approaches and perspectives, a combination of these approaches, as opposed to a strict division, is often found in international feminist legal scholarship.[15] As noted by Charlesworth, a feminist analysis of international law can be compared to an 'archaeological dig' whereby different feminist theories are appropriate at different levels of analysis.[16]

The 'international feminist legal project' can thus be understood as 'a continuous goal-orientated activity based on an analysis of some kind … but the goals and analysis are not necessarily internally coherent or consistent overtime'.[17] The central focus of this book is on norm transfer as a key goal or strategy within feminist scholarship and practice. While norms can be broadly defined as standards 'of appropriate behaviour for actors with a given identity',[18] it is specifically *criminal legal norms* that this book is interested in: that is, 'formally established norms according to which individuals or groups are adjudged guilty or innocent'.[19] In particular this book is concerned with the legal definition of rape, as well as the rules of evidence that are applicable to this crime. There are however a variety of other sexual and gender-based crimes that are noted throughout this book, such as those contained within the Rome Statute of the ICC: sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity.[20]

Further to this, while Bassiouni has identified 28 categories of 'international crimes', the focus of this book is on three categories of 'core' international crimes,

[14] Otto provides a similar summary of these feminist 'taxonomies' in D Otto, 'Feminist Approaches to International Law' in A Orford and F Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford, Oxford University Press, 2016) 491.

[15] M Zalewski, *Feminism after Postmodernism? Theorising through Practice* (London, Routledge, 2003) 120; C O'Rourke, 'Feminist Strategy in International Law: Understanding Its Legal, Normative and Political Dimensions' (2017) 28(4) *European Journal of International Law* 1019, 1023.

[16] H Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) *The American Journal of International Law* 379, 381.

[17] D Kennedy, *A Critique of Adjudication* (Cambridge Massachusetts, Harvard University Press, 1977) as cited in Conaghan above n 12, 351.

[18] M Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887, 891.

[19] N Lacey, 'Legal Constructions of Crime' in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (Oxford, Oxford University Press, 2007) 181.

[20] Art 7(1)(g), Art 8(b)(xxii), Art 8(e)(vi) Rome Statute, above n 7.

namely genocide, crimes against humanity and war crimes.[21] These crimes have been categorised as 'core' because they are deemed to be 'the most serious crimes of concern to the international community as a whole'.[22] Marcus has sub-divided the content of these crimes into three main groups: the 'specific element'; the 'common element'; and the 'linkage element'.[23] The 'specific element' refers to the underlying crime, for example rape or murder; the 'common element' refers to the context and the particularities of war crimes, crimes against humanity, and genocide. For instance, according to the Rome Statute the common element of genocide requires the commission of any of the acts listed under Article 6(a)–(e) of the Statute 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[24] A crime against humanity requires the commission of any of the acts listed under Article 7(a)–(k) of the Statute 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[25] A war crime requires the commission of any of the acts listed under Article 8(a), (b) or (c) of the Statute 'as part of a plan or policy or as part of a large-scale commission of such crimes'.[26] The 'linkage element' refers to the mode of liability that links the commission of each crime to a particular accused person or persons. As already noted, the book is primarily concerned with the definitional construction of the underlying crime of rape. Although, as will be demonstrated throughout the book, the 'common element' plays an extremely important role as this element essentially 'converts'[27] a domestic crime into an international crime and speaks directly to the boundaries and distinctions between international and domestic law.

While this inquiry engages with developments at the *ad hoc* tribunals regarding developments in sexual and gender-based crimes, and particularly the definition of rape, the ICC is the primary focus. There are two reasons behind this focus. First, some non-governmental organisations (NGO) have argued that the ICC definition represents international best practice and should be followed in domestic law.[28] Therefore, this specific definition requires further investigation. Second, the ICC is based on the principle of complementarity, meaning that primary responsibility for prosecuting international crimes rests with domestic states.[29] As a result of this principle there is the potential for international and

[21] M Cherif Bassiouni, *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms Volume II*, 3rd edn (Leiden, Matinus Nijhoff Publishers, 2008) 169.

[22] Bassiouni, ibid, 169.

[23] M Marcus, 'Investigation of Crimes of Sexual and Gender-Based Violence Under International Criminal Law' in AM de Brouwer, C Ku, R Römkens and L van den Herik (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge, Intersentia, 2013) 229.

[24] Art 6 Rome Statute, above n 7.

[25] ibid, Art 7.

[26] ibid, Art 8.

[27] Marcus above n 23, 229.

[28] Amnesty International, 'Stop Violence Against Women: How to use International Criminal Law to Campaign for Gender-Sensitive Law Reform' 12 May 2005, Index number: IOR 40/007/2005, 19.

[29] Art 17 Rome Statute above n 7.

domestic law to converge. In this respect, some feminist scholars have drawn attention to this space as a key site for contesting domestic gender norms.[30] By situating the feminist strategy of norm transfer within the complementarity regime of the ICC, this book more clearly delineates the relationship between the international and the domestic and the way in which this space can be used as a key site of feminist activism. As such, the book does not engage in site specific research of 'complementarity in action'.[31] Rather the conceptions of norm transfer and complementarity advanced in this book are aimed at creating alternative spaces for reflection and dialogue on the development of international criminal legal norms and the controversies surrounding their content.

Finally, this book is primarily focused on the definition of rape and the question of consent in response to women's experiences of the crime. This is not to deny that men can also be victims of rape,[32] nor is it to dispute that women may also commit sexual offences.[33] Rather, the focus is justified for three reasons: first, on the basis that it is women who suffer disproportionately from this type of violence;[34] second, the book is interested in the representation of women through the law which has been the subject of intense debate;[35] third, this book is engaging with the feminist strategy of norm transfer, which, in its early form was focused on advancing the rights of women and girls.[36]

II. SETTING THE THEORETICAL AND LEGAL CONTEXT

Legal responses to sexual and gender-based violence perpetrated against women have long been key organising issues for feminist scholars and practitioners. A central area of study in this regard is the relationship and overlap between different bodies of law, domestic and international, in addressing such violence.[37]

[30] F Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law: Norms, Challenges and Domestication' (2014) 16(4) *International Feminist Journal of Politics* 622.

[31] C Bjork and J Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya' (2011) 14(1) *Yale Human Rights and Development Law Journal* 205.

[32] C Dolan, 'Victims Who are Men' in F Ní Aoláin, N Cahn, FD Haynes and N Valji (eds), The *Oxford Handbook of Gender and Conflict* (USA, Oxford University Press, 2018).

[33] AM de Brouwer and L Ruiz, 'Male Victims and Female Perpetrators of Sexual Violence in Conflict' in S Mouthaan and O Jurasz, (eds), *Gender and War* (Antwerp, Intersentia, 2017).

[34] J Ward and M Marsh, 'Sexual Violence Against Women and Girls in War and its Aftermath: Realities, Responses and Required Resources' (2006) Briefing Paper, United Nations Population Fund. But see C Dolan, 'Has Patriarchy been Stealing Feminists' Clothes? Conflict-Related Sexual Violence and UN Security Council Resolutions' (2014) 45(1) *IDS Bulletin* 80.

[35] Nadj above n 4, 2–4 on the violated body of the woman as a subject of analysis.

[36] K Grewal, 'Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights' (2010) 33(1) *Australian Feminist Law Journal* 57, 58.

[37] C McGlynn and V Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (London, Routledge, 2010); M Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (Sweden, Örebro University, 2010) 531; S Engle Merry, 'Constructing a Global Law-Violence against Women and the Human Rights System' (2003) 28(4) *Law & Social Inquiry* 941.

For instance, in the early 1990s, due to the inadequacies of 'home grown'[38] legal reforms, scholars and activists focused on situating violence against women firmly within the international human rights framework. In doing so, states could be held accountable for their failure to punish and redress this violence.[39] In addition, attention was drawn to the potential of international criminal law which, due to its focus on individual accountability, has frequently been perceived as the 'strong arm of human rights'[40] or the mechanism through which international human rights law can be given real 'teeth'.[41] In this regard, some strategic manoeuvring on the part of feminist scholars and activists in entering the international criminal legal arena can be identified in the early scholarship: it was hoped that there would be a positive 'flow on'[42] or 'boomerang'[43] effect with international criminal legal developments helping to fill gaps in domestic legal regimes in a process termed 'norm transfer'.[44] Within this context, a key issue for contemporary discourses on feminism and international criminal law is delineating the parameters within which this transfer may occur and indeed whether it is desirable.

Crimes of sexual and gender-based violence have become somewhat of a 'passion' of international criminal law.[45] While historically sexual and gender-based crimes have been viewed as an inevitable consequence of war, with little, if any repercussions,[46] and challenges of course remain, crucial legal advances have been made in the last three decades. This is reflected in a series of legal, policy and cultural developments including in the explicit statutory inclusion of the crime of rape as a crime against humanity in the Statute of the ICTY, as both a war crime and a crime against humanity in the Statute of the ICTR, and the recognition of an expansive list of sexual and gender-based crimes as war crimes and crimes against humanity in the Rome Statute of the ICC;[47]

[38] Ní Aoláin above n 30, 622.

[39] United Nations Commission on Human Rights, *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45*, E/CN.4/1995/42 22 November 1994, paras 99–113 citing standards such as Declaration on the Elimination of Violence against Women A/RES/48/104, 20 December 1993; Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with Art 27(1); and United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992.

[40] A Ahmad Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (2005) 9 *Buffalo Criminal Law Review* 273, 274.

[41] Grewal above n 36, 58.

[42] ibid, 64.

[43] O'Rourke above n 6, citing ME Keck and K Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (New York, Cornell University Press, 1998) 12.

[44] ibid.

[45] N Henry, 'The Fixation on Wartime Rape: Feminist Critique and International Criminal Law' (2014) 14(3) *Social & Legal Studies* 93, 106.

[46] United Nations Commission on Human Rights above n 39, para 263.

[47] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia

the production of a series of United Nations Security Council Resolutions on gender, peace and security;[48] political action being taken by states, including the first ever Global Summit to End Sexual Violence in Conflict which was hosted by the United Kingdom government in June 2014 resulting in a *Declaration of Commitment to End Sexual Violence* and an *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, and the Stand Speak Rise Up! Conference hosted by Her Royal Highness The Grand Duchess of Luxembourg;[49] 19 June being designated as the International Day for the Elimination of Sexual Violence in Conflict;[50] and the 2018 Nobel Peace Prize being awarded jointly to Denis Mukwege, founder and medical director of Panzi Hospital in the Democratic Republic of Congo (DRC) which specialises in treating survivors of sexual violence, and Nadia Murad, Yazidi human rights activist and survivor of genocide and human trafficking, 'for their efforts to end the use of sexual violence as a weapon of war and armed conflict'.[51]

Although on the one hand these legal and normative developments have been celebrated, on the other concern has been raised about the nature of this visibility, what might become lost in translation and the picture of violence that dominates as a result.[52] For instance, the idea of rape as a weapon of war has gained traction with international commitments being made to end this form

since 1991, UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993) Art 5(g) Rape as a Crime Against Humanity; Statute of the International Tribunal for Rwanda, adopted by SC Res 955, UN SCOR, 49th Sess, 3453d mtg. at 3, UN Doc S/RES/955 (1994), 33 ILM 1598, 1600 (1994) Art 2(g) Rape as a Crime Against Humanity and Art 4(e) Rape as a War Crime; Rome Statute above n 7, Art 7(1)(g), Art 8(b)(xxii), Art 8(e)(vi).

[48] Security Council resolution 1325, 31 October 2000, S/RES/1325 (2000); Security Council Resolution 1820, 19 June 2008, S/RES/1820 (2008); Security Council Resolution 1888, 30 September 2009, S/RES/1888 (2009); Security Council Resolution 1889, 5 October 2009, S/RES/1889 (2009); Security Council Resolution 1960 16 December 2010, S/RES/1960 (2010); Security Council Resolution 2106, 24 June 2013, S/RES/2106 (2013); Security Council Resolution 2122, 18 October 2013, S/RES/2122 (2013); Security Council Resolution 2242, 13 October 2015, S/RES/2242 (2015); Security Council Resolution 2467, 29 April 2019, S/RES/2467 (2019).

[49] Declaration of Commitment to End Sexual Violence (2014) available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/274724/A_DECLARATION_OF_COMMITMENT_TO_END_SEXUAL_VIOLENCE_IN_CONFLICT.pdf (last accessed 5 March 2019); International Protocol on the Documentation and Investigation of Sexual Violence in Conflict Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law (June 2014); Stand Speak Rise Up! Conference 26–27 March 2019 available at www.standspeakriseup.lu (last accessed 29 March 2019).

[50] UN Women statement for the first International Day for the Elimination of Sexual Violence in Conflict (19 June) – see more at: www.unwomen.org/en/news/stories/2016/6/statement-for--international-day-for-the-elimination-of-sexual-violence-in-conflict#sthash.lG6pIFtA.dpuf (last accessed 5 March 20/06/2016).

[51] The Nobel Peace Prize for 2018, Announcement, 5 October 2018 available at www.nobelprize.org/prizes/peace/2018/press-release/ (last accessed 5 March 2019).

[52] D Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (2007) 25(1) *Windsor Yearbook of Access to Justice* 3; K Grewal, 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies' (2015) *Feminist Legal Studies* 149.

of rape. Questions have thus emerged in relation to international criminal laws 'exceptionalism' rendering any developments 'untranslatable' to domestic settings.[53] This brings to the fore the different expectations and conceptualisations surrounding the purpose and utility of international criminal law.[54] Indeed, according to the feminist strategy of norm transfer, international criminal law has a role to play in advancing women's rights in contexts beyond conflict or mass violence.[55] While international criminal law is often said to perform a number of functions, such as, providing retribution for wrongdoing, giving a voice to victims, contributing to a historical record, deterring future atrocities and strengthening the rule of law, the extent to which international criminal law can or should deliver any of these functions is subject to debate.[56]

Moreover, international criminal institutions, including the ICC, operate in an environment that is imbued with politics. As such, the actions and inactions of these institutions raise questions about their neutrality and consequently their legitimacy. Take for instance criticisms of the early Nuremberg and Tokyo trials as 'victors justice' in which the law was applied unevenly by those in power.[57] Contemporary critiques of the ICC reflect similar sentiments. Indeed, Chief Prosecutor of the ICC, Fatou Bensouda, has stated that the court, and the Rome Statute, create a 'system of global justice against oppression and repression by the powerful'.[58] Yet, questions have been raised over the extent to which the ICC itself is influenced by and manipulated by powerful western states at the expense of those in the global south.[59] Thus, contemporary scholarship has come to understand international criminal law as a 'normative project … including clashes between different legal traditions, protagonists or approaches, and broader critiques about its construction as a field'.[60] Building on this understanding, a central contention of this book is that while international criminal law's ability to directly respond to the different manifestations of sexual and gender-based violence is limited, it can provide the springboard for a broader discussion around this form of violence, its legal categorisation and representation.

[53] Grewal above n 36, 68.

[54] F Mégret, 'International Criminal Justice as a Juridical Field' (2016) 13 *Penal Field* 34.

[55] See also discussion in Grewal above n 36 on international criminal law and the advancement of women's rights.

[56] For an overview of different and conflicting theories see L Moffett, *Justice for Victims before the International Criminal Court* (Oxon, Routledge, 2014) 12–16.

[57] K Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2011) 21(4) *The European Journal of International Law* 1085.

[58] F Bensouda, 'Reflections from the International Criminal Court Prosecutor' (2012) 45(4) *Vanderbilt Journal of Transnational Law* 955, 956.

[59] D Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 *International Criminal Law Review* 409.

[60] C Stahn, *A Critical Introduction to International Criminal Law* (United Kingdom, Cambridge University Press, 2019) 12.

Regarding international criminal law as a springboard, this connects with broader international human rights and international relations research on the emergence, diffusion and internalisation of international norms.[61] Take for instance, Keck and Sikkink's exploration of the promotion of norms against, amongst other conduct, violence against women and their tracking of state behaviour in response to the international recognition of such norms within human rights frameworks.[62] Contemporary explorations of this international/domestic dynamic have moved away from linear evaluations of how norms travel to more critical accounts of norms themselves as 'works in progress'[63] and of 'evolutionary character'.[64] This shift in focus has been due to a key tension identified in the literature: 'a relatively static depiction of norm content, juxtaposed against a comparatively dynamic account of norm creation, diffusion and socialisation'.[65] In the context of Keck and Sikkink's study above, for example, True notes that the concept of violence against women itself was not explored 'in-depth in terms of its conceptualisation, contested content and local meaning in use'.[66] Thus, rather than viewing norms as stable structures, the literature is beginning to explore the process and mechanisms through which the content of norms are shaped and contested. This book contributes to the international norms literature by providing an in-depth analysis of the feminist strategy of norm transfer in the specific context of international criminal, as opposed to international human rights, law and the complementarity system of the ICC. This focus enables a detailed investigation of the particular definitional elements that make up an offence for which individuals can be held individually criminally accountable.

In keeping with the conceptualisation of norms as 'works in progress', this book develops a more nuanced conception of norm transfer within international criminal law: rather than focusing the analysis solely on the way in which norms at the level of international criminal law might be transposed into domestic contexts, it encourages an analysis of how these norms came into being. In this respect, the

[61] Finnemore and Sikkink above n 18; Keck and Sikkink above n 43; T Risse, SC Ropp, and K Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (New York, Cambridge University Press, 1999); K Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (USA, WW Norton & Company, Inc, 2011); L Savery, *Engendering the State: The International Diffusion of Women's Human Rights* (New York, Routledge, 2007).

[62] Keck and Sikkink above n 43.

[63] J True, 'Gender Research and the Study of Institutional Transfer and Norm Transmission' in M Sawer and K Baker (eds), *Gender Innovation in Political Science: New Norms, New Knowledge* (London, Palgrave Macmillan, 2019) 135.

[64] S Zwingel, 'How do Norms Travel? Theorizing International Women's Rights in Transnational Perspective' (2012) 56 *International Studies Quarterly* 115, 115.

[65] ML Krook and J True, 'Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality' (2010) 18(1) *European Journal of International Relations* 103, 104.

[66] True above n 63, 138.

different sources of law that can contribute to the development of international criminal legal norms become relevant. As a subset of public international law, international criminal law must rely on appropriate sources of international law to aid in its development. Consequently, we must turn to Article 38 of the Statute of the International Court of Justice (ICJ) which points to the sources of international law. Article 38 provides the following list of sources:

(a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting States.
(b) International custom, as evidence of a general practice accepted as law.
(c) The general principles of law recognised by civilised nations.
(d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[67]

Although Article 38 is specific to the ICJ, it represents the most authoritative statement of sources of international law.[68]

In codifying the sources of law applicable in international criminal law, Article 21 of the Rome Statute builds on Article 38 and provides that the ICC shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.[69]

Furthermore, Article 21(3) of the Rome Statute provides that:

> The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.[70]

[67] Art 38, United Nations, Statute of the International Court of Justice, 18 April 1946.
[68] C Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues*, (Berlin, Springer, 2008) 30.
[69] Art 21, Rome Statute, above n 7.
[70] ibid, Art 21(3).

International criminal law has thus been described as 'public international law impregnated with notions, principles and legal constructs derived from national criminal law, international humanitarian law as well as human rights law'.[71] The creation, codification and application of this body of law has attracted great interest in relation to whether it respects important legal principles. These include the principle of fair labelling, requiring that the description of the offence should match the wrong done, and the principle of legality, or *nullum crimen sine lege* which translates to 'no punishment without law', requiring the law to be defined in a way that is sufficiently clear and precise.[72] Scholars have also questioned the extent to which domestic legal principles can function in the new and unique context of international criminal law.[73]

The journey to define the crime of rape in international criminal law illuminates the complexity of this process, as well as the contestation and controversy that can ensue when concepts from domestic rape law, such as consent, are drawn upon. The challenge of defining the crime of rape in international criminal law also maps onto a wider process of evolution in terms of the very idea of what rape is and what the crime entails.[74] A significant body of feminist and philosophical scholarship has been preoccupied with these questions for centuries,[75] and jurisdictions across the global stage continue to engage in reform of their law and procedure on rape, most notably in the area of consent.[76] However, while there is an emerging literature exploring the continuities between rape in conflict and rape in peace and the parallel challenges that exist,[77] there is still resistance to what Kelly has described as 'a continuum approach … looking at the benefits of connecting work on sexual violence across contexts'.[78]

[71] A Cassese, G Acquaviva, M Fan and A Whiting, *International Criminal Law: Cases and Commentary*, (Oxford, Oxford University Press, 2011) 2.

[72] HM Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (New York, Oxford University Press, 2014); M Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2(4) *Journal of International Criminal Justice* 1007.

[73] R Haveman, 'Introduction: A System Sui Generis' in R Haveman, O Kavran and J Nicholls (eds), *Supranational Criminal Law: A System Sui Generis*, (Antwerp, Intersentia, 2003).

[74] See for instance, L Du Toit, 'Introduction: Meaning/s of Rape in War and Peace', (2011) 38(3) *Philosophical Papers* 285; McGlynn and Munro above n 37; S Caringella, *Addressing Rape Reform in Law and Practice* (New York, Columbia University Press, 2008).

[75] For an excellent overview of these debates see J Conaghan, 'The Essence of Rape' (2019) 39(1) *Oxford Legal Studies* 151.

[76] DJ Frank, T Hardinge and K Wosick-Correa, 'The Global Dimensions of Rape-Law Reform: A Cross-National Study of Policy Outcomes' (2009) 74 *American Sociological Review* 279; New South Wales Law Reform Commission, Consent in relation to sexual offences, Consultation Paper 21 October 2018; The Gillen Review, *Report into the law and procedures in serious sexual offences in Northern Ireland,* May 2019; Law Reform Commission, Knowledge or Belief Concerning Consent in Rape Law, LRC IP 15 – 2018.

[77] Du Toit above n 74; L Kelly, 'The *everyday/everynightness of rape*: Is it different in war?' in L Sjoberg & S Via (eds), *Gender, war and militarism: Feminist Perspectives* (Santa Barbara, California, Praeger Security International, 2010).

[78] Kelly, ibid, 115.

This book intends to broaden contemporary discourses by situating the debates on the role of consent in an international criminal definition of rape within broader conversations on the underlying wrong of rape. Indeed, while there may be agreement that rape is wrong, significant controversy remains in relation to why it is wrong. This book adopts the conceptualisation of rape as a violation of sexual autonomy; that is, the right of individuals to make autonomous decisions about their sex lives.[79] While scholars such as Grewal and Boon have engaged with this concept,[80] others have questioned the extent to which this conceptualisation of rape is sustainable outside of peacetime contexts.[81] This book more clearly elucidates the different dimensions of sexual autonomy, emphasising, in particular the contextual dimension.[82] It is argued that the contextual dimension requires a thorough consideration of the background circumstances within which sexual choices are made and thus renders sexual autonomy versatile enough to form the key underpinning principle of rape law across the international/domestic, conflict/peace divide. Further to this, engaging with the principle of sexual autonomy enables consideration of the individual harm of rape, a harm that is often side-lined in the context of mass violence. In doing so, the book emphasises the continuing importance of adopting a context-sensitive conception of consent as central to the crime of rape in both international and domestic criminal law.

III. CONTRIBUTION TO SCHOLARSHIP

As the foregoing discussion has demonstrated, a vast and diverse literature on feminism, international criminal law, rape and consent has been fostered. Within this book, three key contributions to original knowledge can be identified. First, the book sets up a robust theoretical framework in relation to how international norms have the potential to impact the law at the domestic level and vis versa: the feminist strategy of norm transfer. It thus provides a different way of thinking about international criminal law from the point of view of international politics, feminist debates, complementarity doctrines and the local/international dynamic. While the book focuses on norm transfer in the context of the legislative definition of rape and the specific question of consent, the

[79] SJ Schulhofer, 'Taking Sexual Autonomy Seriously: Rape Law and Beyond' (1992) 11 *Law and Philosophy* 35.

[80] K Boon, 'Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent', (2000–01) 32 *Columbia Human Rights Law Review* 625; K Grewal, 'The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape' (2012) 10 *Journal of International Criminal Justice* 373.

[81] Schomburg and Peterson above n 9.

[82] For a discussion of sexual autonomy and the different dimensions in the context of domestic rape law see also E Dowds, 'Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force' (2019) *Modern Law Review* (forthcoming).

discussion has the potential to be broader in scope. For instance, the analysis could be applied to other elements of the definition of rape or other international crimes, such as forced pregnancy. Or, instead of focusing on legislative content, it could explore the extent to which the international criminal legal prohibitions therein affect or are affected by society and culture.

Second, the book advances a new typology of the harm and wrong of rape. This typology provides an additional theoretical layer to the book, providing an in-depth exploration of the different conceptualisations of rape set out at the *ad hoc* tribunals: rape as crime of aggression, violation of human dignity and a violation of sexual autonomy,[83] as well as academic literature dealing with such conceptualisations. In adopting the conceptualisation of rape as a violation of sexual autonomy, this book makes an important contribution to countering what Eriksson Bazz and Stern have described as the 'erasure of the sexual' in dominant accounts of wartime rape.[84] Sexual autonomy is used as the guiding principle underpinning the definition of rape advanced at the end of the book and is incorporated into the draft amendments to the Rules of Procedure and Evidence for the ICC. Although the exploration of sexual autonomy is restricted to the crime of rape in this book, the analysis is transferrable to other crimes of sexual and gender-based violence due to the emphasis placed on individual choice in sexual matters.[85]

Third, a norm transfer lens provides a new perspective on the place of consent in a definition of rape in international criminal law and the way in which the domestic and international approaches to this crime can inform one another. In concluding that a context-sensitive definition of consent is wholly appropriate, the book drafts legislative amendments to the ICC definition of rape (see Appendix I). Within this draft legislation the question of whether there was an absence of consent on the part of the complainant and the defendant's awareness of this absence of consent becomes central. A context-sensitive definition of consent is also explicitly set out: *A person consents if they are voluntarily participating in the act, as a result of their free will, assessed in the context of the surrounding circumstances.* It is argued that the other elements contained within the ICC definition of rape constitute *evidence* of lack of consent and are thus split into rebuttable and conclusive presumptions against consent: threat of force or coercion, such as that caused by fear of violence, duress, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment forming rebuttable presumptions; circumstances where the victim is detained, where consent has been obtained by

[83] *Prosecutor v Akayesu*, Case No ICTR-96-4-T, Judgment (2 September1998) para 598; *Prosecutor v Furundžija*, Case No IT-95-17/1, Judgment (10 December 1998) para 184; *Prosecutor v Kunarac, Kovac, Vukovic*, Case No IT-96-23&23/1, Judgment (22 February 2001) para 457, respectively.

[84] M Eriksson Baaz and M Stern, 'Curious erasures: the sexual in wartime sexual violence' (2018) 18(3) *International Feminist Journal of Politics* 295.

[85] Although the underlying principle is applicable to other crimes, a distinction in relation to the label 'rape' is appropriate to differentiate the specific conduct. See Zawati above n 72.

deception or where the invasion was committed against a person incapable of giving genuine consent forming conclusive presumptions.

As such, the book responds to Simić and Collings' suggestion that 'future feminist legal discourse concerning the ICL treatment of wartime rape should focus on how to place the consideration of coercive circumstances within the framework of non-consensual sexual penetration'.[86] In this regard, the book moves beyond existing literature by not only critiquing the ICC definition of rape but drafting workable amendments to this definition, as well as its rules of procedure and evidence. Given the broader lens of norm transfer, the book also drafts amendments to a domestic example, the definition of rape contained within the United Kingdom's (UK) Sexual Offences Act 2003, to bring the arguments in the book to life (see Appendix II). The most significant modification is the inclusion of a rebuttable presumption against consent where coercion, such as that caused by psychological oppression or abuse of power was used against the complainant, or where the perpetrator took advantage of a coercive environment, as well as some modifications to the existing conclusive presumptions to include, amongst other instances, where the complainant is detained. Procedural rules introducing a judicial filter through which evidence of consent must be considered are also set out. The value of legislative drafting as a methodology will be explored in the following section.

IV. METHODOLOGY: FROM THEORY TO PRACTICE

This book is cross-cutting in nature, both in its focus and in its methods. It engages in comparative and doctrinal legal analysis of primary sources by exploring the evolution of the ICC definition of rape, comparing it to the definitions articulated at the *ad hoc* tribunals, as well as the different definitional approaches within human rights and domestic legal regimes. This exploration is important for three reasons. First, the ICC definition and its interpretation, as well as the debates surrounding this definition, have been influenced by the existence of three additional definitions constructed at the *ad hoc* tribunals in the cases of *Akayesu*, *Furundžija* and *Kunarac*,[87] as well as subsequent jurisprudence attempting to reconcile these approaches.[88] The *Akayesu* and *Furundžija* definitions were constructed prior to the ICC definition and are centred around coercion and force whereas the *Kunarac* definition was constructed a year after the ICC definition focusing on lack of consent.

[86] O Simić and J Collings, 'Defining Rape in War: Challenges and Dilemmas' (2018) 16(1) *Griffith Journal of Law and Human Dignity* 184, 223.

[87] *Akayesu*, *Furundžija*, *Kunarac* above n 83.

[88] *Prosecutor v Gacumbitsi*, Case No ICTR-2001-64-A, Appeals Chamber (7 July 2006).

Second, if a central tenet of norm transfer is that international criminal legal norms filter back to domestic systems it is necessary to have an understanding of how the crime of rape is currently defined across some of these systems. As such, a broad overview of consent-based and coercion-based approaches will be given and trends towards reform in a number of jurisdictions will be highlighted. Belgium, New Zealand, Canada, England and Wales, South Africa, Wisconsin, California, Ireland, and New South Wales have been chosen to reflect some domestic consent-based approaches as slight variations in approaches to the definition of consent and treatment of this element for the purpose of *mens rea* and *actus rea* can be identified. Michigan, Maine, New Mexico, Italy, Hungary and Spain, provide examples of coercion-based definitions due to slight differences in their prohibited circumstances. It is acknowledged that there is a smaller sample of coercion-based jurisdictions, however this is as a result of there being more variation to address in relation to the consent-based models. In terms of trends towards reform, recent legislative changes in Iceland and Sweden will be noted as well as considerations for reform under some of the jurisdictions already explored.

Third, attention to developments in international human rights law is relevant due to this body of law setting standards in relation to how states should approach the crime of rape and due to Article 21(3) of the Rome Statute requiring the law at the ICC to be human rights compliant. The 2003 case of *Mc v Bulgaria* before the European Court of Human Rights and the 2010 case of *Vertido v The Philippines* before the Committee on the Elimination of Discrimination,[89] will be drawn upon as both cases provide explicit recommendations to states on what should be included in criminal legal prohibitions on rape. The book complements this doctrinal analysis with a theoretical exploration of the wrong of rape and uses this investigation as a means to critically evaluate the ever-increasing body of critical literature on the appropriate role of consent in international and domestic criminal legal constructions of rape.

Experimental legal drafting is used as an innovative methodological tool to bring the arguments on norm transfer and rape into practice. While legislative drafting is evident in the early work of some feminist scholars,[90] more contemporary feminist scholarship does not actively engage in this type of legislative drafting.[91] The limited use of legal drafting as a form of critical intervention can

[89] *MC v Bulgaria* (Application No 39272/98) 4 December 2003; *Vertido v The Philippines* (Communication No 18/2008) Committee on the Elimination of Discrimination against Women July 2010.

[90] J Green, R Copelon, P Cotter and B Stephens, 'Affecting the Rules for the Prosecution of Rape and Other Gender Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique' (1994) *5 Hastings Women's Law Journal*, 171; K Askin, *War Crimes Against Women: Prosecution in International War Crimes* Tribunals (The Netherlands, Martinus Nijhoff Publishers, 1997); Women's Caucus for Gender Justice, Women's Caucus Advocacy in ICC Negotiations 2002 available at http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/pcindex.html (last accessed 7 March 2019).

[91] See however work by A Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, Future* (Leiden, Brill Nijhoff, 2011). While not scholarship, see also WIGJ's 2019 'Call it what it is' campaign to draft a civil society declaration providing guidance on what an 'act of a sexual nature'

be contrasted with the rise in feminist judgments projects (FJP) in domestic and international contexts where feminist scholars write alternative judgments in a series of key cases.[92] Although these cases are already in existence, the rationale behind such projects is to demonstrate how cases can be reasoned and/or decided differently when a feminist perspective is introduced. A key objective is thus to give practical effect to legal theory. As such, they have been categorised as 'law reform projects, which perform the law anew and in doing so, create spaces for subtle, yet meaningful, changes'.[93] Rather than using judgment writing as a mode of critique and reform, this book reengages with legislative drafting as a methodological tool to demonstrate its value in enabling a rethinking and rewriting of the law itself from a feminist perspective.

In adopting legislative drafting as a legal method, I am acutely aware of the limitations associated with this technique, especially within a criminal context. For instance, a key principle that must be adhered to is the principle of *nullum crimen sine lege*, noted above. Thus, the parameters of change are already set and it is within the framework of the law that this drafting must occur. However, as Charlesworth has insightfully pointed out, 'most feminists are constrained by their environment. If we want to achieve change, we must learn and use the language and methods of the dominant order'.[94] Thus, like the feminist judgments project, which also adopts a traditional legal method, this book, and the legislative drafting that takes place therein, 'finds spaces, however cramped, for alternative iterations of oppressive legal principles'.[95] Indeed, as will be demonstrated, the legislation advanced at the end of this book remains within the bounds of the principle of *nullum crimen sine lege*. Rather than creating new concepts or categories of crimes, the legislation more clearly elucidates the meaning and relationship of existing concepts, specifically consent and coercion, by injecting a feminist informed understanding of these terms.

V. RECURRENT THEMES

The book will consider the principal themes and debates concerning feminist engagement with international criminal law, complementarity, norm transfer,

under the ICC legal materials could entail, available at https://4genderjustice.org/home/campaigns/defining-sexualviolence/ (last accessed 25 June 2019). In domestic context see F de Londras and M Enright, *Repealing the 8th Reforming Irish Abortion Law* (Great Britain, Policy Press, 2018).

[92] The Women's Court of Canada: D Majury, 'Introducing the Women's Court of Canada' (2006) 18 *Canadian Journal of Women and the Law* 1; FJP England: R Hunter, C McGlynn, and E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford, Hart Publishing, 2010); L Hodson and T Lavers, *Feminist Judgments in International Law* (Oxford, Hart Publishing, 2019).

[93] J McCandless, M Enright and A O'Donoghue, 'Introduction: Troubling Judgment' in J McCandless, M Enright and A O'Donoghue, (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Oxford, Hart Publishing, 2017) 7.

[94] Charlesworth above n 16, 380.

[95] McCandless et al above n 93, 7.

rape and consent. A predominant theme within the book is that of challenging boundaries. This theme maps on to broader feminist critiques of the ideological division of life into opposing spheres: the public/private divide. The public/private divide has been explained by Landes in the following terms:

> The term 'public' suggests the opposite of 'private': that which pertains to the people as a whole, the community, the common good, things open to sight, and those things that are accessible and shared by all. Conversely, 'the private' signifies something closed and exclusive, as in the admonition 'Private property – no trespassing'.[96]

It thus refers to a binary opposition that has dichotomised 'the social universe in a comprehensive and sharply demarcated way'.[97] Often it is women who reside in so called 'private' spaces and the public/private divide shields these spaces from legal intervention, resulting in a lack of legal protection for women.[98] In international criminal law this divide is maintained through its focus on the collective in which it responds to harms associated with the community, rather than the individual.[99] While this represents a jurisdictional boundary, between crimes that trigger international criminal jurisdiction versus domestic jurisdiction, chapters five and six will demonstrate how such boundaries can influence the substantive legal construction of crimes and their perceived gravity. However, if we think about feminist futures in international criminal law, the feminist strategy of norm transfer encourages us to think beyond boundaries to a place where debates and dialogue on issues that affect women at all times, such as the crime of rape, are open to everyone active in the pursuit against this violence. Situating norm transfer within the complementarity regime of the ICC will help to challenge and navigate these boundaries.

A related theme within the book is that of the limits and possibilities of law reform. Feminist scholars have long drawn attention to the complexities of sexual experience and sexual violation and the failure of the law to respond adequately.[100] Nourse, for instance, has suggested that 'feminist law reforms have a kind of built-in, albeit unpredictable, capacity for failure'.[101] Carceral frameworks, which are central to this book, are blunt tools structured in binary terms: legal/illegal, innocence/guilt, victim/perpetrator. Thus, while the carceral framework

[96] JB Landes, 'Introduction' in JB Landes (ed), *Feminism, the Public and the Private* (Oxford, Oxford University Press, 1998) 1–2.

[97] J Weintraub, 'The Theory and Politics of the Public/Private Distinction' in J Weintraub and K Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago, University of Chicago Press, 1997) 1.

[98] H Charlesworth, 'Alienating Oscar? Feminist analysis of international law' (1993) 25 *Transnational Legal Policy* 1, 9.

[99] Charlesworth above n 16, 387.

[100] G Heathcote and A Loughnan, 'Introduction – Speaking Subjects: Celebrating Twenty Years of Lacey's Unspeakable Subjects' (2018) 8(2) *Feminists@law* 1; E Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Toronto, UCU Press, 2012).

[101] V Nourse, 'The "Normal" Successes and Failures of Feminism and the Criminal Law' (2000) 75 *Chicago-Kent Law Review* 951, 953.

of the criminal law offers the opportunity to name, define and condemn specific harms, it leaves little room for nuance and complex narratives.[102] Within feminist legal theory these concerns have played out in debates on the law as a source of harm and exclusion, as well as debates around whether the law constructs women as passive victims or individual agents.[103] The book locates the controversy surrounding the appropriate role of consent in international and domestic constructions of rape within these debates. Indeed, discussions around the ability or inability to consent are inextricably linked to discussions on expressions of agency and the various ways this may be constrained.

Another theme running through the book is the importance of dialogue and reflexivity. As noted above, feminism is representative of a mosaic of different perspectives and approaches. Within this context a variety of disagreements and tensions emerge. Direct engagement with these debates is at the heart of this book, and an understanding of 'feminist tensions, as an integral and necessary part of feminist methodologies …'.[104] The conception of norm transfer advanced in this book reflects this approach, as norm transfer is used as a means to engage in conversations around the contested aspects of international criminal legal norms. As such, it is not suggested that the arguments in this book represent 'a single, triumphant truth'.[105] Rather, it is hoped that the discussion and definitions can motivate dialogue and debate around what role consent ought to play in an international criminal definition of rape, as well as on how international criminal legal developments might inform domestic law on rape. Linked to this is the reality that I have been able to write about rape in international criminal law in an environment where I do not have direct experience of such harms. Thus, this book could be viewed as reproducing the problematic global south/global north divide in feminist scholarship where those in the global north attempt to 'speak on behalf of' others.[106] As explained by Orford, 'As well as producing knowledge about Third World Women, the discipline of international law authorizes feminists to design rules that contribute to the protecting or saving of other women'.[107] While this tension will be addressed more clearly in chapters two and six, it should be noted that this book acknowledges rape as

[102] L Gotell, 'Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence: A Critique of the Critique of Carceral Feminism' in N Henry, A Powell and A Flynn (eds), *Rape Justice: Beyond the Criminal Law* (United Kingdom, Palgrave Macmillan, 2015).

[103] Engle above n 11; O Simić, 'Challenging Bosnian Women's Identity as Rape Victims, as Unending Victims: The "Other" Sex in Times of War' (2012) 13(4) *Journal of International Women's Studies* 129.

[104] G Heathcote, *Feminist Dialogues on International Law: Successes, Tensions, Futures* (United Kingdom, Oxford University Press, 2019).

[105] Charlesworth above n 16, 380.

[106] SM Gunew and A Yeatman (eds), *Feminism and the Politics of Difference* (Boulder, Colorado, Westview Press, 1993).

[107] A Orford, 'Feminism, Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law* 275, 281.

a global challenge and advances a more contextual understanding of this crime as opposed to siloed or isolated examinations of its occurrence.

VI. CHAPTER SYNOPSIS

The book is divided into three parts, the first of which sets out the legal and theoretical context. Chapter two provides a critical analysis of feminist engagement with international criminal law over the past three decades. It will address feminist concerns over the ongoing under-enforcement of the law; concerns over a growing 'carceral feminism' preoccupied with remedying wrongs by way of incarceration; feminist contributions to an imperial and hegemonic regime; and the challenges associated with the fixation on wartime rape. It concludes that despite ongoing challenges, feminist engagement with international criminal law continues to be important. Chapter three re-grounds feminist critical reflective scholarship in international criminal law by returning to one of the motivating factors for feminist intervention in the first place: 'norm transfer'.[108] It situates the feminist strategy of norm transfer within the complementarity regime of the ICC, separating it into a tripartite structure and drawing particular attention to the role of 'positive' or 'proactive' complementarity in triggering domestic reform of norms on sexual and gender-based crimes. It argues that the process of norm transfer presents feminist activists with the opportunity to rethink, rather than uncritically accept, the norms developed at the level of international criminal law. The chapter introduces rape and the issue of consent as a case study. In doing so, it draws attention to a more complex and mutually interactive dimension to norm transfer in terms of how domestic law on rape has informed its international criminal legal construction.

Part two seeks to critically examine the range of issues presented by the desire for the ICC definition of rape to inform or replace domestic consent-based definitions. Chapter four traces the development of legal definitions of rape at the *ad hoc* tribunals and ICC. The chapter explores how the origins of the definitions at the different international criminal judicial bodies impact the substantive elements of the definitions and sets out the key tensions within the definitions: in particular, the role of consent versus coercion. It situates the journey to defining rape in international criminal law within its wider context by exploring international human rights law and the approaches by select domestic states. It identifies a discrepancy between the approach to consent taken at the ICC and that of international human rights bodies as well as contemporary trends in domestic law.[109] Chapter five sets out to uncover why the ICC approach

[108] An earlier version of this argument appeared in the *International Feminist Journal of Politics* and has been further developed here. See Dowds above n 6.

[109] The analysis relating to international human rights law and domestic law appears in a more in-depth form in an article in the *Modern Law Review*. See Dowds above n 82.

to consent is at odds with international human rights and domestic regimes by engaging with the debates around the extent to which rape in conflict should be considered as 'exceptional' or a continuation of everyday violence. In arguing that discussions around the exceptional nature of rape in conflict obscure the more individual harm of this crime, this chapter revisits the conceptualisations of rape advanced at the *ad hoc* tribunals: rape as a crime of aggression, a violation of human dignity and a violation of sexual autonomy. In advancing this new typology of rape, it concludes by adopting and developing the conceptualisation of rape as a violation of sexual autonomy.

Chapter six evaluates the competing feminist perspectives of the role of consent in an international criminal definition of rape in light of the conceptualisation of sexual autonomy advanced in chapter five. Following this, it returns to the feminist strategy of norm transfer, as outlined in chapter three, which emphasises dialogue and conversation rather than uncritical acceptance. It applies the lens of norm transfer to the definition of rape at the ICC, identifying both positive and negative aspects of this definition. Consequently, the chapter proposes a number of amendments to the ICC definition and its rules of procedure and evidence, explicitly incorporating and clarifying the role of consent.[110] The chapter also takes the opportunity to demonstrate how certain aspects of the proposed definition may benefit domestic definitions of rape. These amendments are set out in the appendices at the end of the book.

The final part of the book reflects on the future of feminism in international criminal law in the context of norm transfer. Chapter seven pulls together the major themes discussed in previous chapters highlighting the implications and challenges for discourses on feminism, international criminal law, rape and consent. It argues that the significance of the feminist strategy of norm transfer lies in the conversations and dialogue it has the potential to provoke, the boundaries it challenges and the alliances between international and domestic activists it can create.

[110] A skeletal version of this argument appears in Dowds above n 6.