

# Accountability for Conflict-Related Sexual Violence FREE

Philipp Schulz, Institute for Intercultural and International Studies, University of Bremen and Anne-Kathrin Kreft, Department of Political Science, University of Oslo

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## Summary

Since the late 1990s and early 2000s, notable progress has been made toward holding accountable those responsible for conflict-related sexual violence (CRSV), with a view toward ending impunity. Developments by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, as well as by the International Criminal Court, were instrumental to advancing jurisprudence on sexual violence in the context of armed conflict. Despite progress in seeking to hold perpetrators accountable, critics note that there is persistent impunity and a vacuum of justice and accountability for sexual violence crimes in most conflict-affected settings globally. At the same time, feminist scholars in particular have critiqued the ways in which criminal proceedings often fail sexual violence survivors, especially by further silencing their voices and negating their agency. These intersecting gaps and challenges ultimately reveal the need for a broader, deeper, thicker, and more victim-centered understanding of justice and redress in response to sexual violence.

**Keywords:** accountability, justice, sexual and gender-based violence, transitional justice, rape

**Subjects:** Development, Human Rights, International Law, Politics and Sexuality and Gender, Security Studies

## Introduction: Recent Developments in Redressing Conflict-Related Sexual Violence

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On February 4, 2021, the International Criminal Court (ICC) delivered its long-awaited verdict regarding Dominic Ongwen, a former Lord's Resistance Army (LRA) rebel commander. Ongwen was convicted for war crimes and crimes against humanity committed during the more than two-decades-long civil war in northern Uganda, including 19 counts of crimes of sexual and gender-based violence (SGBV)—the highest ever number leveled against an accused person at the ICC. Although the case has attracted widespread international attention, including criticism,<sup>1</sup> the trial has also been praised for highlighting SGBV crimes during the civil war in northern Uganda. In fact, the verdict is the ICC's first ever prosecution of crimes of forced pregnancies and forced marriage—thereby advancing jurisprudence on international accountability for GBV.

Barely 6 weeks later, in March 2021, a regional court in Germany updated its charges in the al-Khatib trial to include several incidents of sexual violence as crimes against humanity “committed as part of a widespread or systematic attack against the civilian population in Syria” (European Center for Constitutional and Human Rights [ECCHR], 2021, p. 1). Started in April 2020, the trial charges Anwar R. and Eyad A. with crimes against humanity, constituting the first trial worldwide on state-sponsored violence in Syria (ECCHR, 2020). Commenting on the inclusion of sexual violence charges, Syrian women’s rights activist Joumana Seif attests that “for the many survivors and their families it is an important signal [that] can empower those affected—women and men—and give them hope to be acknowledged and seen” (ECCHR, 2021, p. 2).

These examples—the Ongwen verdict and the al-Khatib trial—constitute just two contemporary instances in a growing body of international jurisprudence and accountability for conflict-related sexual violence (CRSV). Since the late 1990s and early 2000s, notable progress has been made toward holding accountable those responsible for CRSV, with a view toward ending impunity. Indeed, developments by the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) in the late 1990s were instrumental to the recognition of rape and sexual violence as war crimes, crimes against humanity, and genocide (Mibenge, 2013) and to advancing jurisprudence on sexual violence in the context of armed conflict (Henry, 2009). These developments also set the precedent for other hybrid tribunals—such as the Special Courts for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC)—as well as the permanent ICC, which has heard several cases that include charges of SGBV (Chappell, 2014). In addition, since approximately 2010, progress has been made in prosecuting CRSV in national courts throughout the world (Seelinger, 2020).

Nevertheless, despite this progress, critics attest “persistent impunity for conflict-related sexual violence” (Martin & SáCouto, 2020; Muvumba Sellström, 2015, p. 2) and a vacuum of justice and accountability for the vast majority of sexual violence victims and survivors in conflict-affected settings globally (see Loken et al., 2018; Schulz, 2020a; Seelinger, 2014). Despite a growing caseload for crimes of SGBV across different courts and tribunals globally, the widespread dimension of sexual violence in conflict settings means that most perpetrators escape justice, and the overwhelming majority of crimes are not redressed—thereby mirroring broader global trends of low conviction rates for sexual crimes along a continuum across war and peace (Boesten, 2014; McGlynn & Westmarland, 2019).

At the same time, feminist scholars in particular have critically laid bare how criminal proceedings often fail sexual violence survivors, especially by further silencing their voices and negating their agency (Buss, 2009; Henry, 2009; Mertus, 2004). As a result, criminal accountability does not always and necessarily constitute the preferred justice avenue for all survivors, many of whom often advocate for more immediate forms of support, healing, and redress (Boesten, 2014; Schulz, 2020a). Partly in response to these institutional shortcomings and inconsistencies of criminal trials and retributive proceedings to provide accountability for wartime sexual violence, scholars have explored alternative pathways toward justice for SGBV survivors, including particularly reparations (Ni Aolain et al., 2015; Rubio-Marín, 2006).

Against this background, the authors trace these developments over the past two decades in the area of accountability for CRSV. The objective is to offer a broad and holistic overview of scholarly and political development and debates with regard to accountability for sexual violence in conflict. This overview includes progress that has been made, the possibilities that emerge, as well as the challenges that persist in delivering justice and accountability for CRSV. Situated within a brief outline of the global dynamics surrounding conflict-related sexual violence in general, the authors first review developments in the international policy arena, related to accountability for wartime sexual violence within the United Nations' Women, Peace and Security arena. Then follows a review of developments in the criminal justice arena in relation to the ad hoc international tribunals for the former Yugoslavia and Rwanda and the ICC, but also in relation to early 21st-century developments in national courts in conflict-affected settings, shedding light on various empirical examples from different contexts. Drawing on feminist critiques as well as empirical research in Uganda and Colombia, the authors end by identifying shortcomings and gaps with regard to criminal proceedings across these cases, before contrasting these developments with survivors' conceptions and views on justice.

Amidst the progress that has been made in advancing international jurisprudence on CRSV, numerous challenges remain, while impunity reigns across many war-affected settings globally. In addition, criminal proceedings and retributive accountability frequently contrast with survivors' justice conceptions and needs, which are often less violation-centric and more harm-oriented. Specifically, more immediate assistance and redress for survivors, in the form of physical, psychological, or socioeconomic assistance, is often a priority. This calls for a broader, deeper, and thicker understanding of justice and redress in response to sexual violence that moves beyond the current focus on criminal accountability that dominates existing literature on this topic—echoing emergent calls for a survivor-centric approach.

## Conflict-Related Sexual Violence

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Wartime sexual violence can take various forms and exhibits different patterns across contexts. Existing research gives insights into these patterns and variations and their driving factors. In line with Cohen and Nordås (2014, p. 419), CRSV is understood to comprise rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, forced abortion, sexual mutilation, and sexual torture against civilians, although this definition is extended also to members of armed groups in times of war.<sup>2</sup> Although women and girls are the primary victims of conflict-related sexual violence (Cohen, 2016), sexual violence against men is more common than previously assumed, and it has been gaining more attention in both policy and academic circles (Schulz, 2020a; Touquet & Schulz, 2020). Attention to violence against nonbinary identifying persons (Serrano-Amaya, 2018) is likewise increasing, albeit at a much slower pace.

Previously considered a by-product of armed conflicts and only seldom attended to, international attention following the documentation of the strategic use of sexual violence during the genocide in Rwanda and the wars in the former Yugoslavia (Skjelsbæk, 2001)

contributed to recognizing CRSV as a war crime and crime against humanity (Cohen, 2016; Eriksson Baaz & Stern, 2013). Contrary to predominant policy and popular discourses about sexual violence as a weapon of war (Crawford, 2017), however, researchers have shown that armed actors do not perpetrate sexual violence only as a strategic tool in order to achieve specific objectives in war. Instead, many acts of CRSV can be better understood as opportunistic (Eriksson Baaz & Stern, 2013) or as a normalized practice in war that is not ordered but condoned (Wood, 2014).

Shaped by these dynamics, since the early 2000s, a vibrant academic literature emerged to better understand the different manifestations of CRSV, its causes, and its consequences. Quantitative studies aim to generate systematic insights into perpetration patterns and driving factors across contexts. Data recorded in the Sexual Violence in Armed Conflict data set (Cohen & Nordås, 2014; Nordås & Nagel, 2018), for example, reveal considerable regional variation in CRSV but also shed light on perpetrator patterns. Such insights form an essential evidentiary basis for both designing policy responses and initiating judicial proceedings, given that “more precision in determining the patterns and trends of sexual violence in specific conflicts is the only way to seek accountability” (Boesten, 2017, p. 3).

Jointly, existing studies have identified that a combination of armed group characteristics, conflict dynamics, and social factors are salient in explaining why armed actors perpetrate sexual violence. These include a lack of central control within military organizations (Butler et al., 2007) or individual and interorganizational norms and strategic considerations (Wood, 2018). Conflict dynamics, such as ethnically motivated territorial conflict (Hayden, 2000), ideology and control over civilian populations (Asal & Nagel, 2021; Meger, 2016a), or natural resource extraction (Rustad et al., 2016), have also been linked to increased CRSV. Effective and consistent political education within armed groups, by contrast, can reduce the perpetration of CRSV (Hoover Green, 2016). Where such ideological and social cohesion is absent, however, principally when armed groups rely on forcible recruitment, gang rape can serve as a socialization mechanism within military units (Cohen, 2016).

Feminist scholars, meanwhile, continue to draw attention to the structural underpinnings of CRSV, which is intertwined with the distinctly gendered nature of this type of violence (Boesten, 2017; Davies & True, 2015). Central to this perspective is the notion of a continuum of violence that transcends war and peace (Cockburn, 2004). As such, the ultimate causes of CRSV are to be found within the violent manifestations of patriarchal structures, norms, and practices that permeate society and that are exacerbated in war (Cockburn, 2004; Kreft, 2020; Meger, 2016b). Sexual violence can then also become effective as a tool to achieve specific goals in war, such as civilian displacement or control, because of what this violence signifies in the context of patriarchal structures and gendered hierarchies: a subordination of victims alongside and within gendered hierarchies (Kreft, 2020; Sjoberg, 2016; Touquet & Schulz, 2020).

## The United Nations Women, Peace and Security Agenda

In the realm of international policy, the United Nations Women, Peace and Security (WPS) agenda has been the locus of lively debates and resolutions on CRSV. Kick-started through landmark United Nations Security Council Resolution (UNSCR) 1325 in October 2000, the WPS offers a framework for better understanding the roles and experiences of women in conflict settings in general and in maintaining peace and security in particular. Resolution 1325 and the agenda at large specifically “call for women’s increased participation in conflict prevention and resolution initiatives, as well as their protection during conflict” (Pratt & Richter-Devroe, 2011, p. 489).

Crimes of SGBV occupy a primary focus as part of the WPS agenda (Kreft, 2017). Indeed, as noted by Aroussi (2011), “Accountability for wartime sexual violence was undoubtedly one of the main concerns at the heart of the UN agenda on women, peace and security” ( p. 577). Resolution 1325 specifically deals with questions of accountability for wartime sexual violence by emphasizing states’ responsibility “to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls” (p. 577).

In the years following the passage of Resolution 1325, the WPS agenda expanded with several additional resolutions, many of which paid particular attention to CRSV. For instance, Resolution 1820 from 2008 explicitly recognizes sexual violence as a weapon of war, emphasizing its often strategic use, and how this constitutes a threat toward international peace and security—thereby following and shaping the dominant narrative of “rape as a weapon of war” (Eriksson Baaz & Stern, 2013). With regard to accountability and impunity, Resolution 1820 also employs more concrete language—for example, by emphasizing that sexual violence can constitute a breach of international law.

Subsequently, the Security Council adopted five more resolutions as part of the WPS architecture that specifically deal with conflict-related sexual violence: UNSCRs 1888, 1889, 1960, 2106, and 2467. All of these resolutions repeatedly emphasize the need to prevent sexual violence and to combat impunity and enforce accountability for sexual crimes—and thereby reaffirm “the place of conflict-related sexual violence at the pinnacle of the . . . agenda” (Meger, 2019). Notably, Resolution 2106 from 2013 for the first time explicitly recognizes that sexual violence in armed conflict and post-conflict situations also affects men and boys. In Resolution 2467, then, men and boys as victims are mentioned repeatedly throughout the resolution—indicating growing recognition that sexual violence against men is committed more frequently than is commonly assumed (Schulz, 2020b).

In general, WPS has contributed to moving CRSV into the international political spotlight and has been lauded by many feminist scholars as a successful move toward taking seriously the gendered experiences of conflict-affected communities in policy spheres and programming. These developments are also paralleled by several high-level international campaigns and initiatives that have been launched to raise awareness of, put an end to, and strengthen accountability for wartime sexual violence. Perhaps most notable is the United Kingdom’s

Preventing Sexual Violence Initiative (PSVI) launched in May 2012, with its fourfold focus on documentation of CRSV, support to victims and survivors, international coordination, and gender equality (Kirby, 2015, p. 457). These efforts have culminated, among others, in the UN General Assembly *Declaration of Commitment to End Sexual Violence in Conflict* (2013), the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (2014), and a 2014 international summit in London aimed at ending sexual violence (Kirby, 2015). More recently, the PSVI was instrumental in drafting the Murad Code, a global initiative named after Nobel Peace Prize Laureate Nadia Murad that aims to strengthen justice for survivors throughout the world.

Despite these many developments and efforts, however, impunity for this type of violence prevails (Martin & SáCouto, 2020; Muvumba Sellström, 2015), and justice for sexual violence survivors continues to be marginalized (Aroussi, 2011; Schulz, 2020a). As a study focused on the Security Council's response to eight conflicts with severe sexual violence and other human rights violations finds, the UN Security Council is reluctant to take concrete actions beyond resolutions (Huvé, 2018). Thus, targeted sanctions remain rare and inconsistently employed, even though Resolution 1820 specifies CRSV as a designation criterion for such sanctions. Among the reasons the study identifies are divisions among the permanent Security Council members, specifically Russian and Chinese skepticism of both the WPS agenda and the use of coercive measures, as well as competing objectives that are to the detriment of a decisive response to CRSV.

### Criminal Accountability for Wartime Sexual Violence

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Most calls and measures for ensuring accountability and ending impunity for CRSV advocated for as part of the WPS agenda (and other international initiatives) specifically refer to efforts in the criminal justice arena—of holding perpetrators accountable in courts of law (Houge & Lohne, 2017). These developments and calls thereby immediately correspond with broader trends and debates in relation to gender and transitional justice (TJ)—referring to processes of dealing with violent pasts and rooted in accountability (O'Rourke, 2013). Indeed, the most prevalent utilization of gender in TJ arguably comes through an engagement with SGBV, mostly in the context of international courts and tribunals and with a focus on retributive justice (Chappell, 2014; Henry, 2009). This dominance of criminal prosecutions in much of the earlier literature and policymaking on TJ and SGBV (Campbell, 2007; Henry, 2009) has been met with growing skepticism and criticism, as the section “Shortcomings of Criminal Accountability” on challenges of delivering accountability for CRSV reviews in greater detail. In the next sub-section, the sustained focus on CRSV in the international criminal justice arena is reviewed.

## International Criminal Justice

In many ways, developments by the ICTY and ICTR in the 1990s significantly contributed to the recognition of rape and sexual violence as war crimes, crimes against humanity, and genocide (Mibenge, 2013). Throughout the existing literature, these two ad hoc tribunals are largely credited with the responsibility for the contemporary evolution of jurisprudence on sexual violence in armed conflict, and are viewed as having established landmark and precedence cases concerning sexual violence (Chappell & Durbach, 2014). Prior to these developments, crimes of sexual violence were rarely considered in the realm of international criminal justice. As Henry (2009) notes, for instance, “following the Second World War, the Nuremberg and Tokyo Tribunals failed to adequately address and prosecute sexual violence and no victims of rape were called to testify at these proceedings” (p. 115).

Both during the Rwandan genocide and during the conflicts in the former Yugoslavia, crimes of rape and sexual violence occurred on a massive scale and were employed systematically as war crimes, crimes against humanity, and acts of genocide. As such, several cases at the ICTR and the ICTY specifically dealt with, and prosecuted, crimes of sexual violence. In particular, in “the Tribunal’s single biggest substantive accomplishment” (Mackay, 2008, p. 212), the ICTR in its *Akayesu* case for the first time ever offered a definition of rape in the context of an international criminal tribunal and for the first time ruled that rape, if committed with the intention to destroy a group, could be considered a component of genocide—a milestone in international criminal jurisprudence on sexual violence. In the *Akayesu* case (*Prosecutor v. Akayesu*, 1998), sexual violence is defined as

any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. (para. 597-598)

These developments consequentially shaped jurisprudence both at the ICTR (e.g., in the case against *Musema*) and at the ICTY (e.g., in the case against *Delalic*) by setting a legal precedent and offering a working definition of rape. Since then, both ad hoc tribunals have issued several judgments that include charges for sexual crimes. At the ICTY, for instance, one-third of those convicted by the tribunal have been found guilty of crimes involving sexual violence—constituting an “unprecedented number of prosecutions in this area” (Campbell, 2007, p. 412). As such, accountability for sexual violence during the conflicts in the former Yugoslavia is viewed as “a core-achievement of the ICTY” (Campbell, 2007, p. 412). These cases and judgments thereby contributed toward documenting the patterns and dynamics of sexual violence in this context, evidencing their widespread and often systematic perpetration against civilian populations and enemy armed forces. In addition to this body of caseloads and jurisprudence, the two tribunals’ proceedings also advanced best practices and innovations in investigating and prosecuting SGBV, such as the ICTR’s *Best Practices Manual for the*

*Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions*, which discusses the tribunal's "process of trial and error in creating capacity to address SGBV" (Barbour, 2020, p. 399).

These developments also influenced jurisprudence and proceedings at the two hybrid tribunals, the SCSL and the ECCC. The SCSL completed two cases involving crimes of sexual violence, which was widespread during the civil war in Sierra Leone. Only one of these cases (the Armed Forces Revolutionary Council case), however, contained specific convictions for sexual violence crimes. Nevertheless, and as Oosterveld (2015) notes, "The SCSL was the first international criminal tribunal to convict an individual for the crime against humanity of sexual slavery, and the first to examine the phenomenon referred to as 'forced marriage' or 'conjugal slavery'" (p. 129). The ECCC, too, "so far has been notable for the lack of attention paid to sexual violence crimes" (Killean, 2015, p. 338). The perhaps most noteworthy development here is the ECCC's case 002, in which "forced marriage came to be addressed as a crime against humanity" (Oosterveld & Sellers, 2016, p. 321)—thereby shaping jurisprudence on this thereto underexplored gendered crime and broadening an understanding of SGBV in legal settings more generally.

At the same time, and despite some of this progress, several shortcomings remain with regard to accountability for and the prosecution of CRSV crimes at the ad hoc and hybrid tribunals; these are elaborated upon in greater detail in the section "Shortcomings of Criminal Accountability." Some more general shortcomings of international criminal accountability thereby include the geographically removed locations of these tribunals from the conflict-affected territories—that is the ICTR and the ICTY being located in Arusha, Tanzania, and The Hague, the Netherlands, respectively. Criminal tribunals in general are also critiqued for only enabling very little victim participation, as well as for overtly focusing on perpetrators but not on victims. Specifically with regard to accountability for CRSV at international tribunals, there is only a small number of cases involving sexual violence at the hybrid courts and at the ICTR (MacKinnon, 2008), where sexual violence prosecutions have been hampered, if not even an exception; a low number of cases of sexual violence against men; as well as no cases of sexual violence against persons with diverse sexual orientations and gender identities. At the same time, sexual violence prosecutions at the ICTY and the ICTR "are themselves gendered, and can serve to reinforce and entrench gendered hierarchies" (Campbell, 2007, p. 412), mostly in the form of "an essentializing and gendered binary of male abusers and female victims" (Mibenge, 2013, p. 5).

## The International Criminal Court and Sexual Violence

In many ways, these developments at the ad hoc and hybrid tribunals also influenced the treatment of SGBV at the permanent ICC established in 2002 and located in The Hague. The Court's Rome Statute explicitly recognizes crimes of "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other forms of sexual violence of comparable gravity" [Art. 7.1(g)], which can constitute crimes against humanity, war crimes, or may amount to acts of genocide. In defining SGBV, the Rome Statute specifically utilizes

gender-neutral language and offers an inclusive conception of sexual violence (that moves beyond a focus on rape). Therefore, the definition has been lauded for contributing to a broader and inclusive understanding of sexual violence (Cohen & Nordås, 2014).

Despite this broader, inclusive, and indeed quite promising mandate, the Court “had a slow start with respect to sexual violence” (Seelinger, 2020, p. 224). For instance, in the *Lubanga* decision in the situation of the Eastern Democratic Republic of the Congo (DRC), the charges against the accused “did not explicitly reflect the ample indication of sexual crimes in trial evidence” (Seelinger, 2020, p. 224). This initial insufficient treatment of SGBV began to change in 2012 with the installation of Prosecutor Fatou Bensouda, who expressed a personal commitment to address GBV and declared that prosecuting SGBV is among the Office of the Prosecutor’s (OTP) key strategic goals. This is reflected in the “Policy Paper on Sexual and Gender-Based Crimes” (ICC, 2014), which emphasizes the Court’s commitment toward “integrating a gender perspective and analysis into all of its work” (p. 6) and holding accountable perpetrators of wartime SGBV. Shaped by these developments, as of 2018, 16 of the 23 cases (or 61.5%) pending at the Court included charges of SGBV (Women’s Initiative for Gender Justice, 2018, p. 42).

Nonetheless, the actual track record in delivering justice for sexual violence victims at the ICC remains low. Many of these previous efforts culminated in the judgment against Jean Paul Bemba from the Central African Republic, who in 2016 was convicted for crimes involving rape as a war crime and a crime against humanity. The case was significant because it is the first at the Court that includes charges for crimes of sexual violence against women and men (Chappell, 2017). In June 2018, however, the Appeal Chamber overturned the conviction and acquitted Bemba of all charges—which many viewed as “a huge disappointment and a setback for the prosecution of sexual violence crimes” (Forlani, 2018, p. 1) at the ICC. One year later, in July 2019, the Court convicted Bosco Ntaganda on 18 counts of war crimes and crimes against humanity, including charges of rape and sexual slavery committed in the Central African Republic. If the decision is upheld, it will be the ICC’s first final conviction for sexual violence against women, girls, men, and boys. Especially the inclusion of charges of sexual violence against men and boys is significant, given the overall low conviction rate and the vacuum of justice for male sexual violence survivors across most international (and national) courts and tribunals.

In 2021 followed the ICC case against Dominic Ongwen in the Uganda situation. Ongwen was found guilty of 19 counts of sexual and gender-based crimes—“the highest number of counts of sexual violence preferred against an accused person at the ICC” (Kasande, 2021). This case is significant also because it marks the first time that crimes of forced marriage and forced pregnancy were explicitly recognized as inhumane acts (Kather & Nassar, 2021) and not merely as forms of sexual slavery; the previously mentioned OTP’s 2014 policy paper on SGBV does not explicitly mention forced marriage as a crime. As Kather and Nassar argue, “The explicit forced marriage charges brought in the Ongwen case represented a move away from the limited consideration of forced marriage, and an opportunity to explore its gendered

dimensions.” As such, by convicting a defendant, for the first time, of the crime of forced pregnancy, the ICC enhances international jurisprudence on and accountability for gender-based crimes.

Despite these recent developments, however, scholars and practitioners alike continuously critique the ICC for its overall weak track record in delivering accountability of sexual violence crimes (Chappell, 2017). As Tanja Altunjan (2021) notes, “The Court and particularly its Prosecutor have been criticized for failing to adequately address and prioritize sexual violence, culminating in only a single final conviction since 2002 (p. 878). According to critics, this lack of progress is due to, among other reasons, a lack of prioritization of sexual violence investigations in the early work of the tribunal; conceptual misunderstandings of the scope and nature of sexual violence; and at times weak evidence bases in several cases dealing with sexual violence—such as the *Katanga* case, in which a judgment was overturned on appeal (Altunjan, 2021; Chappell, 2017). In addition, critics voice concerns about the lack of reparations administered by the Court in general and specifically for victims of CRSV.

### National and Domestic Courts

Somewhat in the shadow of these developments in the international criminal justice arena, and in the interest of complementarity as a foundational principle of international criminal law (Chappell et al., 2013), there also is a growing collection of judgments concerning CRSV at national and domestic courts. As Kim Thuy Seelinger (2020) observes, an “interest in national courts has grown alongside a deepening impatience with the [ICC], which many had hoped would deliver convictions for sexual violence more quickly and more often” (p. 220). National courts in, inter alia, Bosnia-Herzegovina, Guatemala, El Salvador, Peru, or the DRC (Seelinger, 2014, 2020)—but also in the two contexts that the authors’ research predominantly focuses on, Colombia and Uganda—have heard cases of conflict-related sexual violence. Although a comprehensive review of domestic court responses to SGBV is beyond the scope of this article, a closer examination of an indicative subset of cases illustrates the potential and challenges of criminal accountability via domestic courts.

In 2017, Colombia established a special jurisdiction for conflict-related violence, *La Jurisdicción Especial para la Paz* (JEP; i.e., the Special Jurisdiction for Peace), which hears cases of violence that have been perpetrated by the Revolutionary Armed Forces of Colombia (FARC) rebels, state forces, or other actors involved in the armed conflict. With regard to accountability for CRSV specifically, the Colombian Constitutional Court set a significant precedent in a landmark decision in December 2019. In the *Helena* case, it ruled that women and girls subjected to sexual violence within the FARC’s ranks—including forced abortion and forced use of contraception—are also victims of the armed conflict (Zulver & Weber, 2020). As many of the women affected by the FARC’s mandatory contraception and forced abortion policy had been forcibly recruited, the lines between victim and perpetrator are particularly blurred.

Generally, however, the courts in Colombia have been slow in responding to conflict-related sexual violence charges, given the sheer volume of cases, compounded by the lack of gender sensitivity of the courts (as discussed in the section “Shortcomings of Criminal Accountability”). The JEP, for instance, has faced criticism for a lack of focus on CRSV in its mandate. In January 2021, the JEP indicted eight leading FARC commanders for their role in perpetrating war crimes, including sexual violence, throughout the armed conflict (Emblin, 2021). However, the charges relating to sexual violence were brought alongside cases of kidnapping, which is the primary focus of the case. Colombian victims of sexual violence have long expressed concern that they have second-class status because none of the court’s seven major cases focus specifically on sexual violence (Bermúdez Liévano, 2019). Another criticism relates to the way in which the courts generally delineate conflict-related sexual violence. In interviews, representatives of Colombian women’s organizations voiced concern that cases in which armed actors raped civilians while not in uniform, while “off duty,” or in which they perpetrated sexual violence against family members, are not recognized as conflict-related and thus evade the mandate of the JEP. Instead, such cases have to go the longer track through the regular court system. The same applies to cases in which the victims are minors (younger than 18 years of age): They do not fall within the JEP’s mandate and go to the regular court system instead, where according to one interviewee “nothing will happen.”

Another prominent example of accountability in national and domestic settings relates to the eastern territories of the DRC, where sexual violence is particularly widespread, perpetrated by armed rebel groups but also the state armed forces or the national police (Eriksson Baaz & Stern, 2013). In this context, the country’s military tribunals “play a critical role in the pursuit of accountability for conflict-related sexual violence in the country because of the recurring involvement of armed actors” (Seelinger, 2020, p. 226). And indeed, as Seelinger (2020) observes, military courts in the DRC in the 2010s “issued a number of convictions for rape as a crime against humanity—even against members of the armed forces” (p. 226; see also Trial International, 2019).

One particular case that received relatively widespread international attention was a trial in 2013 of 14 officers and 25 soldiers of the armed forces, in which the accused were charged with “rape as both a war crime and as an ordinary crime under domestic penal law” (Seelinger, 2020, p. 227; see Human Rights Watch, 2015). Ultimately, however, in May 2014, only 2 of the 25 soldiers of the armed forces were convicted of rape, and none of the commanding officers in charge were found guilty. A more applauded example from the DRC’s military tribunals is the *Kavumu* case, concerning crimes of serial rapes of more than 40 girls in the South Kivu province (Perissi & Naimer, 2020). In this case, in 2017, “11 militia members were convicted of rape as a crime against humanity by a mobile military high court sitting in Kavumu” (Seelinger, 2020, p. 227). This time, the convictions were upheld, and each victim was to be paid \$5,000 in court-ordered reparations (Trial International, 2019; see also Perissi & Naimer, 2020; Seelinger, 2020).

Despite numerous successful charges and convictions for conflict-related sexual crimes in local and domestic courts across different conflict-affected settings, certain challenges remain. These include insufficient legal frameworks, as in the case of Uganda, where the

Uganda Penal Code defines rape in specifically gendered terms, referring to male perpetrators and female victims (Schulz, 2020b); persistent funding needs; and threats of political interference in national court proceedings. In light of the slow progress of ensuring accountability for SGBV in the international criminal arena, however, national courts can well be expected to gain growing importance in prosecuting sexual violence in the future (Seelinger, 2020).

It is worth mentioning in this context that for many victims of CRSV in general, the act of officially reporting crimes in national courts is complicated by major psychological, bureaucratic, political, and socioeconomic hurdles. In the context of national proceedings, this is further complicated if the accused perpetrators are part of the government in power, which often effectively controls judiciary proceedings—which is the case, for instance, in the DRC and in Uganda. In various conflict-affected countries, including Colombia and Uganda, domestic civil society organizations and victims' associations often play a fundamental role in helping victims formally press charges and providing psycholegal support in court proceedings (Kreft, 2020; Schulz, 2020a). These nonjudicial actors, which also often raise public awareness, can thereby function as important accountability vectors as well.

### Shortcomings of Criminal Accountability

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As becomes clear from this broader overview, during the past two decades, significant progress has been made in investigating and prosecuting crimes of sexual violence. Since the early 2000s, tribunals and courts throughout the world have developed capacities to deliver accountability for sexual violence, and there is growing jurisprudence on the issue, in addition to a more nuanced and inclusive understanding of who can be a victim. However, viewed in light of the widespread perpetration of CRSV across time and space (Cohen, 2016; Wood, 2014), and the sheer numbers of victims and survivors across different cases, the empirical and political reality appears less optimistic. The review of previous developments in actually prosecuting perpetrators of sexual violence in the criminal justice area evidences that the existing caseload of successful convictions is limited, at best, and the justice system cannot adequately respond to the extensive levels of sexual violence perpetration nor survivors' justice-related needs (Aroussi, 2011; Schulz, 2020a). Consider, for instance, the insufficiently low caseload of only one sexual violence-related conviction before the ICC, as discussed in the section "The International Criminal Court and Sexual Violence." These developments thereby mirror the "justice gap" for SGBV that persists not only in (post-)conflict settings but also more widely across time and space (McGlynn & Westmarland, 2019). In many ways, it may not be surprising to observe low caseloads and convictions for sexual violence in conflict-affected settings—in which sociopolitical and legal infrastructures are often weakened by political turmoil—if there is a relatively weak record of redressing sexual crimes across most criminal justice systems during so-called "peacetime."

In addition to the relatively low caseload, critical feminists in particular have illuminated numerous legal, political, and technical shortcomings of criminal proceedings, many of which are heavily influenced by gender (Henry, 2009; Mibenge, 2013). In more general and

structural terms, critical legal feminism has previously evidenced the masculine character of the law in general, which typically excludes women and their experiences while privileging the interests of men (Smart, 1989). This general critique regarding the masculine character of the law can be similarly transferred to criminal justice in conflict-affected settings. In the case of SGBV, this means that domestic laws and judicial proceedings often overlook underlying structural gender inequalities that give rise to this violence (MacKinnon, 2006). In addition, according to Collier (2010), the “masculinism of law’s institutions and practices has been linked . . . to the reproduction of gendered and discriminatory beliefs and practices” (p. 437), and therefore the “law is accorded a particular place in the reproduction of gender relations” (p. 433). This is very apparent in the way criminal proceedings commonly play out, in both domestic and international courts. Lack of gender sensitivity among judges, prosecutors, and judicial staff—many of whom tend to be men—often results in the dismissal of victim testimony, victim-blaming, and unsuitable interrogation techniques, as reported, for example, by women’s organizations providing psycholegal support to victims in Colombia (Kreft, 2020, p. 470). In international justice proceedings, moreover, the predominant focus on redressing civil and political rights obscures other conflict-related economic, social, and cultural rights and harms (O’Rourke, 2013), many of which are heavily gendered. In addition to this masculine character, retributive justice systems are also inherently centered around notions of heteronormativity, often precluding an engagement with violations and experiences falling outside this dominant script. As a result, criminal justice systems predominantly tend to privilege the positions and experiences of heterosexual men while marginalizing other perspectives and realities and consequently producing exclusions, including sexual and gender-based crimes.

In this vein, Houge and Lohne (2017) have raised concerns that treating conflict-related sexual violence exclusively as a problem of law overlooks its structural underpinnings—that is, how this violence originates in structural gender inequalities, discrimination, and harmful norms and practices (Kreft, 2020) that perpetuate unabated if the sole focus is on criminal accountability. In addition to these broader and more structural limitations, a growing body of critical scholarship also identifies more concrete and practical shortcomings of international criminal justice proceedings and their potential to adequately respond to gendered harms. As such, a wealth of research has demonstrated sexual violence victims’ and survivors’ dissatisfaction with criminal justice processes in relation to both conflict (Henry, 2009) and non-conflict settings (McGlynn & Westmarland, 2019). This body of work takes note of the fact that many survivors feel “footnoted” in the proceedings, silenced (Kelsall & Stepakoff, 2007), deprived of any agency (Mertus, 2004), or re-victimized (Franke, 2006)—leading feminist scholars to question whether criminal proceedings can actually constitute adequate means to deliver accountability for GBV (Henry, 2009; Otto, 2009).

Throughout scholarship and practice on international criminal law, it is often assumed that testifying in a court of law will translate into a linear path of healing, recovery, and justice. Indeed, for some survivors, testifying in a court of law about their experiences of sexual violence may well be a healing, empowering, and cathartic process that equips them with a sense of agency and enables them to articulate their voice. As Mertus (2004) notes with

specific reference to CRSV, “Many survivors of wartime rape who testified or who sought to testify before the [ICTY] believed giving testimony would help them heal” (p. 111). For other survivors, however, criminal proceedings may be rather disempowering, further silencing them and depriving them of agency (Kelsall & Stepakoff, 2007; Mertus, 2004). As such, sexual violence survivors’ “experience[s] of giving testimony [are] likely to be mixed” (Henry, 2009, p. 114), and it is important to keep in mind, as Henry does, that “victims are a diverse and heterogeneous group of individuals with differing expectations and experiences” (p. 116).

Across different case sites, the empirical reality indeed often paints a critical picture, and scholars and activists have begun to recognize that testifying about experiences of sexual violence in court cases often carries negative consequences. Many of these shortcomings and their effects are structural and due to the design of legal processes, which do “not permit witnesses to tell their own coherent narrative” (Mertus, 2004, p. 113). Thus, “tribunal investigators and interpreters translate witnesses’ complex, painful, and sometimes confused stories about suffering and violence into a language and format that emphasizes factual information, particularly dates, times, chronology, names, and places,” in a way that leaves very little room for victims to actually share their stories, let alone their pain (Koomen, 2013, p. 260).

In light of this, a growing body of work attests that frequently in adversarial and criminal proceedings, “women are disempowered, their voices silenced, patriarchal tales validated, rapes legalized” (Taslitz, 1999, p. 11). Drawing on an in-depth analysis of the *Foca* case at the ICTY, which marked the first-ever case at an international criminal tribunal that focused exclusively on sexual violence against women, Mertus (2004) shows that women’s agency during criminal proceedings was severely stunted. As one survivor of wartime rape stated, participating in criminal tribunals as a means to seek accountability for wartime sexual violence “is like shouting from the bottom of a well” (Mertus, 2004, p. 113).

Criminal investigations of sexual violence at the SCSL in Sierra Leone constitute yet another poignant illustration of how criminal proceedings negate survivors’ agency and voice, and how this carries respective legal and psychological ramifications for survivors. By juxtaposing “what the Special Court allowed the women to say and what the women themselves wanted to say” (Kelsall & Stepakoff, 2007, p. 355), they demonstrate how survivors’ testimonies about sexual violence in the trial of the Civil Defence Forces were consequentially silenced. Kelsall and Stepakoff (2007) show how in the trial, “women took the stand to testify about other [nonsexual] acts of violence” but that they “were prohibited from speaking about the principal manner in which they were victimized [sexually] during the conflict” (p. 356). As a result, wider circles of women’s experiences during the conflict were removed from the trial and the Court’s records at large (see Mibenge, 2013). For affected survivors, the effects of these exclusions and the silencing can be severe, carrying numerous legal, political, and social consequences, and often “further entrench[ing] gendered harms” (Schulz, 2018a, p. 2). Drawing on empirical research specifically with male survivors of sexual violence, Schulz (2018a) conceptualized these processes of exclusion from official justice and accountability measures and their effects as forms of “ethical loneliness,” which according to Stauffer (2015,

p. i) can be seen as the “result of multiple lapses on the part of human beings and political institutions that, in failing to listen well to survivors, deny them redress by negating their testimony and thwarting their claims for justice.”

Other concerns about criminal accountability relate to the types of GBV that are rendered relevant, visible, and prosecutable in domestic and international courts, which most often excludes more structural forms of GBV and violations, or acts of sexual violence that occur outside specific political or geographically mandated areas (Mibenge, 2013). On the issue of mandates, the authors discussed in the section “National and Domestic Courts” criticism leveled at the JEP in Colombia, which by default does not include CRSV as a core focus in any of its seven meta-cases. Political or politicized decisions about the mandates of special courts or other transitional justice institutions can thus exacerbate or facilitate exclusions. The same applies to scripts about CRSV in specific settings: Buss (2009) illustrates how the ICTR adhered to a narrow and problematically homogenizing narrative of genocidal sexual violence perpetrated by Hutu men against Tutsi women, which renders invisible groups of victims and acts of violence that do not fit this neatly defined narrative. The consequence of privileging certain forms and accounts of violence—such as predominantly sexual violence and particularly rape—over others is that tribunals often (re-)produce essentialist gender norms and categorizations, thereby “consigning women to permanent rape victim status” (Mibenge, 2013, p. 2).

On a more general level, legal and academic definitions of CRSV are rather narrow. This leaves certain crimes in a gray area: Although they do not meet the formal criteria for classification as “conflict-related,” many observers argue that they should be understood as such. Examples are (a) cases in Colombia that fall outside the JEP’s mandate because military perpetrators were not in uniform when committing crimes of sexual violence or because they perpetrated sexual violence against family members and (b) crimes of sexual violence in the former Yugoslavia that were not included in charges and indictments because they occurred outside of clearly delineated conflict territories. Feminist scholars in particular have noted that clear dividing lines between public/political or CRSV and private or “everyday” sexual violence are blurred in situations of war (Kreft, 2020; Swaine, 2015). As such, it is important to reiterate that a singular focus on criminal accountability for crimes perpetrated by armed actors is insufficient to effectively deliver accountability for the vast spectrum of sexual violence in times of war. Courts’ needs for clear mandates, parameters, and crimes can thus stand in conflict with a form of violence that is structurally entrenched.

## Moving Beyond Criminal Justice: Reparations for Sexual Violence

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As a result of these debates and critiques, the realization is taking hold that trial proceedings only constitute *one* (often limited) mechanism of TJ, and for accountability for CRSV in particular (Henry, 2009). In light of some of the shortcomings and critiques the authors have reviewed, scholarship and policymaking in recent years have moved beyond this dominant focus on criminal accountability, which resulted in too limited and exclusionary gender justice debates (Franke, 2006), to also explore other dimensions of justice in response to SGBV.

Within this growing body of scholarship and programming on gender and TJ, particular attention is being paid to reparations in response to SGBV (Ni Aolain et al., 2015; Rubio-Marín, 2006). Reparations and compensation measures are often portrayed to be among the most victim- and survivor-centric TJ mechanisms available. For the most part, however, reparations programs to assist victims are not “designed with an explicit gender dimension in mind” (Rubio-Marín, 2006, p. 23), nor have they “focused on the forms of victimization that women are more commonly subject to” (p. 23), including forms of CRSV. As Ni Aolain et al. (2015) observe, global discussions aimed at ensuring accountability and ending impunity for CRSV have largely neglected and marginalized reparations.

In recent years, however, SGBV has been increasingly discussed in relation to reparations. Especially the UN Secretary-General’s adoption of a guidance note on reparations for CRSV (United Nations, 2014) marks an important turning point in the area of reparations for SGBV (Ni Aolain et al., 2015). At the same time, several of the UNSC resolutions that make up the WPS agenda, such as Resolution 2122, repeatedly refer to reparations in response to GBV. Throughout the literature on this topic, there have also been growing debates about a move from reparative justice toward transformative justice TJ, including in response to sexual violence (Ketelaars, 2018). Such calls for a transformative approach to reparations are also reflected in UNSCR 2122 (from 2013) and in the UN guidance note on reparations, which acknowledges that “reparations have the potential to be transformative . . . in overcoming structures of inequality and discrimination” (United Nations, 2014, p. 6; see also Ni Aolain et al., 2015).

These debates unfold against a growing feminist critique that if reparations aim to quite literally *repair* a pre-conflict status quo ante, this often risks a return to heteronormative and patriarchal societal structures, characterized by vast gendered inequalities and systematic discrimination of women (Rubio-Marín, 2006). Gender-sensitive transformative justice, TJ instead, follows a feminist “commitment to profoundly recalibrate power relationships” (Ni Aolain, 2019, p. 150). Specifically applied to SGBV, Ni Aolain et al. (2015) consequentially note that “a commitment to transformative reparations is critical to gender-sensitive reparations” (p. 98), which require to “go beyond the immediacy of sexual violence, encompassing the equality, justice and longitudinal needs of those who have experienced sexual harms” (p. 98). In this capacity, transformative reparations carry the potential to adequately address sexual violence survivors’ harms and vulnerabilities and thus to contribute to accountability for SGBV.

This rhetorical attention to (transformative) reparations in policy spheres is often mirrored by survivors’ justice-related priorities and preferences across different case sites, whereby reparations and transformative justice often take on a central role (Duggan et al., 2008; Rubio-Marín, 2006; Walker, 2016). The authors’ research in Colombia and Uganda demonstrates this focus on reparations from survivors’ points of view. In northern Uganda, reparations are central to local conceptions of justice more broadly and also feature prominently among sexual violence survivors’ justice-related needs and priorities. Survivors of sexual violence, men and women alike, emphasized that “for justice, we ask the government to provide reparations for us” (Schulz, 2020b, pp. 151–152)—to the extent that for the majority

of sexual violence survivors, “reparations—and especially material compensation and physical rehabilitation—offer gender-sensitive remedies in response to their gendered and sexual harms” (p. 538). Civil society activists in Colombia, several of them victims of CRSV, similarly emphasized the importance of collective healing—physically, psychologically, emotionally, and spiritually—as a core dimension of justice. Individual victims moreover recounted how they felt neglected by heavily bureaucratized and stagnating compensation procedures that have left a majority of victims without the financial reparations to which they are legally entitled.

In many places, the actual implementation and delivery of reparations for SGBV remain similarly slow and halted—and there are practical and “conceptual gaps in the legal and policy framework for reparations addressing conflict-related sexual violence” globally (Ni Aolain et al., 2015, p. 97). In fact, and regardless of wider rhetorical attention in policymaking and scholarship, only insufficient “policy and legal attention has been directed at supporting and directly remedying the harms to women, girls, men and boys who have experienced sexual harms in conflict” through reparative justice schemes (p. 102). In both of the case sites in which the authors work, Colombia and Uganda, sexual violence survivors have expressed repeated frustrations with regard to gaps and delays in implementing and delivering reparations. One sexual violence survivor from northern Uganda articulated this frustration (United Nations, 2019): “I always hear these NGOs [nongovernmental organizations] speak about reparations, but I am yet to see any of the promises delivered.” The increased awareness of and engagement with CRSV in legal and policy spheres thus have yet to be translated into the implementation of reparations and compensations for sexual violence survivors across most contexts globally, with only very few examples of successful reparations payments. Against this backdrop, the UN’s Special Representative of the Secretary-General on Sexual Violence in Conflict, Pramilla Patten, attests that “reparations are what survivors want most, yet receive least” (United Nations, 2019). One notable exception at the ICC is the case against Bosco Ntanga—convicted *inter alia* for rape as a war crime and crime against humanity—in which the court in March 2021 ordered reparations of \$30 million to be administered through the Court’s Trust Fund for Victims, including specifically to victims of sexual violence.

## Toward Victim-Centric Justice and Accountability

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With the development of the WPS framework and the establishment of the ICC, there has been an increased global commitment to enhancing accountability for CRSV. This article reviewed central criminal justice proceedings and sketched legal developments both globally and at national levels—ranging from the ICTY and the ICTR to the ICC and domestic courts in various conflict-affected contexts globally.

Jointly, international and domestic courts have played important roles in advancing legal definitions, conceptions, and understandings of CRSV, although cross-national differences exist. The Colombian Constitutional Court, for example, has significantly broadened common understandings of wartime sexual violence by extending the definition also to acts of forced abortion and forced use of contraception and the focus to victims within armed groups (i.e.,

against combatants). The ICC in its recent verdict of Dominic Ongwen—even though this case has been met with criticism—likewise further advanced jurisprudence and accountability for wartime sexual violence by prosecuting crimes of forced pregnancies and forced marriages.

Despite this much needed progress, a series of challenges in both international and domestic courts nevertheless abound. An important one is that the pursuit of justice and court proceedings on SGBV are often slow and insufficient, impeded by weak legal frameworks, a backlog of cases, understaffing, a prioritization of crimes other than sexual violence, and a perpetrator-centric approach. At the same time, retributive justice responses, in the form of international criminal prosecutions, are focused primarily on the offenders, seeking to punish perpetrators, but thereby do not sufficiently take into account those affected by sexual violence. Lacking gender sensitivity, prevailing practices of victim-blaming, or tendencies to dismiss or sanitize victim testimony moreover deter many victims from reporting SGBV crimes committed against them in the first place, further magnified by the bureaucratic, political, and socioeconomic hurdles they often face. Masculine and heteronormative biases within courts and legal frameworks also prevent a more comprehensive reckoning with the structural factors that underlie SGBV (in war and beyond), which has produced criticism of a purely criminal/legal approach to accountability.

Amid flawed efforts to ensure accountability for CRSV through criminal justice, calls for a more victim- and survivor-centric approach, which takes into account victims' and survivors' needs and priorities, have become louder. Accordingly, WPS Resolution 2467 from 2019 “emphasizes the urgency of providing access to justice for survivors and of addressing their socio-economic needs” (Schulz, 2020b, p. 167) and specifically stipulates the importance of recognizing and fostering victims' and survivors' agency in determining such processes (UN, 2019, p. 3). Such calls for a survivor-centered approach of delivering justice and accountability are mirrored in recent policy initiatives, such as the PSVI-supported “Draft Global Code of Conduct for Investigating and Documenting Conflict-Related Sexual Violence” (Murad Code) and the Global Survivors Fund for survivors of CRSV, supported by the Mukwege Foundation and aiming to ensure that survivors of CRSV have access to reparations, care, and other forms of redress.

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### Notes

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1. Most criticism refers to the ethics of prosecuting someone who themselves was abducted and a victim of atrocities. Critics also problematize the one-sidedness of the ICC's investigation in Uganda, focused only on the LRA but not on well-documented atrocities committed by the Ugandan military, for which widespread impunity reigns.
2. The most common definitions of conflict-related sexual violence, including the one adopted by Cohen and Nordås (2014), are limited to these acts of violence perpetrated by armed actors during armed conflict. Although the authors of this article generally align with this established definition of conflict-related sexual violence, they discuss at somewhat greater length in the section "Conflict-Related Sexual Violence" why both scholars and practitioners contend that unambiguously classifying an act of sexual violence as (not) conflict-related is not always so clear-cut (Porter, 2015; Swaine, 2015).

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