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Science and International Thematic Prosecution of Sex Crimes: A Tale of Re-Essentialisation

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12.1. Introduction

International thematic prosecution of sex crimes is a model for criminal investigation that emerged as the result of successful western feminist advocacy efforts dating back to the early 1990s.[1] This article demonstrates that, as a feminist project, thematic prosecution has undergone three clearly identifiable phases. The first period began in 1993, when feminists negotiated the inclusion of rape as an international crime under the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'). The following year, ICTY Prosecutor Richard Goldstone appointed Patricia Viseur Sellers, a prominent feminist internationalist, as Legal Advisor

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1 Although feminism is not the only force behind the rise of thematic prosecution it is definitely the most significant. This volume and the conference that preceded its publication attest to the fact that today international prosecution of sex crimes is an issue that appeals to a broader community of scholars and practitioners from within and without the legal field. For a summary of feminist efforts to reverse the under-prosecution of sex crimes by giving priority to thematic sex crime prosecutions see Margaret M. deGuzman, "Giving Priority to Sex Crime Prosecutions at International Courts: The Philosophical Foundations of a Feminist Agenda", *International Criminal Law Review*, vol. 11, pp. 516–519. See also Margaret M. deGuzman, "An Expressive Rationale for Thematic Prosecution of Sex Crimes", in this volume; and Valerie Oosterveld, "Contextualising Sexual Violence in the Prosecution of International Crimes", also in this volume.

on Gender for the ICTY. It took feminists less than five years to crystallize this first phase, with the result that "gender strategizing" could no longer be considered a luxury for international criminal courts.[2] During the second phase, feminists successfully pushed for prioritizing and isolating the prosecution of sex crimes at the ICTY.[3] This occurred between 1995 and 2001 when the ICTY issued the first indictments and verdicts *exclusively* for counts of rape and sexual slavery in *Kunarac et al.*[4] – also known as the "Foča cases". Such cases became the first thematic prosecution of sex crimes in the history of international criminal courts. Finally, the third phase began in 2006 when, after a thematic prosecution approach prioritized the unlawful enlistment of children, the ICC excluded charges of sexual violence in the case against Thomas Lubanga Dyilo.[5] Despite this decision being considered a reversal of feminists' advocacy achievements, in little more than 20 years, the thematic prosecution of sex crimes became part of mainstream international criminal law practice.

The parallelism between the international legal feminist project in international criminal law – which had the notorious participation of American feminists[6] – and the U.S. women's health movement project for

[2] I am referencing here the title of a keynote address by Patricia Viseur Sellers entitled "Gender Strategy is not a Luxury for International Courts", in *American University Journal of Gender, Social Policy and the Law,* 2009, vol. 17, p. 301.

[3] For a discussion of feminist engagement with international criminal law in the mid-late 1990s, see Doris Buss, "Performing Legal Order: Some Feminist Thoughts on International Criminal Law", in *International Criminal Law Review,* 2011, vol. 11, no. 3, pp. 412–413.

[4] International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković,* Trial Judgment, 22 February 2001, IT-96-23-T and IT-96-23/1-T.

[5] For a feminist critique of the Lubanga case see Valentina Spiga, "Indirect Victims' Participation in the Lubanga Trial", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, pp. 183–198 (discussing the Court's decision to deny sexual violence survivors the status of indirect victims), Sienna Merope, "Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC", in *Criminal Law Forum,* 2011, vol. 22, p. 1–36 (discussing the Court's decision to omit any charges of sexual violence against the accused).

[6] For a critical discussion of the role of American feminists in setting the agenda during the 1990s to ensure the criminalization of rape at the ICTY and the International Criminal Court see, *e.g.*, Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law'" *Michigan Journal of International Law*, 2008, vol. 30; Janet Halley, "Rape in Berlin:

the development of sex-specific biomedicine is the departing point of this article. During the last two decades, health feminists in the United States have endorsed scientific theories of essential biological differences between the sexes and used them to justify the need to isolate medical research to focus uniquely on women and girls, and to ultimately create separate specialized institutions for women's health.[7]

First, between 1990 and 1995, health feminists ardently lobbied before Congress for the creation of separate offices within the department of health to address women's health concerns; while also pushing for the mandatory inclusion of women in clinical trials and the subsequent analysis of data separately according to sex. As a result, "gender strategizing" ceased to be considered a luxury for American biomedical institutions. Second, between 1995 and 2004, women's health advocates championed sex-specific research agendas.[8] They also expanded their argument about essential biological differences between men and women beyond disease and health concerns, sustaining that sexual difference could also explain female behavior.[9] It became the first time feminists countered their own project – longstanding since the 1970s – to dissociate gender from nature (the latter in turn is associated with sex), and instead argued in favour of

Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict", in *Melbourne Journal of International Law,* 2008, vol. 78, p. 114.

7 Steven Epstein, *Inclusion: The Politics in Medical Research,* University of Chicago Press, Chicago, 2007, pp. 233–257; Sarah Richardson, *Sex Itself: Male and Female in the Human Genome*, University of Chicago Press, forthcoming, 2013.

8 Richardson, forthcoming, 2013, *supra* note 7.

9 This expansion was partly subsequent to the publication of a report by the Institute of Medicine and sponsored by the Society for Women's Health Research. See Institute of Medicine, "Exploring the Biological Contributions to Human Health: Does Sex Matter?", available at http://iom.edu/Reports/2001/Exploring-the-Biological-Contributions-to-Human-Health-Does-Sex-Matter.aspx, last accessed on 29 September 2011:

> Sex differences in health throughout the lifespan have been documented. Exploring the Biological Contributions to Human Health begins to snap the pieces of the puzzle into place so that this knowledge can be used to improve health for both sexes. From behavior and cognition to metabolism and response to chemicals and infectious organisms, this book explores the health impact of sex (being male or female, according to reproductive organs and chromosomes) and gender (one's sense of self as male or female in society).

gender being determined by differences at the biological level.[10] Finally, starting in 2005, feminists enlisted genomic findings about sexual difference[11] to champion the idea that all biomedical research ought to be conducted and designed to take into account genomics' assertion that men and women should be considered different species. In little more than 20 years health feminists made a remarkable turn to arguments of essential differences between the sexes.

The alignment between the two feminist projects over the past two decades is nothing less than astounding. What we are witnessing is a re-essentialization of feminist advocacy in law and science in ways that are as surprising as the fact that the phenomenon has remained largely unexplored by theorists of science[12] and legal academics alike. However, it is

[10] Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality,* Basic Books, New York, 2000, pp. 3–4:

> In 1972 the sexologists John Money and Anke Ehrhardt popularized the idea that sex and gender are separate categories. Sex, they argued refers to physical attributes and is anatomically and physiologically determined. Gender they saw as a psychological transformation of the self – the internal conviction that one is either male or female (gender identity) and the behavioral expressions of that conviction […]. Meanwhile, the second-wave feminists of the 1970s also argued that sex is distinct from gender – that social institutions, themselves designed to perpetuate gender inequality, produce most of the differences between men and women […]. Money, Ehrhardt, and feminists set the terms so that sex represented the body's anatomy and physiological workings and gender represented social forces that molded behavior. Feminists did not question physical sex; it was the psychological and cultural meanings of these differences – gender – that was at issue.

[11] My analysis of the rise of genomic models of sexual difference is based on the work of Sarah Richardson. See Sarah Richardson, "Sexes, Species, and Genomes: Why Males and Females are not Like Humans and Chimpanzees", in *Biology and Philosophy,* 2010, vol. 25, pp. 823–841.

[12] See, *e.g.*, Carla Fehr, "The Evolution of Sex: Domains and Explanatory Pluralism", in *Biology and Philosophy,* 2001, vol. 16, pp. 145–170; Sarah Richardson, 2010, p. 837, *supra* note 11 ("Despite its ubiquity in biological explanation, the foundations of the concept of sex (unlike that of species and population, for instance) in biology have gone largely unexamined"; Steven Epstein, 2007, p. 254, *supra* note 7:

> [V]arious authorities perform the social control function of fitting individuals into categories. Yet the active labor that goes into making sex appear dichotomous is generally invisible to the broader society, or at least, rarely remarked upon.

not in my interest to argue this is a case of 'bad science'. Nor am I claiming that science is being distorted and captured by politics, or arguing for the need to establish sociological explanations and causal links. What captivates me about the matching moves of both projects and their almost perfect correspondence in time is how it points in the direction of the complex relationship between feminists and scientists when it comes to shaping the meaning(s) of sexual difference(s).[13] I reinterpret the emergence and proliferation of thematic prosecutions as a scenario where international legal feminists have explicitly and implicitly engaged with essentialist biological ideas about sexual difference.[14] This is a tale of re-essentialization that does not end with a lesson about how, when and why feminists should engage, reject or ignore biological explanations of sexual difference. Instead, it ends by raising questions about the ways in which both projects might be gesturing towards the emergence of a novel regime of ideological governance of sexual difference.

The article is structured in three parts. I tell the parallel histories of both projects articulated in three successive periods in order to track the different phases of re-essentialization of advocacy in both spheres. I have given each period a title that speaks commonly to the science and the law. Part I tells about the "era of gender strategizing"; Part II outlines the rise of sex-specific research agendas in biomedicine and international criminal

[13] Anne Fausto-Sterling, 2000, p. 4, *supra* note 10. Fausto-Sterling poignantly discusses how feminists have constantly oscillated between endorsing and rejecting scientific explanations of sexual difference, while also influencing the production of scientific knowledge. Often, this coming and going has been justified by the need to dislocate long-standing cultural associations between sex, nature, and femalehood. Other times, feminists have opted to ignore science altogether. However, for Fausto-Sterling argues that:

> [F]eminists definitions of sex and gender left open the possibility that male/female differences in cognitive function and behavior could result from sex differences […] in ceding territories of physical sex, feminists left themselves open to renewed attack on the grounds of biological difference. Indeed, feminism has encountered massive resistance from the domains of biology, medicine, and significant components of social science.

See also, Anne Fausto-Sterling, *Myths of Gender: Biological Theories About Women and Men,* Basic Books, New York, 1992, p. 162 (here the author discusses the influence of feminist advocacy in science).

[14] Anne Fausto-Sterling, 2000, p. 8, *supra* note 10 ("Feminists, too, have used scientific arguments to bolster their cause.").

law; and Part III describes the emergence of a post-genomic age. The purpose of what follows is to dislodge the familiarity with the virtues of thematic prosecution. Putting the arguments in their historical context and allowing the reader to see them afresh would render visible the part of the process that led to their familiarity and "ring of truth".[15]

12.2. The Era of Gender Strategizing: 1990–1995

> It is readily understood that gender is a code word. Gender strategy, especially if gleaned from court decisions, case law, press releases, or public pronouncements of international courts or tribunals, is frequently reduced to: "Oh, were the female sexual assault charges (read rape) included in the indictment?"[16]

Early in the 1990s feminists championed gender-based analysis of disease and violence to reverse the invisibility of women's experience[17] in health policies and criminal law.[18] Women's health advocates asserted that breast cancer – among several other illnesses and conditions – should be seen as a woman's disease,[19] despite the fact it also occurred in men. At

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[15] Evelyn F. Keller, *Refiguring Life, Metaphors of Twentieth Century Biology*, New York University Press, 1995, p. 9.

[16] Patricia Viseur Sellers, 2009, p. 303, *supra* note 2.

[17] Doris Buss, 2011, p. 413, *supra* note 3

> The fact that women *experience* wartime violence in ways particular to them as women was largely disregarded in the post–1945 period. Feminist activists thus needed to address an immediate gap in knowledge about, and political commitment to addressing, sexual violence in conflict situations (emphasis added).

[18] See, *e.g.*, Patricia Viseur Sellers, 2009, pp. 301–326, *supra* note 2 (discussing the history of gender strategizing between 1990 and 2009); Diane Lupig, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court", in *American University Journal of Gender, Social Policy and the Law*, 2009, pp. 17, 431 (discussing the history of feminist advocacy in international criminal courts up to the adoption of the Rome Statute). Doris Buss, 2011, p. 413, *supra* note 3:

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[19] Carole S. Weisman, "Breast Cancer Policy-Making", in Anne S. Kasper and Susan J. Ferguson (eds.), *Breast Cancer: Society Shapes an Epidemic*, Palgrave, New York,

approximately the same time, legal feminists used international treaty negotiations to push for the international recognition of rape against women. The conclusion was the same: breast cancer and rape need to be seen as gender-coded phenomena.[20] Although in their campaigning efforts neither group of feminists expressly denied that men could get breast cancer, that men are raped, or that women can and do rape, they did imply, and sometimes even publicly stated, that these gender coded phenomena occurred uniquely against women.[21]

Consequently, under the banner of gender-based disease and crime, feminist organizations for women's health and rights' pushed for the establishment of what they foresaw as gender-competent institutional formations. Such institutions would be able to address the overlooked needs of women and girls. Gender-coded analysis of disease and criminal violence set the stage for a whole architecture of gender-coded institutional formations and protocols. I will call this first period of health and legal advocacy, the "Era of Gender Strategizing".

2002, p. 213. ("[…] because breast cancer is primarily an illness of women, gender issues have been central to its politics").

[20] See, *e.g.*, Doris Buss, 2011, p. 413, *supra* note 3. In Buss' words, one of the goals of 1990s feminist activism "was to ensure that rape remains visible as a gendered crime, not just or only a crime against an ethnic/ racial/religious community. The concern here was (and is) that sexual violence against women might grab international attention only when it can be seen as part of an attack on a community; as 'the dishonoring of the nation'. The task then was and is to ensure the ongoing visibility of the gendered nature of the harms women face in conflict, while maintaining recognition of the political, social and economic complexity of violence and conflict" (emphasis added).

[21] Former Legal Advisor for the ICTY and ICTR, Patricia Viseur Sellers addressed this issue and characterized as unfortunate the reduction of gender to sexual violence against women and girls in the field of international criminal law: "*Gender* in the popular sense-not necessarily in the academic sense, and I am quite aware that I am in a university – *is shorthand for women and girls*. The word evokes comments, such as, "Oh, I read an article on gender", or "Oh, they've got a new gender thing coming out, right? […] Gender depends on the meaning given males and females in the context of a society. So we often speak in 'reductionist' terms, *reducing gender to women*, and when we refer to gender strategy we tend to reduce it to sexual violence committed *against women and girls*. This is unfortunate. There is room for growth [emphasis added]". Patricia Viseur Sellers, 2011, p. 303–304, *supra* note 2.

12.2.1. Gender Strategizing at the *ad hoc* Tribunals

Stemming from feminist anti-rape campaigning during the 1970s and 1980s in the United States,[22] feminist activists moved outside the domestic arena and began to push for the international recognition of sexual violence.[23] The efforts for international recognition fell into two components. One was the negotiation by international legal feminists for the recognition of sexual violence as a breach of women's human rights.[24] The second was advocacy for the international criminalization of sexual violence in armed conflict.[25] Due in part to specialization of feminism at large,[26] and to divisions within the international legal feminist movement,[27] the two agendas of legal reform have followed different trajectories.

22 "Remember the gender strategy at the International Criminal Tribunal for the former Yugoslavia (ICTY) directly descends from the Western feminist banners that led the domestic campaigns against rape in the 1970s and 80s". *Ibid*.

23 See, *e.g.*, Hillary, Charlesworth, Christine Chinkin, and Shelley Wright, "Feminist Approaches to International Law", in *American Journal of International Law,* 1991, vol. 85, pp. 613–645 (narrating the emergence of this feminist-activist push); see also Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism", in *Harvard Journal of Law and Gender,* 2006, vol. 29, pp. 342 (for a discussion of the internationalization of the turn in American feminism to criminal/social control visions of law).

24 Rhonda Copelon, "Toward Accountability for Violence Against Women in War: Progress and Challenges", in *Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights,* Elizabeth D. Heineman (ed.), 2011, University of Pennsylvania Press, Philadelphia, pp. 232–256 (describing the process of changing the status of sexual violence in international human rights law).

25 For a general discussion of feminist involvement in the international criminalization of sexual violence in war, see Barbara Bedont and Katherine Hall-Martinez, "Ending Impunity for Gender Crimes under the International Criminal Court", in *Brown Journal of World Affairs*, 1999, vol. 6, pp. 65–85; Rhonda Copelon, "Integrating Crimes against Women into International Criminal Law", in *McGill Law Journal,* 2000, vol. 46, pp. 217–240; Karen Engle, "Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina", in *American Journal of International Law*, 2005, vol. 99, no. 4, pp. 778–816.

26 Ellen Messer-Davidow, *Disciplining Feminism: From Social Activism to Academic Discourse*, Duke University Press, 2002, p. 207 (Specialization is part of the trajectory of disciplinary growth of feminism, one that tends to intensify the production of differences within feminist discourses).

27 Karen Engle, 2005, pp. 778–816, *supra* note 25 (for an illuminating account of divisions within international legal feminism).

The history of gender strategizing in international criminal law begins a few years before the UN Security Council established the *ad hoc* tribunals in Yugoslavia and Rwanda. By 1993, reports of sexual violence in the Bosnia-Herzegovina conflicts had reached international media.[28] Perhaps conscious of this attention, the UN Security Council quickly established a commission of experts to verify the situation in the Balkans. The report produced by the Commission of Experts,[29] led by Cherif Bassiouni, became both the basis for the establishment of the Yugoslavia tribunal in 1993, and a milestone in the campaigning for criminalization of rape insofar as it established patterns of sexual violence.[30] Indeed, the documentation of sexual violence in Annex IX of the Commission's report is still considered by legal practitioners and scholars to be a landmark in terms of the documentation and legal analysis of sexual violence against women and men in war.[31]

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[28] Alexandra Stiglmayer's journalistic account first published in German and later translated to English was one of the first documents to set off the alarms. Alexandra Stiglmayer (ed.), *Mass Rape: The War Against Women in Bosnia-Herzegovina,* University of Nebraska Press, 1994.

[29] The report includes documentation of thousands of cases of crimes and abuses, including information ensuing from over 200 interviews with survivors and witnesses to sexual violence committed against civilians. Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, Annex IX: Rape and Sexual Assault, May 1994, available at http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf, last accessed on 30 September 2011. An official letter dated May 24 1994 from the Secretary General of the United Nations, Mr. Kofi Anan, presents the report of the commission of experts to the UN Security Council (UNSC S/1994/674).

[30] "Five patterns emerge from the reported cases, regardless of the ethnicity of the perpetrators or the victims". See *supra* note 29. The Commission also included a medical team sent by the UN "to investigate rape in the former Yugoslavia". The rationale behind this decision was that medical data could be a method for verifying claims of widespread rape in Bosnia:

> Using a public health approach, medical personnel can help provide evidence of the scale of these abuses. An illustration of this kind of documentation is provided by the international team of four physicians (which included one of us [Shana Swiss] sent by the UN to investigate reports sent by the UN to investigate reports of rape in the former Yugoslavia in January 1993.

Shana Swiss and Joan E. Giller, "Rape as a Crime of War: A Medical Perspective", in *Journal of American Medical Association*, 1993, p. 613.

[31] Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, *supra* note 29:

The first step of the gender strategy meant including sexual violence as a constituent act of the crimes that fell under the jurisdiction of the ICTY. Thus, the era of gender strategizing begins following the publication of the Commission of Expert's report, as feminists successfully influenced the inclusion of rape as a crime against humanity under the jurisdiction of an international tribunal for the first time. These developments first occurred through Article 5 of the statute establishing the ICTY,[32] and one year later through Article 3 of the statute pursuant to the ICTR.[33] Once reform had taken place at the statutory level, the next step was the

> There have also been instances of sexual abuse of *men* as well as castration and mutilation of *male sexual organs* […]. *Men* are also subject to sexual assault. They are forced to rape women and to perform sex acts on guards or each other. They have also been subjected to castration, circumcision or other sexual mutilation.

Art. 5 of the 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 since 1991, "Crimes Against Humanity": The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts (emphasis is mine). United Nations Security Council, 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 since 1991, 25 May 1993, UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), UN Doc. S/RES/827 (1993).

[33] Art. 3 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and other such violations committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, "Crimes against Humanity": The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) Other inhumane acts (emphasis is mine). United Nations Security Council, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994.

transformation of institutional arrangements and prosecutorial practices. International legal feminists aimed to create separate units of investigation for gender-related crimes.[34] They saw this institutional arrangement as a necessary precondition to infuse with gender expertise the production of evidence and the interpretation of procedural rules during the investigations. However, partly due to lack of political will, and partly because of budget constraints, the so-called sex crime units were not created. Instead, in 1994 Richard Goldstone appointed a full time Legal Advisor for Gender, and made her responsible for the implementation of the tribunal's gender strategy.[35] This model of gender expertise, aimed at coordinating, supervising, and educating teams of well-trained court personnel, has re-

[34] Patricia Viseur Sellers, 2009, p. 307, *supra* note 2:

> In 1994, after the naming of a Prosecutor, women's groups, especially European and American groups (both North and South Americans) pursued their discussions with both the Prosecutor and the Deputy Prosecutor at the ICTY. They urged the establishment of a separate prosecution unit for sexual assault investigations. Women's groups wanted to ensure that sexual assault investigations were a forethought, and not an afterthought. The vigilant contributors reiterated that the investigation and prosecution of sexual assault crimes were integral to the Tribunal's mandate.

[35] By 1994 Richard Goldstone had appointed Patricia Viseur Sellers, a prominent feminist internationalist, as first Legal Advisor for Gender at the ICTY. Sellers occupied the same position at the ICTR from 1995 until 1999.

> In order conscientiously to address the prevalence of sexual assault allegations committed in the former Yugoslavia and Rwanda, a legal adviser for gender-related crimes has been appointed. The adviser, as a member of the Prosecutor's secretariat, reports directly to the Prosecutor and the two Deputy Prosecutors and has three major areas of responsibility: to provide advice on gender-related crimes and women's policy issues, including internal gender issues such as hiring and promotion; to work with the Prosecution Section to formulate the legal strategy and the development of international criminal law jurisprudence for sexual assaults; and to assist the Investigations Unit in developing an investigative strategy to pursue evidence of sexual assaults.

Second Annual Report 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 Since 1991, § 2(B)(6), UN Doc. A/50/365-S/1995/728 (1995), reprinted in [1995] ICTY Y.B. 261.

mained instrumental to the international legal feminist agenda for gender-competent international courts.[36]

Interestingly, the vocabulary that emerged from this period involved an intricate system of gender-coding aimed at making visible the harmful experiences of women and girls in war.[37] In a nutshell, the system was grounded on the use of the word 'gender' as, effectively, a synonym for "women and girls".[38] In Sellers' own words, gender became a "code" to refer to women and girls.[39] This move transformed the interpretation of other expressions and international criminal law categories. Gender crimes stood for rape against women and girls,[40] while gender strategies

[36] "The Gender Legal Advisor has been instrumental in ensuring the investigation and prosecution of sexual violence crimes". Barbara Bedont and Katherine Hall-Martinez, 1999, *supra* note 25, p. 76.

[37] See, *e.g.*, Doris Buss, 2011, p. 413, *supra* note 17; Karen Engle, 2005, p. 814, *supra* note 25 ("for the most part, feminists in both camps emphazised male-on-female sexual violence as the harm that needed to be addressed by the ICTY").

[38] Patricia Viseur Sellers, 2009, p. 303, *supra* note 2:

> Gender in the popular sense-not necessarily in the academic sense, and I am quite aware that I am in a university-is shorthand for women and girls. The word evokes comments, such as, 'Oh, I read an article on gender', or 'Oh, they've got a new gender thing coming out, right?'.

For other examples see, *e.g.*, Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles", in *Berkley Journal of International Law,* 2003, vol. 21, p. 317 (for an example of the interchangeable use of the words gender, and the expression women and girls) p. 317; Jennifer Green, Rhonda Copelon, Patrick Cotter and Beth 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", in *Hastings Women's Law Journal*, 1994, vol. 5, p. 173 (using the expression gender-based crimes while referring to increased international attention to violence against women)

[39] Patricia Viseur Sellers, 2009, *supra note* 17.

[40] "Even though the reduction of gender strategy to sexual violence is too simplistic, there exists a basis of truth. However, there is an emerging, hopefully prevailing, norm that gender crimes under international criminal law and under humanitarian law should not be limited to prosecution of sexual violence. Gender crimes should not be limited, to what I call the 'R word': rape. Rape was just the beachhead; the proverbial landing at Normandy, so that we could wade ashore at Kigali. It was the enumerated provisional place where we chose to disembark while under fire and while behind enemy lines". Patricia Viseur Sellers, 2009, p. 305, *supra* note 2. See also Kelly D. Askin, 2003, pp. 288–349, *supra* note 38 (using throughout the article expression gender-related crimes to refer to rape against women and girls); Karen Engle, 2005, p.

were defined as the "legal ability to prosecute crimes committed against women and girls under humanitarian law […]";[41] and gender-competent tribunals defined as those that successfully addressed the sexual assaults under their jurisdiction.[42] Gender justice required the arrest of suspects, the adjudication on individual responsibility and the delivery of jurisprudence aimed at countering impunity of sexual assaults against women and girls,[43] while gender injustice became the mishandling of sexual assault charges against women by prosecutors.[44] In this coding system, gender ended up simultaneously equated to sex,[45] while embodied by women and girls.[46] Tellingly, by the end of her genealogy of international legal feminist advocacy, Sellers had replaced the use of the expression gender-based crimes for sex-based crimes.[47]

12.2.2. Gender Strategizing in Biomedical Research

While legal feminists called for gender strategizing at the *ad hoc* tribunals, a sector of the United States' women's health movement pushed for their own version of gender strategies by denouncing the lack of sex and gender-specific research.[48] They called for the inclusion of women in clin-

801, *supra* note 25 (noting how Sellers suggests gender crimes and sexual assault were considered as one and the same from the early 1990s).

41 Patricia Viseur Sellers, 2009, p. 305, *supra* note 2.

42 *Ibid*.

43 *Ibid*.

44 *Ibid*, p. 316.

45 "An unintended consequence of the jurisprudence might well be that the primary harm to be addressed becomes one of sex, not of violence or gender oppression". Karen Engle, 2005, p. 801, 815, *supra* note 25 (poignantly discussing the "replacement of a focus on gender with a focus on sex" as one of the unintended consequences of the gender strategy at the ICTY).

46 "Repeatedly the raped female, the sexual assault victim/survivor, has become unforgivably reduced to embody gender strategy. This is reasonable to a certain extent". Patricia Viseur Sellers, 2009, p. 316, *supra* note 17.

47 "The successes of the ICTY and the ICTR—meaning the arrest of suspects, the adjudication of crimes based on individual responsibility, and the delivery of jurisprudence that countered impunity including impunity for sex-based crimes—are great". *Ibid*.

48 See, *e.g.*, Tracy L. Johnson and Elizabeth Fee, Introduction to Women's Health Research in *Women's Health Research: A Medical and Policy Primer*, Florence P. Haseltine (ed.), 1997, Society for the Advancement of Women's Health Research,

ical trials and the regulation of biomedical research so that it would include analysis of results according to the sex of the participants. Underlying this feminist strategy was the idea of "illnesses and disorders that affect women predominantly or differently than men"[49] needed to be addressed by producing more data on women. In 1990, under the leadership of Drs. Florence Haseltine and Joanne Howes, a coalition that included feminist activists and people from scientific and medical establishments created the Society for Women's Health Research ('SWHR').[50] This non-profit organization became the steering wheel of advocacy efforts against the lack of clinical investigations on "disease and conditions that affect women *uniquely*".[51] Their first big success was to get Congress' General Accountability Office ('GAO') to evaluate the policies and practices related to the application of the National Institutes of Health ('NIH').[52]

The next strategic step of the SWHR was to push for the creation of separate offices for sex and gender-specific research within the department of health.[53] As a result of this successful advocacy effort, GAO created the Office for Research on Women's Health ('ORWH'). But health feminists, in the same fashion as international legal feminists, believed it was necessary to create separate institutional formations exclusively dedi-

1997 (recounting how women have been excluded from medical research for decades).

49 Society for Women's Health Research, available at http://www.womenshealth research.org/site/PageServer?pagename=about_main, last accessed on 30 September 2011.

50 See, *e.g.*, Karen L. Baird, Beyond Reproduction: The Women's Health Movement in the 1990s, in *Beyond Reproduction: Women s Health, Activism, and Public Policy*, Karen L. Baird, with Dana-Ain Davis and Kimbely Christensen, Associated University Press, Cranburry, 2009, p. 9 (for a broad history of the movement during this first period of advocacy); Karen L. Baird, "Protecting the Fetus: The NIH and FDA Medical Research Policies", in *Beyond Reproduction: Women's Health, Activism, and Public Policy*, Karen L. Baird, with Dana-Ain Davis and Kimbely Christensen, Associated University Press, Cranburry, 2009 (for an account of the role of SWHR in this process).

51 Society for Women's Health Research ('SWHR'), "About Us: Celebrating 20 Years", available at http://www.womenshealthresearch.org/site/DocServer/SW HR_One-Sheeter_2011.pdf?docID=7461, last accessed on 30 September 2011 (Emphasis added).

52 Steven Epstein, 2007, p. 303, *supra* note 7.

53 *Ibid*., 2007, pp. 233–257.

cated to research on women's biomedical issues.[54] By 1993, they succeeded in getting the NIH Revitalization Act passed in Congress, making it mandatory to include women in all clinical trials. After this decision the FDA issued a guideline on "calling analysis of data by *gender*".[55]

The push for legal reform was expected to transform scientific and medical practices in two fundamental ways. On the one hand, it would make the inclusion of women in medical trials a legal obligation; and second, it would mandate the analysis of medical trial results by sex. This second objective is also linked to a third and more ambitious project health feminists already had in mind: setting up clinical research trials in order to carry out biomedical research specifically aimed at measuring differences between males and females. Despite the fact that the whole point of their effort was to promote biomedical research practice grounded on biological sexual difference, they referred to it as "sex and gender differences research", while using both terms interchangeably.[56]

The push for the establishment of institutions with expertise on women's issues both in biomedicine and international criminal law was

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[54] I thank Sarah Richardson for pointing out to me this trend in the women's health movement. According to Richardson, health feminists aimed, first, for the establishment of offices within institutions and later for the creation of permanent specialized units and institutions to carry out sex-difference research. See Richardson, forthcoming 2013, *supra* note 7. See also, Steven Epstein, 2007, pp. 233–257, *supra* note 7.

[55] The NIH Revitalization Act ordered the inclusion of women in trials combined with the analysis of results by sex. Furthermore it made the ORWH a permanent entity. See, *e.g.*, Society for Women's Health Research, "SWHR Timeline", available at http://www.womenshealthresearch.org/site/DocServer/SWHR_Timeline_2011.pdf?docID=7463, last accessed on 30 September 2011; Steven Epstein, 2007, p. 304, *supra* note 7. See also, J. Claude Bennet, "Inclusion of Women in Clinical Trials: Policies for Population Subgroups", in New England Journal of Medicine, July 22 1993, vol. 329, pp. 288–292 (discussing the pros and cons of the inclusion of women in clinical trials).

[56] Altogether it remains unclear whether or not health feminists were sustaining the idea of gender being grounded in biology, nor if biological sexual differences were being deployed to analyze female social behavior. For an example of the interchangeable use of sex and gender in this type of research see, *e.g.*, A. Parekh1, W. Sanhai, S. Marts and K. Uhl, "Advancing women's health *via* FDA Critical Path Initiative", in *Drug Discovery Today: Technologies,* 2007, vol. 4, no. 2, p. 69. ("Studying sex and gender differences is critical to understanding diseases that affect women solely, disproportionately or differently from men").

the result of a successful shift in their advocacy strategies.[57] The shift was grounded on the assumption that men and women were the two relevant groups to compare.[58] Steven Epstein has criticized this trend in women's health advocacy and framed it as partaking in what he calls the "inclusion and difference paradigm", which is a "set of changes in research policies, ideologies, and practices, and the accompanying creation of bureaucratic offices, procedures, and monitoring systems".[59] The turn towards differences between the sexes in feminist advocacy, argues Epstein, is part of a tendency to dethrone the standard human and replace it with group-specific approaches.[60] He argues that in doing so, the women's health

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57 I thank Sarah Richardson for pointing out to me the relation between institution building and changes in advocacy strategies in the field of sex-based biology.

58 Steven Epstein, 2007, p. 250, *supra* note 7:

> As Judith Lorber has argued, the overriding mistake of so many 'epistemologically spurious' studies of sex differences in both the biological and the social sciences is that they begin simply by assuming that 'men' and 'women' are the relevant groups to compare, look for the differences between them, and then attribute whatever they find to the underlying sex difference.

See also Judith Lorber, "Believing is Seeing: Biology as Ideology", in *Gender and Society,* December 1993, vol. 7, no. 4, p. 571.

59 According to Epstein, this biopolitical paradigm refers to "the research and policy focus on including diverse groups as participants in medical studies and in measuring differences across those groups". Steven Epstein, 2007, pp. 6, 17, *supra* note 7:

> [It is biopolitical because] it reflects the presumption that health research is an appropriate an important site for state intervention and regulation and because it infuses the life sciences with new political import. […] It hybridizes scientific and state policies and categories. Specifically, it takes two different areas of concern – the meaning of biological difference and the status of socially subordinated groups – and weaves them together by articulating a distinctive way of asking and answering questions about the demarcating of subpopulations of patients and citizens.

60 *Ibid*., pp. 233–257:

> There has been almost no scholarly attention to the broad-scale attempt to dethrone the 'standard human' and mandate a group-specific approach to biomedical knowledge production – an identity-centered redefinition of U.S. biomedical research practice that encompasses multiple social categories.

movement has participated in the creation of equivalence across two previously distinguishable forms of difference – gender and sex.[61]

The parallel between the gender strategizing of health feminists and international legal feminists between 1990 and 1995 shows a shared move towards re-essentialization of advocacy efforts already underway. The first step in that direction was the flattening of gender and sex either by reducing gender to refer to women and girls, interchangeably using both categories, or implicitly and explicitly suggesting that gender is determined by biological differences.[62] Interestingly, feminists' use of gender and sex coding in both spheres appears as an invitation for sex-based institutional formations. However, these institutional projects are not presented to the public as sex-coded but gender-coded initiatives. By 1995 each group of advocates had succeeded in influencing the creation of new institutions, the renovation of old ones, and the transformation of institutional practices within their own spheres of action.

12.3. The Rise of Sex-Specific Agendas: 1996–2001

> The very fact of dividing subjects into male and female categories for research purposes may serve to reify and perpetuate a socially created dichotomy. The search for differences can help to create the differences, if you are looking for something you are likely to find it.[63]

In the previous section I described how feminists' gender-coded analysis of both female disease and criminal violence against women set the stage for a whole architecture of sex-based institutional formations and protocols. This era of female inclusive institution building under the banner of gender strategizing was succeeded by a period of advocacy aimed at further differentiating men and women on the basis of sexual dif-

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61 "[S]ex/gender, race/ethnicity, and age are all treated as formally equivalent modes of difference to be 'handled' administratively in similar ways". *Ibid*., p. 142.

62 For a discussion on how this shift counters the feminist project – longstanding since the 1970s – to dissociate gender from nature, and instead supports the idea of gender being determined by differences at the biological level, see Fausto-Sterling, 2000, *supra* note 10.

63 Susan Star Leigh, "Sex Differences and the Dichotomization of the Brain: Methods, Limits and Problems in Research on Consciousness", in *Genes and Gender II,* cited in Steven Epstein, 2007, p. 251 *supra* note 7.

ference.[64] Successful feminist advocacy during the second half of the 1990s led to the implementation of methods and institutional practices that separated, and often isolated the analysis of illness, health conditions, or criminal conduct, on the basis that it affected women predominantly, or differently than men. Between 1996 and 2001 feminist advocacy thus moved into another era, which geared away from inclusion and pushed for institutions to develop sex-specific agendas.[65]

During this period, thematic prosecutions became the prime focus of international feminists' sex-specific agenda. Under this prosecutorial model, sexual crimes committed by men against women[66] were prioritized, grouped, and investigated in isolation from other acts that also fell under the jurisdiction of the ICTY. Health feminists' own version of a sex-specific agenda led to the emergence of sex-based biology, which is explained in further detail in section 12.3.2.[67] Dichotomist sexual coding, along with the flattening of gender and sex, remained two key underpinnings of this period. However, in this period feminists appear to go one step further in their embrace of essentialist notions of sexual difference, by claiming or assuming the overriding significance of biology and genetics in understanding the behavior of males and females. In this way these two feminist projects inadvertently make their projects increasingly dependent on the possibility of containing reality in mutually exclusive categories like males and females, or victims and perpetrators. I will call this era "the rise of sex-specific agendas".

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[64] During the early 1990s advocates for change used early reports of such differences as a rationale for inclusionary reform, during this second period, inclusionary policies and procedures for subgroup comparisons resulted in proliferation of difference findings. Steven Epstein, 2007, p. 235 *supra* note 7.

[65] I borrow this category from Sarah Richardson's analysis of sex-specific research agendas in a post-genomic context. See Sarah Richardson, forthcoming 2013, *supra* note 7.

[66] Karen Engle has pointed our how the ICTY's prosecutorial strategy has functioned "to see all sexual assault as reproducing the dynamics of male-on-female (sexual) violence". Karen Engle, 2005, pp. 815, *supra* note 25.

[67] Steven Epstein, 2007, pp. 233-257, *supra* note 7:

> [E]mphasis on sex differences in medicine is part of a larger trend toward claiming or assuming the overriding significance of biology and genetics in understanding the behavior of males and females.

12.3.1. The Birth of Sex-Specific Prosecutions

Between 1996 and 2001, international legal feminists successfully completed the second phase of their project for redefining the status of sex crimes in international humanitarian law. Two major events mark this period. The first are the landmark *Foča* cases which involve the indictments and verdicts against Kunarak, Kovak, and Vukovik.[68] The *Foča* cases refer to the prosecution and conviction of three middle rank Bosnian police officers for their individual responsibility in the rapes and sexual enslavement of Muslim women from the municipality of Foča in the early 1990s. The second event is the adoption of the Rome Statute in 1998.

Foča is the ICTY case that has received the most media attention, following the Milošević trial.[69] It was the first time in history that an international tribunal convicted an accused solely on counts of sexual violence.[70] Even more significant is the fact that the convictions were the result of a prosecutorial strategy designed to prioritize, group, and isolate sexual crimes committed against women from a broader repertoire of criminal acts that occurred in Foča around the same time.[71] The convictions against Kunarac *et al*. constitute the first example of international thematic prosecutions of sexual violence in armed conflict.[72]

It was not mere coincidence that in *Foča* the ICTY grouped sexual crimes committed predominantly against women and simultaneously isolated their prosecution from the investigation of other offences under its

[68] *Prosecutor v. Kunarac et al.*, *supra* note 4.

[69] Minna Schrag, "Lessons Learned from ICTY Experience", in *Journal of International Criminal Justice,* 2004, vol. 2, no. 2, p. 427–343.

[70] Institute for War and Peace Reporting, 22 February 2005, available at http://iwpr.net/report-news/foca-rape-case, last accessed on 30 September 2011:

> This trial and verdicts have two very important aspects for international law. This is the first conviction by an international court for sexual enslavement and the first trial to deal exclusively with sexual crimes per se rather than grouping such offences with killings and similar war crimes as the "accompanying phenomena" of war.

[71] See, *e.g.*, Doris Buss, "Rethinking 'Rape as a Weapon of War'", in *Feminist Legal Studies,* 2009, vol. 17, p. 145–163 (discussing the importance this case played in shifting the understanding of sexual violence against women as simply accompanying phenomena to other crimes).

[72] See Minna Schrag, 2004, pp. 427–343, *supra* note 69 (discussing how the thematic approach to prosecution in Foča countered the initial internal decision at the ICTY's OTP not to pursue 'theme cases').

jurisdiction. International legal feminists, together with non-governmental organizations and university-based institutes, lobbied and campaigned for the prioritization of cases of systematic rape against women.[73] In response, as the press release following the indictment reveals, the Office of the Prosecutor ('OTP') had decided to "pay specific attention to gender-related crimes".[74] The head prosecutor at the ICTY, Richard Goldstone, placed the prioritization of sex crimes against women at the core of the tribunal's mission.[75] The prosecutor himself portrayed the separate prosecution of sex crimes committed by men against women as the core of the gender strategy of the court.

The prosecution strategy in *Foča* was designed to meet two objectives. First, it was intended to focus exclusively on sexual crimes against women; and second, it was meant to bring attention to the systematic nature of rapes of Bosnian Muslim women.[76] By having the first successful thematic prosecution of rape also become the first ICTY prosecution for

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[73] For detailed analyses of feminist's campaigning at the ICTY see, *e.g.*, Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism", in *Harvard Journal of Law and Gender,* 2006, vol. 29, pp. 342–347; Kelly D. Askin, "A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993–2003", in *Human Rights Brief,* 2004, vol. 11, p. 16; Karen Engle, 2005, p. 778, *supra* note 25 (account of feminist activists' concerted effort to affect the prosecutorial strategies at the ICTY); Joanne Barkan, "As Old as War Itself: Rape in Foca", in *Dissent*, Winter 2002, p. 63–64 (detailed account of feminist campaigning in Foča).

[74] ICTY, Press Release: "Gang Rape, Torture and Enslavement of Muslim Women Charged in ICTY's First Indictment Dealing Specifically with Sexual Offences", 27 June 1996, CC/PIO/093-E, available at http://www.icty.org/sid/7334, last accessed on 30 September 2011:

> The indictment made public today is the result of an investigation which commenced in late 1994. This indictment fully illustrates the OTP's strategy […] to investigate the operation of detention facilities in connection with the takeover of parts of Bosnia and Herzegovina by the Bosnian Serb forces […] *to pay specific attention to gender-related crimes*" [emphasis added].

[75] "We have always regarded it as an important part of our mission to redefine and consolidate the place of these offences in humanitarian law". ICTY, *supra* note 74.

[76] During the seminar that precedes this volume, Morten Bergsmo pointed out that "international sex crimes were first investigated and prosecuted in a systematic manner by the ICTY through the so-called Foča cases". See, *e.g.*, Karen Engle, 2005, p. 798, *supra* note 25 (discussing how the exclusive focus on rape was widely acknowledged and seen as precedent).

rape as an autonomous act that constituted a crime against humanity, *Foča* created a link between the isolation of sex crimes and proving the systematic nature of sexual violence against women in war.[77] Despite having resulted in some disappointment for feminists, it became the iconic "rape case", and demonstrated the potential of a sex-specific thematic prosecution for the advancement of feminist goals.[78]

Unfortunately, *Foča*'s symbolic power in shaping the legal consciousness of its time also legitimized the need to strategically isolate cases of sexual violence against women in order to make them successful. This legitimized the practice of sex-specific prosecution at a time when it was still hard to appreciate some of its unintended consequences.[79] Neither was it easy to appreciate amidst the success of feminist campaigning how slowly but steadily a context of heightened reductionism of gender to sex was unfolding.

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[77] The front page of the New York Times quoted a court spokesman, who called it a "landmark indictment because it focuses exclusively on sexual assaults, without including any other charges […]. There is no precedent for this. It is of major legal significance because it illustrates the court's strategy to focus on gender-related crimes and give them their proper place in the prosecution of war crimes". Karen Engle, 2005, p. 798, *supra* note 25.

[78] Joanne Barkan, 2002, *supra* note 73:

> History – in so far as it will deal with human rights for women – will likely judge one strategic decision made by the ICTY as invaluable: the decision to put together "the rape case". Even in the early stages of the tribunal's work, the lobbying to get prosecutors to pay attention to sexual offenses paid off. Before long, more than 20 percent of the charges filed at the ICTY involved allegations of sexual assault – an extraordinarily high percentage in light of the past record. But in any individual case, the rape of women was only one crime among many being prosecuted. If rape were overshadowed in most trials by other crimes, the possibility of breaking new legal ground for women's rights decreased. But, hypothetically, a case devoted to just one type of crime, just one category of victim, and just one place might have significant impact on the law and on public opinion. In late 1994, the ICTY office of the prosecutor, supported by women's rights advocates, began the investigation for a rape case. The prosecutors would investigate only sexual crimes and only those committed against women. The place they chose to investigate was Foca.

[79] See, *e.g.*, Karen Engle, 2005, *supra* note 25 (for a discussion of some of the unintended consequences of feminist advocacy at the ICTY).

The adoption of the Rome Statute clearly illustrates how the success of international feminist campaigning was fraught with a strong taint of re-essentialization. Three years before the final verdicts in *Foča*, Article 7(3) of the Rome Statute defined gender as referring only to the "two sexes".[80] Despite containing the most comprehensive enumeration of sex crimes in international criminal law to date, and incorporating several structural provisions designed to facilitate the effective investigation and prosecution of sex crimes,[81] the equation of gender to sex had become embedded in the future statutory and regulatory framework of the ICC.[82]

12.3.2. The Birth of Sex-Based Biology

Sex-based biology ('SBB') is a term coined by Dr. Florence Haseltine[83] – founder of the Society for Women's Health Research ('SWHR')[84] – refer-

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[80] Art. 7(3) of the Rome Statute of the International Criminal Court provides in full:

> For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

[81] See, *e.g.*, Sienna Merope, 2011, p. 2. *supra* note 5. For a discussion of these provisions as the result of over a decade of feminist advocacy see*, e.g.*, Susanna SáCouto and Katherine Cleary, "The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court", in *American University Journal of Gender, Social Policy and the Law,* 2009, vol. 17, pp. 337, 339.

[82] For a thorough and balanced analysis of the downside of the definition of gender in the Rome Statute see Valerie Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice", in *Harvard Human Rights Journal,* 2005, vol. 18, p 55.

[83] Dr. Haseltine has published extensively on the topic of women's health research, and specifically in the field of sex-based biology. See, *e.g.*, Florence P. Haseltine, "Formula for Change: Examining the Glass Ceiling", in Florence Haseltine (ed.), 1997, p. 255, *supra* note 48; Florence P. Haseltine "Gender Differences in Addiction and Recovery", in *Journal of Women's Health & Gender-Based Medicine*, July 2000, vol. 9, no. 6, pp. 579–583;

[84] Steven Epstein, in *What's the Use of Race: Modern Governance and the Biology of Difference,* pp. 62–87:

> In the early 1990s, the SWHR had coalesced around the goal of inclusion of women in research and had campaigned for the NIH Revitalization Act. By the late 1990s, the Society's raison d'etre was the furtherance of research on differences between men and women that bore medical significance.

ring to "the study of sex differences in health and disease".[85] Substantively, SBB involves both increased research on women's health, and sex-based analysis of data.[86] Methodologically, it entails the push for the establishment of institutions specialized in doing research about diseases and conditions that affect women uniquely.[87] The rise of SBB is the result of a conscious and certainly successful transformation in feminist women's health advocacy strategies from sameness as inclusion to sameness as difference.[88] The movement towards difference was marked by a strong activist return to arguments that highlight the biological differences between males and females, accompanied by growing funding of research that reflects this shift.

As a social movement that has "swum in feminist currents", SBB distinguishes itself from feminist health movements of the 1970s and

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[85] SWHR appears to be the most salient organization in accounts that retrace the emergence and development of SBB. In some of these accounts Haseltine appears as also having coined the term gender-specific biology. It remains unclear whether or not SBB is different from gender-specific biology. However, they both appear to rely heavily on notions of sexual difference to *explain* gender attributes. See, *e.g.*, Steven Epstein, "Bodily Differences and Collective Identities: The Politics of Gender and Race in Biomedical Research in the United States", in *Body & Society*, 2004, vol. 10, pp. 194:

> In recent years, the emphasis on biological difference has also been promoted by advocacy groups such as the Society for the Advancement of Women's Health Research, which heralds the new field of 'gender-specific biology' – a term invented by Florence Haseltine and defined as 'the field of scientific inquiry committed to identifying the biological and physiological differences between men and women.

[86] Steven Epstein, 2007, p. 243, *supra* note 7.

[87] SWHR's Web Catalog, *supra* note 51.

[88] Early in the 1990s feminist health activism made a significant move from arguing fundamental sameness towards arguing fundamental differences between the sexes – what Steve Epstein has called the inclusion and exclusion paradigm. During the 1970s and 80s, American women's health activism focused on the inclusion of women's health needs and concerns in public policy and scientific research agendas. However, by the early 90s the inclusionary policies and procedures achieved had resulted in the proliferation of scientific findings reinforcing the idea of difference between the sexes. As a result of this process, a strand of the feminist movement began pushing for "the emphasis on sex differences in medicine" See Steven Epstein, 2007, p. 236, *supra* note 7; Sarah Richardson, forthcoming 2013, *supra* note 7 (for detailed discussions of this move from sameness to difference and the complex web of implications for scientific practices).

1980s by showing eagerness to embrace assertions of biological differences by sex.[89] This has remained the core of health feminist advocacy strategies for over more than a decade.[90] SBB is grounded on a conception of the sexes as dramatically different, and claims to have "revolutionized the way that the scientific community views the sexes".[91] If not a revolution, a major transformation took place between 1995 and 2001. While in the 1970s the term 'gender' was absent from biomedical writing and research, today the words 'sex' and 'gender' are everywhere in biomedical literature.[92] What we observe in their usage starting in the mid- 1990s is a trend to interchange them without any explanation. Contrary to the trend from the 1970s, when the use of the term 'gender' expanded while that of 'sex' contracted in biomedical writing. From the 1990s onwards the usage

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[89] Steven Epstein, 2007, p. 244, 247, *supra* note 7:

> The strategic moves in the construction and public representation of sex-based biology raise important questions about the politics of women's health and about the broader feminist currents within which the women's health movement has swum.

Drawing from the work of Hara Estroff Marano, Epstein catalogues it as post-feminism, ("the fruits of previous feminist struggles are now being reaped […] it's safe to talk about sex differences again"). However, SBB proponents locate it "broadly within the legacy of feminism", despite ideological divides within the women's health movement. Others like Bernadine Healy call it the "third stage of feminism" or even "post-feminism". See, *e.g.*, Steven Epstein, 2007, p. 248, *supra* note 7; Marianne Legato, "Gender-Specific Physiology: How Real is it? How Important is it?", in *International Journal of Fertility and Women's Medicine,* 1997, vol. 42, no. 1, p. 26.

[90] Steven Epstein, 2007, p. 241, *supra* note 7:

> [SBB] emphasize[s] fundamental, thoroughgoing, biological differences between men's and women's bodies […] those who subscribe this movement believe that women – and men – deserve separated medical scrutiny because they are biologically different at the level of the cell, the organ, the system, the organism.

[91] SWHR, "Before the Senate Appropriations Subcommittee on Labor, Health and Human Services, Education, and Other Related Agencies", 15 March 2010, available at http://www.womenshealthresearch.org/site/DocServer/NIH_Approps-_Senate_Testimony.pdf?docID=4424, last accessed on 30 September 2011.

[92] Nancy Krieger, "Genders, sexes, and health: what are the connections – and why does it matter?", in *International Journal of Epidemiology,* 2003, vol. 32, no. 4, p. 652:

> Open up any biomedical or public health journal prior to the 1970s, and one term will be glaringly absent: gender. Open up any recent biomedical or public health journal, and two terms will be used either: (1) interchangeably, or (2) as distinct constructs: gender and sex.

of 'sex' has expanded while that of 'gender' has contracted to the point that today 'gender' appears to have been reduced to 'sex'.

The term 'sex-based biology' was well established by the end of the 1990s.[93] In 2001, the Institute of Medicine ('IOM') published a report sponsored by SWHR entitled "Exploring the Biological Contributions to Human Health: Does Sex Matter?".[94] This publication is considered to signal the naissance of SBB as a field of biomedical study. The report, which concluded with a recommendation for scientists to investigate sex "from womb to tomb",[95] became a powerful advocacy tool used by SWHR and its allies to advocate for major funding for sex-specific research before Congress.[96] It became the banner under which SBB expanded the use of sex-difference research from its initial priority – studying women's responses to medication – towards its application in interdisciplinary studies of female behavior.[97]

The rise of SBB, starting in 1995, and the subsequent development of sex-specific research agendas with their heightened emphasis on sex differences, occurred in a context of ever-growing claims and assumptions of the "overriding significance of biology and genetics in understanding the behavior of males and females".[98] As Anne Fausto-Sterling announced back in 1985: "[t]he popular press and scientists alike have apparently fallen in love with the gene".[99] As explanations of sexual difference move from human anatomy and chromosomes towards genetic expression, the

[93] In 1995, the SWHR held its first national meeting focused on sex-based biology. Phyllis Greenberger, Sherry Marts, "News from the Society of Women's Health Research: Hormones, Chromosomes and the Future of Sex-Based Biology", in *Journal of Women's Health and Gender-Based Medicine,* 2000, vol. 9, no. 9, p. 937:

> The intriguing notion – that sex differences could be found at a level as basic as the control of gene expression – led the Society to begin planning a series of conferences with a focus on basic research in sex-based biology.

[94] Institute of Medicine, *Exploring the Biological Contributions to Human Health: Does Sex Matter?,* National Academy Press, Washington DC, 2001.

[95] *Ibid*., p. 5.

[96] Thanks to SWHR post-report advocacy strategies in 2001 Congress passed a new funding initiative aimed at the creation of specialized centers of research on sex and gender factors affecting women's lives. See Steven Epstein, 2007, p. 242, *supra* note 7.

[97] See, *e.g.*, Phyllis Greenberger, Sherry Marts, 2000, pp. 93–938, *supra note* 93.

[98] Steven Epstein, 2007, p. 236, *supra* note 7

[99] Anne Fausto-Sterling, 1985, p. 62, *supra* note 13 (first edition).

enlistment of sex-specific research to explain and understand male and female behavior augmented rapidly. The public and scientists alike seemed increasingly interested in proving or disproving how much of our social behavior can be explained through genetic mapping.

The rise of sex-specific agendas in international criminal law and biomedicine is characterized by an increasing turn towards notions of fundamental difference between the sexes. Of course, in each sphere these notions tend to manifest themselves quite differently. This turn towards difference echoed both during the Foča, and the birth of SBB. Choosing to isolate the prosecution of crimes against women and biomedical investigations of female reactions to medicine produced more data on sexual difference, and this data was used to further assert differences among men and women. The criticism of sex-specific agendas in biomedicine by authors like Epstein and Richardson[100] illuminate some of the unintended consequences of these practices, including on international legal feminists' agendas. For instance, we could examine the ways in which the practice of sex-specific prosecutions obscure commonalities across males and females (that is when females are perpetrators or male are victims of sexual violence); and occludes differences within each sex (that is, the rape of indigenous women, or women with disabilities). However, despite the pressing need to formulate these questions – and many others – to ensure that the gender strategizing remained true to its goals of reversing the invisibility of harmful experiences of women and girls, by the beginning of the 21st century sex-specific prosecution and biomedical research were so well meaning and seen as such advancements for women that it was hard to argue they could be reinforcing gender stereotypes[101] or disguising problems of categorization of the two sexes as unambiguously divided.[102]

[100] See Steven Epstein 2007, *supra* note 7; Sarah Richardson, forthcoming 2013, *supra* note 7.

[101] Sarah Richardson, forthcoming 2013, *supra* note 7 (for the analysis of this phenomenon in sex-specific biomedical research).

[102] See Steven Epstein 2007, p. 253, *supra* note 7 (arguing "there is no unambiguous divide between the two sexes").

12.4. The Post-Genomic Age: 2002–2010

> [Today] contrary to politically correct visions of a shared, universal human genome, males and females are more genetically different than ever conceived.[103]

Between 2005 and 2010 international legal feminists have dealt with the paradoxical effects of advocating for sex-specific agendas. While SBB advocates joyfully enlisted recent findings in genomic science, placing sexual differences at the level of genetic expression, international legal feminists saw the ICC to be turning gender strategizing on its head when trying to prioritize the prosecution of war crimes constituted by the unlawful enlistment of children. As biological explanations of sexual difference shift from the anatomic and chromosomal towards locating the essence of sex at the level of genetic expression, it becomes harder for feminists to contain the expansive quality of binary thinking embedded in sex-specific agendas. This is the case especially when the "labors involved in making sex appear dichotomous"[104] in feminist advocacy remain largely unexplored.[105]

The classification of individuals into mutually exclusive categories that apparently have nothing to do with sex – that is, victims and perpetrators – is inevitably infused with social constructions about men and women. When gender is reduced, confused, or replaced by sex, and sex is thought to be determined by genes, assertions about stereotypical gender differences (that is, women are victims and men are perpetrators of sexual violence in war) gain an apparent truth-value. Consequently, gender attributes – even stereotypical ones – end up associated to notions of nature and essence. The challenge of feminist projects in the face of such scenarios is not the facticity of biological sexes, but the unintended consequences of binary thinking for their own political agendas.

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[103] Richardson, 2010, p. 824, *supra* note 11.

[104] Steven Epstein, 2007, *supra* note 7.

[105] See Lynda Birke, "Sitting on the Fence: Biology, Feminism and Gender-Bending Environments, in *Women's Studies International Forum,* 2000, vol. 23, no. 5, p. 587–599 (discussing the challenges of examining feminist advocates' use of categories such as sex and gender due to the "schism between feminist theorists and feminist activists").

12.4.1. Investigating Sex Crimes in a Post-Genomic Age

In 2006, the ICC issued a warrant of arrest against Thomas Lubanga, former commander-in-chief of the *Forces Patriotiques pour la Libération du Congo* ('FPLC').[106] After his arrest and the confirmation of charges by a Pre-Trial Chamber, Lubanga became the first person to be tried under the Rome Statute.[107] This case signals the beginning of a new phase in the development of thematic prosecutions for two reasons. On the one hand, the case inaugurates the practice of thematic prosecution at the ICC, having progressed from its use in special tribunals; and on the other hand, it is the first time an international court explicitly alludes to a thematic prioritization strategy not centered on gender-based crimes. Instead, Lubanga's trial focuses solely on his responsibility as co-perpetrator of war crimes consisting of enlisting and conscripting children under the age of 15.[108]

The principle of selective prosecution broadly defines the practice of criminal investigations at the ICC. In order to select the crimes the court first goes through several "screening decisions".[109] First, the focus is

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[106] International Criminal Court, "Press Release: Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo", ICC-OTP-20060302-126, 14 March 2006, available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Reports+and+Statements/Press+Releases/Press+Releases+2006/Issuance+of+a+Warrant+of+Arrest+against+Thomas+Lubanga+Dyilo.htm, last accessed on 25 March 2011:

> Thomas Lubanga Dyilo founded the UPC in September 2000 and became its president. In September 2002, he set up the FPLC as the military wing of the UPC and became its commander-in-chief. During the fighting in Ituri, more than 8,000 civilians have died and in excess of 600,000 others have been displaced. In 2002, the FPLC seized control of Bunia and parts of Ituri in Orientale Province.

[107] The Lubanga Trial at the International Criminal Court, "Who is Thomas Lubanga?", available at http://www.lubangatrial.org/qa/, last accessed on 28 September 2011.

[108] Valentina Spiga, "Indirect Victims' Participation in the *Lubanga* Trial", in *Journal of International Criminal Justice,* 2010, vol. 8, p. 191, *supra* note 5 ("analyzing the criminal charge that results from the breach to the prohibition of using persons under the age of 15 to participate actively in hostilities").

[109] On the notion "screening decisions" as the ICC's OTP prerogative of selecting which situations to investigate and deciding how to prioritize, see Alison Marston Danner, "Prosecutorial Discretion and Legitimacy", in *Guest Lecture Series of the Office of the Prosecutor,* 13 June 2005, The Hague, available at http://212.159.242.181/iccdocs/asp_docs/library/organs/otp/050613_Danner_presentation.pdf, last accessed on 30 September 2011.

on crimes committed by "those persons who bear the greatest responsibility".[110] Second, the investigation focuses on those crimes of the accused that "show a sample […] reflective of the gravest incidents".[111] Third, when it comes to choosing which group of crimes will be part of the sample the court must identify and prioritize the main types of victimization.[112] The ICC has deployed the notion of gravity to identify such types, when they are considered grave on the basis of their quantitative or qualitative salience. In other words, they have to be frequent, egregious or both. In *Lubanga*, the OTP prioritized child enlisting on the basis that it was both quantitatively[113] and qualitatively[114] salient. In deciding to prosecute solely on the basis of child enlistment, the OTP was also making a

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[110] International Criminal Court, 14 March 2006, *supra* note 106.

[111] Office of the Prosecutor, "Report on Prosecutorial Strategy", 14 September 2006, pp. 5–6, available at http://www.fidh.org/IMG/pdf/OTPProsecutorialStrategy_20 06-2009.pdf, last accessed on 30 September 2011. See, *e.g.*, Sienna Merope, "Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC", in *Criminal Law Forum*, 2011 (discussing the OTP's screening decisions in Lubanga).

[112] *Ibid*.

[113] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo,* "Confirmation Hearing: Introductory Comments of Senior Trial Attorney Ekkehard Withopf", 9 November 2006, available at http://212.159.242.181/iccdocs/asp_docs/library/%20organs/otp/speeches/EW_20061113_en.pdf, last accessed on 30 September 2011:

> [T]he Prosecution will show the face of a military commander who for the sake of that war, together with others, conscripted and enlisted children under the age of fifteen years into the FPLC. Thomas Lubanga Dyilo made the children get military training. Thomas Lubanga Dyilo made them train to kill. Thomas Lubanga Dyilo made the children kill. And Thomas Lubanga Dyilo let the children die. Die in hostilities. *Many, many children*. [emphasis added]

[114] International Criminal Court, 14 March 2006, *supra* note 106:

> Young children – boys and girls alike – were taken from their families and forced to join the FPLC. They were taken away and trained in camps set up for this purpose. As president of the UPC and commander-in-chief of the FPLC, Thomas Lubanga Dyilo exercised de facto authority. He had ultimate control over the adoption and implementation of the UPC's and FPLC's policies and practices, which consisted, amongst other things, of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities.

political decision to use the Lubanga case to send a message about the status of child enlistment as an international crime.[115]

International legal feminist advocates and scholars,[116] together with internationalist commentators and human rights organizations,[117] denounced the decision to exclude charges of sexual violence from the investigation against Lubanga and the refusal to let the victims of sexual assaults committed by child soldiers participate in the proceedings. They read this as turning the principle of gender strategizing on its head. Feminists' criticisms seem legitimate, insofar as the court's decision meant that acts of sexual violence by child soldiers against women, and against child soldiers themselves, should not be prioritized despite evidence of their high frequency and egregiousness.[118] However, in asserting this view, in-

[115] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo,* "Confirmation Hearing: Introductory Comments of Senior Trial Attorney Ekkehard Withopf", *supra* note 113:

> This Confirmation Hearing will give the world a picture, an idea about the brutality of the life of child soldiers. And it will give the world a picture about people who are responsible for it. Criminally responsible.In this case: Thomas Lubanga Dyilo.

[116] See, *e.g.*, Susana SáCouto and Katherine Cleary, 2009, p. 337–359, *supra* note 81 (for a detailed recount of reactions to exclusion of charges for sexual violence in Lubanga); Sienna Merope, 2011, *supra* note 111 (analyzing the consequences for gender justice of the Trial Chamber decision not to recharacterize the facts); Suzan M. Pritchett, "Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court", in *Transnational Law and Contemporary Problems,* 2008, vol. 17, 265–305 (case note applying "critical feminist jurisprudential analysis to the application of the Rome Statute in the ICC case of Prosecutor v. Thomas Lubanga"); Margaret M. deGuzman, 2011, p. 518, *supra* note 1(discussing feminist organizations' reaction to Lubanga).

[117] Women's Initiative for Gender Justice, "Letter from Women's Initiatives for Gender Justice to Mr. Luis Moreno Ocampo", 20 September 2006), available at http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf, last accessed on 30 September 2011; see also Human Rights Watch, "Joint Letter to the Chief Prosecutor of the International Criminal Court", available at http://hrw.org/english/docs/2006/08/01/congo13891_txt.htm, last accessed on 30 September 2011; Avocats Sans Frontières *et al.*, "Joint Letter from Avocats Sans Frontières *et al.* to the Chief Prosecutor of the International Criminal Court, D.R. Congo: ICC Charges Raise Concern", 31 July 2006.

[118] See, *e.g.*, Avocats Sans Frontieres *et al.*, 2006, *supra* note 117. Susana SáCouto and Katherine Cleary, 2009, *supra* note 81 (discussing the existence of evidence supporting allegations that girls had been kidnapped into Lubanga's militia and were often raped and/or kept as sex slaves); Suzan M. Pritchett, 2008, p. 267, *supra* note 116

ternational legal feminists failed to appreciate that the reasoning behind this exclusion is the same type of reasoning that underpins sex-specific prosecutions: successful international prosecution of gender crimes requires isolating the investigation from other criminal acts.

As it is clear from feminist reactions to Lubanga, the problem is not that the OTP chose to prosecute child enlistment, but that it found this strategy irreconcilable with the formulation of charges on sexual violence despite the evidence.[119] Given the long-standing history of associating women and children in both feminist and child advocacy strategies, it appears surprising that the Trial Chamber refused to include women as indirect victims.[120] One possible explanation for this phenomenon is to read Lubanga as a sex-specific prosecution. To exclude women as victims of child soldiers is the only way to salvage the sexual difference that underpins the binary of victims and perpetrators. In other words, to see child soldiers as victims of Lubanga and perpetrators of sexual assaults at the same time is an impossible move under a sex-difference approach to pros-

(noting how it is "virtually undoubted that violence against women in the DRC conflict has been systematic and widespread").

[119] Despite vocal criticisms against the omission of charges in the Lubanga case, feminists have qualified as "positive developments" for gender strategizing the fact that subsequent ICC decisions have included charges for sexual violence. See, *e.g.*, Susana SáCouto and Katherine Cleary, 2009, p. 342, *supra* note 81.

[120] The OTPs draft policy on victim's participation attests of the existence of a difference in views between the Trial Chamber and the OTP in respect to making the victims of rape by child soldiers into indirect victims of Lubanga. Despite the OTPs view, the Trial Chamber concluded in favor of the exclusion of victims of child soldier rape from the category of victims. Sexual violence was left out of the charges against Thomas Lubanga. Despite its efforts, the OTP failed to convince the court of its theory of indirect victimhood.

> The Office concurs that "victims" under rule 85(a) can be persons who were not the direct targets of a crime, but who suffered indirect harm as a result of the commission of a crime. The Office supports a broad characterization of "indirect victims". In Lubanga, the Office expressed its views that those who have suffered harm as a result of crimes committed by child soldiers, *i.e.* as a consequence of the crimes charged, are also entitled to participate.

See International Criminal Court, "Policy Paper on Victims' Participation", April 2010, available at http://www.icc-cpi.int/NR/rdonlyres/BC21BFDF-88CD-426B-BAC3-D0981E4ABE02/281751/PolicyPaperonVictimsParticipationApril2010.pdf, last accessed on 15 March 2012.

ecution. Children could not be considered victims and perpetrators insofar as one cannot be female and male at the same time.[121]

This statement by Catharine MacKinnon, Special Gender Advisor to the ICC and vocal feminist advocate of thematic prosecutions, brings to the foreground how the coupling of female (victim) and the male (perpetrator) is reproduced over and over. Interestingly, MacKinnon is using it to differentiate between boy and girls within the category of child soldiers: "Lubanga made boys into rapists and girls into sex slaves in order to make them into soldiers he could command and use at will".[122]

The coupling of female/victims and male/perpetrators and the treatment of both couples as dichotomous categories, thus mutually exclusive, might help understand what prevented the ICC from including women as indirect victims, nor formulating charges against Lubanga for sexual assaults committed by children.[123] Furthermore, it could even illuminate the exclusion of sexual violence charges against Lubanga, including his responsibility for sexual assaults perpetrated against male and female child soldiers.[124]

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[121] See, *e.g.*, Valentina Spiga, 2010, p. 184, *supra* note 5 (for a meditation on the question "when the direct victims are at the same time perpetrators, as in the case of child soldiers, who may inflict harm upon others).

[122] For a note on the role of gender advisors at international courts *vis-à-vis* instance of sexual violence involving child soldiers, see Patricia Viseur Sellers, 2009, p. 301, *supra* note 2:

> The Legal Advisor should also address the sexual assaults committed upon boy soldiers and sexual assaults boy soldiers are ordered to commit as part of their training or in order to "carry out" their military missions.

[123] For discussion of the tensions of showcasing the prosecution against Lubanga as a case dealing with the sexual abuse of child soldiers given the decision not to include counts of sexual violence, see Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law,* forthcoming 2012, p. 265 (noting how, "[w]hile the ICC prosecutor initially justified crime selection in the Lubanga case by invoking practical considerations involving timing and evidence availability", he later highlighted "the case's role in showcasing the sexual abuse of child soldiers"). See also Luis Moreno-Ocampo, "Keynote Address: Interdisciplinary Colloquium on Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence", in *Law and Social Inquiry,* 2010, vol. 15, pp. 845–846.

[124] The male child (child soldier) is the victim, and the male adult (Lubanga) is the perpetrator. The male child is read as the female in the victim-perpetrator scheme. Thus, it excludes the possibility of including women as victims, much less of charging Luban-

12.4.2. Investigating Sexual Difference in a Post-Genomic Age

In March 2005, the Duke Institute for Genome Sciences and Policy ('IGSP') issued a press release announcing, "the first comprehensive survey of gene activity has revealed an unexpected level of variation among individuals".[125] The results were described as potentially having major implications for "understanding the differences in traits among women and between males and females, in terms of both health, disease […] as well as normal gender differences".[126] In essence, said Huntington Willard, one of the authors of the report, "there is not one human genome, but two – male and female".[127]

Following the announcement, several news outlets published their takes on the report.[128] While most writers focused on the difference be-

ga of rapes of the child soldiers. In both hypotheses, the female/victim male-child would be considered a male/perpetrator male-child. Following binary reasoning under which male and female are mutually exclusive categories the required move would be against the goal of the court, since it would entail the impossibility of making the male/child a victim of unlawful enlistment.

[125] The NIH supported their findings as published in the March 2005 edition of the journal *Nature.* Laura Carrel, Huntington Willard, "X-Inactivation Profile Reveals Extensive Variability in X-Linked Gene Expression in Females", in *Nature*, vol. 434, no. 7031, pp. 400–404.

[126] From the outset, the authors of the investigation used the words *sex* and *gender* to suggest that their findings would have bearings for the study of sex and gender. See Duke Medicine News and Communications, "X Chromosome Variation May Explain Differences Among Women, Between Sexes", 16 March 2005, available at http://www.dukehealth.org/health_library/news/8450, last accessed on 30 September 2011:

> Such characteristic genomic differences should be recognized as a potential factor to explain sex-specific traits both in complex disease, as well as normal gender differences.

[127] Duke Medicine News and Communications, 2005, *supra* note 126. See Richardson, 2010, p. 823 *supra* note 11 (discussing the way the findings by Willard and Carrel were presented to the public).

[128] Fred Guterl, "The Truth About Gender", in *Newsweek,* 2005, vol. 145, no. 13, pp. 38–39, available at http://www.thedailybeast.com/newsweek/2005/03/28/the-truth-about-gender.html, last accessed on 30 September 2011:

> [A] new study has found that women and men differ genetically almost as much as humans differ from chimpanzees […]. [The] study published last week in the journal Nature puts this difference at about 1 percent. Considering that the genetic makeup of chimpanzees and humans differs by only 1.5 percent, this is significant.

tween men and women, others, like Maureen Dowd from the New York Times, chose to focus on what the findings said about difference among women: "[w]omen are not only more different from men than we knew. Women are more different from each other than we knew – creatures of 'infinite variety', as Shakespeare wrote".[129] Indeed, as Huntington Willard stated to the press,

> [t]he findings suggest a remarkable and previously unsus-pected degree of expression heterogeneity among females in the popula-tion [and] further work is required to explore potential conseq-uences of that variation.[130]

Despite divergent emphasis in reporting, the remarkable fascination these findings generated serves as a reminder of the preoccupation that scientists and popular press had with the gene.[131]

But what does it mean to say – quoting the New York Times – "that, women are, indeed, 'a different species'"?[132] Historian of science Sarah Richardson interprets the finding in the following way:[133] Based on differences between their DNA maps – also known as genomes – men and women ought to be considered members of different animal species.[134] Richardson points out two discursive moves that ensue from this assertion. On the one hand, arguing that males and females have different genomes entails an analogy between sex and species; and on the other hand, this formulation carries along a reversal – if not a contradiction – *vis-à-vis*

> "You could say that there are two human genomes, one for men and one for women", says Huntington Willard, a geneticist at Duke University and coauthor of the article.

See also Richardson, 2010, p. 823 *supra* note 11 (for a detailed discussion of media reporting of the findings).

129 Maureen Dowd, "X-Celling over Men", *The New York Times*, 20 March 2005, available at http://www.nytimes.com/2005/03/20/opinion/20dowd.html, last accessed on 30 September 2011.

130 Duke Medicine News and Communications, 2005, *supra* note 126.

131 "The popular press and scientists alike have apparently fallen in love with the gene", Anne Fausto-Sterling, 1992, p. 62, *supra* note 13.

132 Maureen Dowd, 2005, *supra* note 129.

133 Richardson, 2010, p. 823, *supra* note 11.

134 In comparative genomic research about sex differences males are considered different species, based on the differences between their DNA maps. See, Richardson, 2010, p. 823, *supra* note 11.

the single genome paradigm dominant during the 1990's.[135] Furthermore, she observes that:

> Willard's construction argues this shift is part of a broader move in human genomics – a subfield within molecular biology that studies human DNA maps – toward studies of human diversity, focusing on the differences between different populations.[136]

The findings by Willard and Carrel signal the emergence of a "genomic concept of sex"[137] and a "genomic model of biological sex differences".[138] The uncritical embrace by genetic researchers of the newly found variations between male and female genes[139] – considered nothing less than astounding[140] – set up the stage for the breadth and scope of a discursive shift that has considerably transformed "in an often invisible way", thinking about genetic differences between the sexes.[141]

Richardson poignantly illustrates this point. First, she observes how the "genomic construction of biological sex differences"[142] inaccurately implies far greater variation between males and females than understandings of sexual difference still dominant in the 1990s. In doing so, she argues, they play "into traditional gender-ideological views of sex differ-

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[135] "Part of what gives Willard's statement […] its effect and significance is its startling reversal of the mantra of the 1990s Human Genome Project (HGP) – that there is a single human genome and humans are 99.9% identical". See Richardson, 2010, p. 827, *supra* note 11 (discussing how the existence of two different human genomes can be read as a reversal – if not a contradiction – of the 1990s *single human genome* mantra widely publicized by the Human Genome Project).

[136] *Ibid*.

[137] "Recent genetic research on human sex differences evidences the emergence of a 'genomic' concept of sex, analogizing sexes to 'species' and 'genetic populations". *Ibid.*

[138] *Ibid*.

[139] Richardson, 2010, pp. 827, 837–839, *supra* note 11:

> I find that there are not strong, empirical, explanatory, social, or ethical reasons for genomicizing sex differences. For these reasons, it is more advisable to refer to 'sex differences in the human genome' than to 'male genome' and 'female genome' […]. [T]here are not strong empirical, explanatory, social, or ethical reasons for genomicizing sex differences.

[140] Lauren A. Weiss, Lin Pan, Mark Abney and Carole Ober, "The Sex-Specific Genetic Architecture of Quantitative Traits in Humans", see http://genes.uchicago.edu/wp-content/uploads/ober/NatureGenet38-218-222.pdf, last accessed on 25 March 2012.

[141] See Richardson, 2010, pp. 830–831, *supra* note 11.

[142] See *ibid.*, p. 828.

ences".[143] Second, she points out how seeing males and females as different species is influenced by phylogenetics, a subfield of genomics that uses, and is criticized for using, population-based genetic variation (also known as profiling) to explain differences in health and disease between racial and ethnic groups.[144] Third, since this scientific model stems from the assertion that male and female genes differ systematically from each other, Richardson argues that it tends to discard altogether the idea of a single human genome – at least in the context of sex research. Thus, doing so implicitly legitimizes the scientific analysis of "males and females independently of the other".[145]

What Richardson describes is an extraordinary shift towards binary thinking about sex in biology that has largely gone unnoticed in other realms of knowledge, including feminist legal theory and practice.[146] Thus, the "methodological consequences [of this discursive move] for the study of the social dynamics of gender"[147] have been denounced by only a few voices in academia. Nonetheless, the fact that this is happening precisely at a time when sex-specific agendas proliferate in international legal feminist projects is of particular interest; chiefly, given the well-documented tendency in biology to "expand the relevance of explanatory categories beyond their empirically warranted limits".[148] Since there is evidence of the importance of the single human genome paradigm both for late 20th century science, liberal social discourse, and feminist agendas,[149]

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[143] "Thinking of males and females as having different genomes exaggerates the amount of difference between them […] playing into traditional gender-ideological views of sex differences". *Ibid*.

[144] *Ibid*.

[145] This is the case despite the fact that sexes do not meet any of the criteria required to be categorized as a species interbreeding, shared common ancestry, morphology, spatial and temporal boundaries. See Richardson, 2010, pp. 831–832, *supra* note 11.

[146] Despite its ubiquity in biological explanation, the foundations of the concept of sex (unlike that of species and population) in biology have gone largely unexamined. See, Richardson, 2010, p. 837, *supra* note 11. See also ("Indeed, binary thinking underpins 'genomic thinking' about sex difference in biology"); Carla Fehr, 2001, *supra* note 12.

[147] See Richardson, 2010, p. 837, *supra* note 11.

[148] John Dupré, *The Disorder of Things: Metaphysical Foundations of the Disunity of Science*, Harvard University Press, 1993, p. 79.

[149] See Richardson, 2010, p. 827, *supra* note 11:

the emergence of a two-human-genome paradigm merits – at least – that we raise some questions about the unintended consequence of prosecutorial practices that either assume or foster binary thinking about the sexes.

12.5. Some Questions about the Future of Thematic Prosecution

In this article, I have offered a reinterpretation of the emergence of international thematic prosecutions of sex crimes and the rise of sex-specific biomedical research as parallel tales of re-essentialization. I argue it is a scenario where international legal feminists have explicitly and implicitly engaged with biologically grounded notions of essential differences between men and women. Nonetheless, this tale of re-essentialization does not end with a lesson about how, when and why feminists should engage, reject or simply ignore biological explanations of sexual difference. Instead, it ends by raising questions about the ways in which these two feminist projects might be gesturing towards the emergence of a novel regime of ideological governance of sexual difference.

In this final section, I will step back from the parallel I have just presented in order to ask some questions that might help make sense of the ways in which two apparently very successful feminist projects have produced results that are gender essentializing. After all, is it not surprising that gender-coding disease and crime has led to gender essentializing? I invite future exploration of these questions.

Questions about binary reasoning. This chapter raises a series of questions regarding the vices and virtues of binary thinking for feminist agendas, in general, and for international legal feminism in particular. Why is binary thinking problematic? The problem with binary thinking derives from its potential to disguise problems of categorization.[150] The

> The power and importance of this idea of a single, shared human genome in the late twentieth century science and liberal social discourse should not be underestimated.

[150] "It is not the facticity of the two biological sexes that is problematic from the perspective of critical gender theory [search Fausto and google "the construction of sex"]; rather, it is *binary thinking* that carries the epistemic failure and leads to shaky reasoning about sex in biology […]. As gender theorists have observed, binaries invite dualistic, dichotomous thinking, so that it becomes difficult to think of two without subsuming one in to the other, ranking them, implying polarity or complementarity, or posing them as opposites [see books cited by Richardson, 2010, *supra* note 7, p. 838]. Binaries tend to imply exhaustive categories and to drive reasoning toward the detection of difference as fixed polarity". See Richardson, 2010, p. 838, *supra* note 12.

unjustified use of sex as an organizing category for analysing disease or crime, combined with the interchangeable use of sex and gender as categories of analysis and the reduction of gender to sex, are all different manifestations of binary thinking. As I discussed in sections 12.2., 12.3., and 12.4., these moves have had tangible effects for feminist advocacy projects (that is, obscuring commonalities across men and women, obscuring differences within each sex). I would add that ignoring binary thinking also dismisses feminist critiques of scientific categories of sexual difference.

Questions about categorisation. What is the relation, if any, between mutually exclusive categorization associated with binary thinking and subordination? I maintain that the story I have told in these pages is not simply a story about re-essentialization. It is also a story about a shift from a regime of epistemic subordination to a regime of oppression through categorization. When asking these questions it should not be forgotten that the two feminist projects that are the subject of my argument are part of a broader governance trend that gives overriding significance to sex and gender for understanding and managing male and female behaviour.

Questions about governance. The account I gave here has an institutional focus. It derives from an interest in understanding the conflicts and compromises that shape how international thematic prosecution of sex crimes becomes policy, practice, and institutional formations. Questions about governance are thus read as ways to better understand the processes by which social and legal changes take institutionalized forms. There are questions about the institutional formations that have followed the move towards re-essentialization in feminist advocacy agendas. What would it look like to create institutional formations that respond to sexual difference as variation instead of seeing it as dichotomous? Is there a way of ensuring that institutions do not get entrapped in the practice of governance I have presented in these pages?

Questions about governance also offer the possibility to engage with the place of governance *in* feminist projects. For example, the two feminist agendas I have analysed here can be read as manifestations of Governance Feminism. As such, they show the "incremental but by now

quite noticeable installation of feminists and feminist ideas in actual legal-institutional power".[151]

Questions about feminism. Last and surely not least, this article raises a series of important questions about feminist theory and practice. How does the phenomenon described here relate to the professionalization of feminists? How does it relate to the specialization of feminism? As Ellen Messer-Davidow has pointed out, specialization is part of the trajectory of disciplinary growth of feminism, one that tends to intensify the production of differences within feminist discourses.[152] However, commonalities between health and international legal feminists' activist strategies during the past two decades defy the tendency of feminism to grow towards difference within its own ranks. All the more relevant is that we consider how and when these two particular spheres of feminist advocacy align. Finally, there is the issue of professionalization, and how experts trained in gender within their own fields have become key players for the development of new prosecutorial and biomedical knowledge.[153]

[151] See Halley, Kotiswaran, Shamir, and Thomas, 2006, *supra* note 23.

[152] Ellen Messer-Davidow, 2002, p. 207, *supra* note 26.

[153] Steven Epstein, 2007, *supra* note 7:

> While an insistence on equality as sameness was a typical strategy of feminist movement in past decades, in more recent years notions of essential difference appear to provide strategic wedge specially to certain sectors of the women's health movement […] this wave […] reflects the professionalization of the women's health movement and the concomitant rise of some women (often white and middle-class) to positions of authority and influence […].

See also Richardson, forthcoming 2013, *supra* note 7 (Discussing how the women's health movement is about professional women's activism, professional women advocating for women's issues). What Epstein and Richardson have identified as the professionalization of women's health activism is illustrative of a well-documented global phenomenon since the 1980s: the professionalization of feminism altogether. See Sabine Langa, "The NGO-Ization of Feminism: Institutionalization and Institution Building within the German Women's Movement", in *Global Feminisms Since 1945* (Bonnie Smith ed.) 2000, p. 290:

> Globalization has changed the nature of women's activism […]. The reality of a visible women's movement is replaced by the professionalization of feminism, resting in the policy decisions of a few individuals.

Questions about genetics. Amidst this landscape of "geneticization",[154] is it possible to ignore the impact of genetics for international legal feminist advocacy agendas? After all, there are some serious feminist critiques of this tendency.[155] It is precisely in the context of evaluating thematic prosecution as institutional design and feminist practice as it is today, where there is space for thinking how we ought to engage with the science in thematic prosecution tomorrow.

[154] Antoinette Rouvroy, *Human Genes and Neoliberal Governance,* Routledge-Cavendish, 2008, p. 124 (discussing the concept as the ever growing tendency to distinguish people one from another on the basis of genetics).

[155] This question is inspired by the work of Anne K. Eckman. See Anne K. Eckman, "Beyond the Yentl Syndrome: Making Women Visible in Post 1990 Women's Health Discourse", in *The Visible Woman: Imaging Technologies, Gender, and Science.* New York University Press, New York, p. 145.