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'The Richness of the Jurisprudence That Is Absent'

Imagining a Different Legal Past

Patricia Sellers in conversation with Rosemary Grey

INTRODUCTION

For over three decades, Professor Patricia Sellers has been a leading feminist voice in international criminal law. In 1994, she was hand-picked by the inaugural Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) Richard Goldstone as his Special Advisor on Gender. She has since been Acting Head of the Legal Advisory Section and a prosecutor at the ICTY, and held three posts as Special Advisor to the ICC Prosecutor: first on prosecution strategies, then gender, and, since 2021, on slavery crimes. In 2024, she developed the ICC Prosecutor's inaugural Policy on Slavery Crimes. Sellers is on the law faculty and is a visiting fellow at Oxford University's Kellogg College, and has published widely on gender and enslavement in international criminal law. In 2000, she served as Chief Prosecutor of the Women's International War Crimes Tribunal on the Trial of Japan's Military Sexual Slavery, a people's tribunal that symbolically prosecuted and determined individual liability and state accountability for crimes committed against several hundred thousand 'comfort women' in Japanese military brothels before and during World War II.[1]

In this chapter, which is based on interviews with Rosemary Grey in 2022 and 2023, Sellers reflects on these experiences. The chapter extends this ICC feminist judgment collection in a unique way. In line with previous feminist judgment projects, most of this book's contributions take the form of a reimagined decision: the authors take an existing ICC judgment (or part of one) and rewrite it as if they had been on the Bench, equipped with the same submissions, evidence, and law as the real judges were, but rendering a judgment that seeks to be more gender-competent than the original.[2] This process can be described as a feminist rewriting of history: the

[1] T. Dolgopol, 'The Tokyo Women's Tribunal' in A. Byrnes and G. Simm (eds.), *Peoples' Tribunals and International Law* (Cambridge: Cambridge University Press, 2018) 84–106.

[2] Chapter 2, Introduction, in this book.

author goes back to their chosen moment in the ICC's past and produces an alternative decision, thereby revealing a road not taken in the Court's case law.

But here, Sellers takes us back even further in time, to cases adjudicated *before the creation of the ICC*. By imagining judgments that could have been made by previous international tribunals, she conjures up an alternative legal present and paves the way for an alternative legal future. Specifically, Sellers shows how contemporary jurisprudence on the crimes of 'enslavement' and 'slave-trading' might have been more gender-attuned had a deeper understanding of gender and intersectionality been embedded in international criminal tribunals in the past. Her thought-experiment reaches back to the beginning of contemporary international criminal law, with the trials of German and Japanese defendants in the International Military Tribunal (IMT or Nuremberg Tribunal) and International Military Tribunal for the Far East (IMTFE or Tokyo Tribunal) after World War II. It then moves on to the ICTY and International Criminal Tribunal for Rwanda (ICTR), and finally to current proceedings in the ICC.

By altering legal history in this way, the chapter resonates with the more experimental contributions to previous feminist judgment projects, such as Nicole Watson's entries in the Australian and Indigenous collections, which take the form of judgments that could hypothetically be rendered *if* Australia had made a treaty with its Indigenous people.[3] Such contributions veer off the guardrails of the 'feminist judgment method' proposed by Rosemary Hunter,[4] and in doing so reinterpret the method in thought-provoking ways.

In particular, Sellers' approach prompts us to consider the effect of legal precedent – of judicial analysis from past generations – on the development of international criminal law today. This issue of precedent is important in the ICC context. Legally speaking, the ICC is not bound by the principle of *stare decisis* (standing by past decisions) in the way that courts are in the common-law world. But in the practice of the ICC, legal precedents continue to loom large. In fact, ICC judgments regularly cite and follow decisions of the ICTY and ICTR, and sometimes also look to the Special Court of Sierra Leone (SCSL), Extraordinary Chambers in the Courts of Cambodia (ECCC), the Nuremberg and Tokyo Tribunals, and other courts that have adjudicated war crimes, crimes against humanity, and genocide. In addition, the career trajectories and educational pathways that lead lawyers and judges to the ICC provide an informal route by which ideas travel from past tribunals to this Court.

Therefore, to fully appreciate the limitations and possibilities of feminist judgment writing in the ICC, we need to contemplate the jurisprudence, absent jurisprudence, and forgotten jurisprudence of previous international criminal tribunals, as Sellers does here.

[3] N. Watson, 'In the Matter of Djaparri (Re Tuckiar)' in H. Douglas, R. Hunter, T. Luker, and F. Bartlett (eds.), *Australian Feminist Judgments* (Oxford: Hart, 2014) 442–451; N. Watson and T. Broderick, 'Dempsey v Rigg [1914] St R Qd 245' in N. Watson and H. Douglas (eds.), *Indigenous Legal Judgments* (Abingdon: Routledge, 2021) 189–205.

[4] See the discussion of Hunter's checklist in the Introduction to this book (Chapter 2).

THE CONVERSATION BEGINS

Sellers: I've been thinking a lot about the idea of absent jurisprudence. About the jurisprudence that we *don't* have, the jurisprudence that fails to inform us now. *I think we're living with the consequences of trying to imagine and legally characterise something that* could have been *given to us via precedent*, but was not. In international criminal law, we have certain 'holy books' of jurisprudence, but as feminist legal thinkers know, they are far from complete. I don't just mean the reductive call that 'there's no mention of the word rape in the Nuremberg judgment'. There's much more to it than that.

Grey: That is an intriguing way to begin, thank you. Where would you like to start?

On 'Comfort Women' and the Tokyo Tribunal

Sellers: I want to bring up the Tokyo judgment because it's so overlooked by most feminists. It speaks to something within us that we don't more closely examine the Tokyo jurisprudence for what is present in it. There's a lot of sexual violence present. But then, there is also a huge absence with the omission of the 'comfort women' crimes. Within the Tokyo Tribunal, there were no indictments that concerned the 'comfort women'. But we have an estimated 100,000 to 200,000 women wherein the crimes committed against them were not part of the evidentiary basis and certainly not part of the jurisprudence. Until today, we live in an absence of what that jurisprudence could have been like.

For example, that jurisprudence *might* have emphasised how women from a vast sphere of countries within Asia-Pacific were abducted, falsely recruited, and enslaved in a sexualised nature. And during their enslavement, continually transferred, reposted, etcetera, meaning continual slave-trading and enslavement. And because we don't have that as part of the IMTFE jurisprudence, we have an absence of understanding of that gendered aspect of enslavement and slave-trading over a long period of time in relationship to armed conflict. That lack of jurisprudence regarding 'comfort women' shows us very early on what could have been 'same-side sexual violence', an issue that we don't really understand until the ICC's *Ntaganda* case.[5]

Grey: When we discussed *Ntaganda* back in 2018, you described that appeal judgment as a 'high point' in the ICC's evolving jurisprudence, and

[5] The *Naganda* case is one of the ICC cases from the situation in the Democratic Republic of Congo. For background on the case, see discussion of the DRC in the Introduction to this book (Chapter 2).

observed that 'it hasn't really hit the international criminal law consciousness yet'.[6]

[*Editorial note:* In 2017 in the *Ntaganda* case, the ICC Appeals Chamber confirmed that the rape and sexual enslavement of female child soldiers by their commanders could constitute war crimes under Article 8(2)(e)(vi) of the Rome Statute, even though the putative victims and perpetrators were part of the same military force. This issue was contentious because the defence had argued that a war crime necessarily involves violations against persons or property affiliated with the 'other side', as opposed to crimes committed against members of one's own military force.[7]]

Would it have taken until 2017 to reach this 'high point' if the Tokyo Tribunal had addressed the question of 'same-side sexual violence' back in the 1940s?

Sellers: I believe that if we'd had jurisprudence regarding the 'comfort women', particularly those from Korea, which was a Japanese colony at the time, we would already have dispelled the myth that you can't have war crimes over your 'own' people over seventy years earlier.

Grey: And now the *Ntaganda* ruling has been picked up in Colombia too, so the idea that sexual crimes *within* a military force can be a war crime is starting to travel across time and space.[8] But as you said, this could have happened decades ago, had the Tokyo Tribunal looked at this issue.

Sellers: In addition, the Tokyo Tribunal could have provided a valuable intersectional analysis had it examined the slave-trading and enslavement of 'comfort women'. We can see the very racialised nature of enslavement within this context. Some of the women were indigenous, from Okinawa, Taiwan, Timor, and Burma. Those women's treatment were not only among the worst, but those were the women that enlisted men could have access to. Whereas some of the women who were the daughters of colonisers in Indonesia, who were white European women, were abused by the officer corps of the Japanese army. So, this racialisation of the different comfort

[6] R. Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court* (Cambridge: Cambridge University Press, 2019) 142.

[7] P. Viseur Sellers, 'Ntaganda: Re-alignment of a Paradigm' in F. Pocar (ed.), *The Additional Protocols 40 Years Later* (Sanremo: International Institute of Humanitarian Law, 2018) 116–136; Grey, *supra* note 6, at 274–278.

[8] See C. Laverty and D. de Vos, '"Ntaganda" in Colombia: Intra-Party Reproductive Violence at the Colombian Constitutional Court', *Opinio Juris*, 25 February 2020, available at http://opiniojuris.org/2020/02/25/ntaganda-in-colombia-intra-party-reproductive-violence-at-the-colombian-constitutional-court/.

women was part of the ideology of the perpetrators. We shouldn't be surprised; in the Asia-Pacific arena at that time, there was a highly racialised war. Japan was blatantly claiming racial superiority over the other countries in Asia and South-East Asia and Asia-Pacific. There were issues of class too. The women and girls recruited for work purposes were from working families that not only needed the money, but that could 'allow' their daughters to go to a foreign place with the hopes of bringing back money. But in the IMTFE, we really lacked this kind of intersectional gender analysis of the crimes committed against the 'comfort women'. I think that we have to be very cognisant of the richness of the jurisprudence that is absent by not having had that as part of the foundational Tokyo judgment jurisprudence.

Grey: The judgment from the Tokyo Women's Tribunal in 2000 showed us what that intersectional analysis of crimes against the 'comfort women' might have looked like.

> [*Editorial note:* After an extensive intersectional analysis, the Tokyo Women's Tribunal concluded: 'The Japanese military targeted women and girls primarily of subjugated populations viewed as inferior by Japanese Imperial culture, for the provision of forced sexual services because they were female and thus seen as disposable . . . The creation of the "comfort women" system reflects the intersection of discrimination based on both gender and race/ethnicity.'[9]]

And so do the chapters by Pryia Gopalan, Angela Mudukuti and Jarpa Dawuni on intersectionality in this book.[10] It's incredible to imagine how advanced intersectional gender analysis might be in international criminal law today if that legal interpretive approach had begun with the Tokyo Tribunal in the 1940s.

On the Ravensbrück Camp and Nuremberg Trials

Sellers: I also want to look at the other absent jurisprudence from the European theatre. We know that the Ravensbrück camp in Germany detained females (I assume they were female), let's say women, mostly above eighteen, but there might have been some younger. Why were they detained in this camp that wasn't necessarily a death camp for the Jewish population, but was certainly

[9] Judgment, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito Emperor Showa et al.*, Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, 4 December 2001, § 929.

[10] Gopalan, Chapter 7 in this book.

a detention camp that the National Socialist [Nazi] regime set up for females? Well, in Nazi ideology these women were outcasts, enemies of society. They were 'prostitutes', today we would say commercial sex workers, or considered to be lesbian, and therefore were not adding to the Nazi birth project of increasing the procreation of the Aryan race. They were women who might have been criminals under national penal law. All of these 'unsociable' female elements were gathered together at the detention camp. They were basically detained for not performing the expected gender roles of women in society, which is not examined in jurisprudence after the war.

That jurisprudence has not been examined to the extent that it could have been, given that some trials did occur regarding the Ravensbrück camp.[11] These trials mainly concerned the female guards employed at the camp. We have to ask ourselves, who were these female perpetrators? Some had already been female guards at domestic women's prisons, and some might have been recruited specifically for Ravensbrück. Therefore, you see the use of women to be guards over women who are considered to be outcasts. Among some of these female guards, it appears from the readings I've done, but not in the court transcripts, that some were lesbian women. It's an interesting choice by the National Socialist regime to deploy lesbians on the one hand as a productive part of society, to guard other women who were considered 'a-sociable', some of them for that same reason.

We really haven't explored those Ravensbrück trials to the commensurate extent that we've explored other subsequent cases from that period: the medical trial, the judges' trial,[12] and others tried in Nuremberg under Control Council Law 10. Those Control Council cases have entered the common knowledge, at least of those who want to be a little more nerdy about the Nuremberg proceedings. But we haven't focused on trials against women defendants or about female camps. We have lost a richness in potential jurisprudence, even with its own prejudices of the day, that might have allowed us to better understand the gender ideology that related to imprisonment, to crimes against humanity against a

[11] See M. J. Bazyler and F. M. Tuerkheimer, *Forgotten Trials of the Holocaust* (New York: New York University Press: 2014) 129–157.

[12] Known officially as *United States of America v. Karl Brandt et al. and United States of America v. Josef Altstötter et al.*, both prosecuted between 1946 and 1947 by an American military tribunal in Nuremberg under Control Council Law 10.

female German population that was attacked, thus persecuted, by German society.

If we looked more closely at the Ravensbrück cases, it also would inform how we understand the detention of women during periods of armed conflict later on. For example, when we come to Yugoslavia, we find the Omarska camp and other gender-separated camps, where females and males are detained separately. We would see a slight continuum of past conflicts. *It is horrific and terrible, but we would have places in our legal historical memory in which to slot the detention of women and help us understand this type of crime.*

On Gendered Deportation and Enslavement

Sellers: The last thing I will say, coming up from the Nuremberg and the Tokyo era, is that the relationship between deportation and slave labour was never analysed to the extent it might have been. Those tribunals certainly look at enslavement under crimes against humanity, more so with Nuremberg. In fact, there is part of the Nuremberg judgment that talks about 500,000 women being deported into Germany to work as domestic labourers.[13] This idea of deporting into enslavement is, I think, another way of saying they were slave-traded. We don't have that terminology within the jurisprudence, but certainly it could have been a more apt description of this very gendered example of slave-trading and enslavement.

And so, that consideration of gendered deportation, slave-trading, and enslavement is also absent from our jurisprudential background. There was no examination of the experience of this huge number of women being placed in German homes. As we know from historical experiences, they likely faced the kind of harsh treatment and sexual violence that maids and domestic workers confront when they're isolated in private houses, particularly by persons who are considered their enemy at this point in time. So, this is individualised domestic labour in relationship to armed conflict. It's not quite (imprisonment) detention, but it's a different type of framework. That type of framework might help us to understand more about the experience of enslaved Yazidi females, who have been placed in individualised homes today as 'domestic workers', and whose enslavement is also sexualised.

[13] See 'International Military Tribunal: Judgment and Sentence, October 1, 1946' 41(1) *American Journal of International Law* (1947) 172–333, at 330.

On Enslavement and the ICTY

Grey: I wrote down something you said before, 'the richness of the jurisprudence that is absent'. Building on that idea, what do you see as absent from the jurisprudence of the ICTY, the tribunal where you began to actively shape the international jurisprudence on sexual and gender-based crimes? Speaking about jurisprudence that we don't have, whose absence we're haunted by, we've previously talked about the ICTY's *Kunarac* case, in which you were on the prosecution trial team. Could you take us through your thoughts on that case?

[*Editorial note*: In 2001 in the *Kunarac* case, the ICTY rendered its first conviction of rape as a crime against humanity. The case also broke new legal ground by recognising that the detention by male Serb forces of Bosnian Muslim women and girls in homes in the Foča area of Bosnia and Herzegovina, where they were subjected to forced domestic and sexual servitude, amounted to the crime against humanity of enslavement. These historic convictions for rape and enslavement were upheld on appeal in 2002.[14]]

Sellers: Yes, I wanted to give this background, so I could finally elaborate upon the ICTY jurisprudence and the *Kunarac* case. Months ago, we were speaking about what's missing from the slavery jurisprudence. In doing that, I realised that the absences didn't start with *Kunarac*, and they probably won't end with *Kunarac*. I needed to recall the beginning, to the 1940s, to the foundations of international criminal law.

Within the ICTY jurisprudence, by the time the *Kunarac* case is delivered, we have already received the *Furundžija* and the *Čelebići* cases on sexual violence. There was an understanding from these cases that rape can be categorised as torture under the grave breaches of the Geneva Conventions, and also the customary-based war crime of outrages upon personal dignity. So, we're positioning ourselves within this 'rape as torture' compendium. Before that, there seemed to be a binary understanding of crimes against male and female. Males came under torture; women came under rape. False legal hierarchies were set up. We thought that if crimes against women could come under torture, that would show that we're as

[14] See K. D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' 21(2) *Berkeley Journal of International Law* (2003) 288–349, at 333–341.

important as men. So, there was this interest in linking rape and torture together.

At that time that we're investigating and drafting the indictment for *Kunarac*, we understand that *Čelebići* is coming out. There's a bit more comfort with understanding that rape, when done for certain purposes, can be torture. However, in *Kunarac*, we have evidence showing something *in addition* is happening to these females who were taken from the detention facility and into the soldier's homes, to be abused for weeks or months, which we eventually charged as their enslavement. I was legal advising on the case. It took some time to understand that there was something in addition to, if not more than, torture and rape. That in *Kunarac*, enslavement is happening, particularly when facts are being revealed of trading girls, and sales, and acts of that nature. *If we had had that World War II jurisprudence, that would have popped out at us without a blink.* We would have gone straight to charging enslavement, as opposed to having to go through the process of convincing colleagues, and making sure we could convince the judges.

At the time, this option [of charging forced sexual and domestic labour as enslavement] was completely off the radar of most of the feminists. We may make analogies by asking ourselves today: *what is off the radar, what can't we see because there hasn't been a precedent?*

On Slave-Trading

Sellers: So, going forward with *Kunarac*, we started to better understand the choosing, gathering, and transferring of females for sexual violence, until they were reduced to a situation of enslavement. But we had missed legally categorising the transfers, the instances of trading and selling women, as slave-trading, which is a different crime to enslavement. Slave-trading is the precursory conduct that can lead to enslavement: the earlier steps of selecting, relocating, and sometimes transacting of people, so that they can be reduced to a situation of enslavement.

That understanding could have been reached via precedent if we'd better understood at Nuremberg what the deportation of 500,000 women into slave labour meant, or at Tokyo, what the transfer on Japanese wartime frigates or battleships meant for the 'comfort women'. We would have followed that legal logic when interpreting Article 3 of the Yugoslav Statute, which was not an exhaustive list of war crimes. Rather, it allowed the pursuit of a war crime as long as it

was a serious violation of the laws and customs of war, and one could have individual criminal responsibility for it. It could be a war crime in treaty, or in customary international law. Therefore, both slavery and the slave trade could have been, or *should* have been, prosecuted under Article 3 of the ICTY Statute. This would have been following Rule 94 of the ICRC study of customary law.[15]

So those precedents also are missing from the ICTY. We don't have the customary law basis of slavery and [the] slave trade as war crimes inflicted upon the Foča women in the *Kunarac* case. The evidence was there, but neither the prosecution made submissions nor judges made observations of that nature in *obiter dicta*, which could have also clarified the issue. What they *did* say is that one does not need the sale of a person in order to prove enslavement. Now, we might go further and clarify that the sale of a person could indicate the war crime of slave-trading, but not necessarily enslavement. There were so many ways that this could have been clarified by submissions, or by adjudication. Instead, we have this absence in *Kunarac*. You also see that absence in the *Stanković* indictment.

[*Editorial note:* Like the *Kunarac* case, the *Stanković* case concerned the abuse of Bosnian Muslim women and girls by male Serb forces in the Foča area. Some of these girls were just twelve or fourteen years old. The prosecution alleged that defendant Radovan Stanković was in charge of an abandoned house owned by a man named Karaman. According to the indictment, Stanković 'not only stocked Karaman's House with Muslim girls and women so that Serb soldiers and other Serb men could sexually assault them, but also kept tight control on their movements'.[16] He was charged with the crimes against humanity of rape and enslavement, and the war crimes of rape and outrages on personal dignity, but there were no charges for the war crimes of enslavement or slave-trading. The case was referred from the ICTY to the Bosnia and Herzegovina State Court, where he was convicted of the crimes against humanity of enslavement, imprisonment, torture, and rape.[17]]

[15] This 2005 study by the ICRC is based on an extensive analysis of state practice in relation to the laws of war. Rule 94 recognises that under customary international law, slavery and the slave trade in all their forms are prohibited. See J.-M. Henckaerts and L. Doswald-Beck, *International Committee of the Red Cross: Customary International Humanitarian Law (Vol. I)* (Cambridge: Cambridge University Press, 2005) 327.

[16] Third Amended Indictment, *Radovan Stanković* (IT-96-23/2-I), ICTY, 8 December 2003, 'The Charges', § 3.

[17] K. Vigneswaran, 'Annex B: Charges and Outcomes in ICTY Cases Involving Sexual Violence' in S. Brammertz and M. Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) 429–481, at 476.

I maintain that this missing jurisprudence has influenced, or, I like the word you used earlier, has 'haunted' our approach to the subsequent ICC cases of *Katanga*, *Ongwen*, and *Ntaganda*. It's clear in those cases that the abduction of boys and girls into militia groups was really the precursory conduct, the slave-trading conduct, in order to reduce them to enslavement.

On the Rome Statute's Silences around Enslavement and Slave-Trading

Grey: Listening to you just now, I had another thought about the ongoing impact of absences in past jurisprudence. As you've written about before, enslavement and the slave trade are not listed as war crimes under the Rome Statute. It doesn't appear that the drafters deliberately considered and excluded these crimes, it just seems to have slipped people's attention at Rome. I wonder, if there had been strong jurisprudence from Nuremberg, Tokyo, and the ICTY about enslavement and slave-trading as war crimes, maybe this wouldn't have been forgotten at Rome, and we'd now see those war crimes in Article 8 of the ICC Statute.

Sellers: Yes, I think they would have been in the Rome Statute because the jurisprudence from Tokyo, and particularly from Nuremberg, is just so pivotal. What also could have occurred to encourage the placement of these war crimes in the Rome Statute is if they were enumerated in the ICTR Statute. In 1977, in Article 4 of Additional Protocol II, there is a prohibition of slavery and the slave trade in all its forms.[18] Those prohibitions were not picked up in the ICTR Statute, although other parts of Protocol II were included. Maybe, there was a presumption that the Rwanda conflict was about genocide, rape, and so forth, but it wasn't about slavery and slave-trading, so there was no need for their inclusion. In any case, I think *that* absence in the ICTR Statute contributed to these war crimes not even being concertedly considered during the drafting of the Rome Statute.

Grey: In your previous answer, you mentioned the ICC's *Katanga*, *Ntaganda*, and *Ongwen* cases as examples where the transfer of people into enslavement could have been classified as slave-trading,

[18] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (entered into force 7 December 1978), Art. 4(2)(f).

if that were a war crime in the Rome Statute. Could you elaborate on your reading of those cases?

Sellers: Right, I'm using *Katanga and Chui* as an illustration.[19] The Trial Chamber seems to have correctly adjudicated that sexual violence occurred; it was committed by the militia groups that Katanga and Chui were involved in, and female civilians were taken from one place to another. Here is where we get our preliminary jurisprudence on the 'sexual slavery' provision of the Rome Statute. But we can look at the facts prior to the sexual slavery, which is not attributed to the accused. Once again there is evidence of choosing, of transporting, of distributing women and girls. If we'd had the jurisprudence on slave-trading that I talked about before, we could have understood this evidence from *Katanga* as analogous to what happened to the 'comfort women', and what happened to the women in Foča. The judges might have characterised, in *obiter dicta*, those acts as slave-trading.

It's also a notable gap in *Ongwen*.[20] There, the Trial Chamber does a very thorough job of understanding the idea of abducting civilians to go into an enslaved workforce, and that within those civilians, the boys are later reduced to child soldiers, another form of enslavement. The girls are reduced to what is called '*ting tings*' [babysitters/domestic servants] if they are pre-menstrual, or to 'bush wives' if they are post-puberty and targeted to be sexually violated immediately. Now, looking back, we understand that the Trial Chamber is deliberating about their abduction and further distribution. These boys and girls were slave-traded until they were enslaved as child soldiers or as *tings tings* or as bush wives. When the fighter in charge of those enslaved children died, sometimes the children were slave-traded again. It perfectly fits into the 1926 and 1956 definition of slave-trading,[21] which can occur as a precursor to enslavement, but also subsequently, whenever enslaved persons are taken to new situations of enslavement. If we had the jurisprudential precedents that I spoke about earlier, and if that had led to the

[19] The *Katanga and Chui* case is one of the ICC cases from the situation in the Democratic Republic of Congo. For background on the case, see discussion of the DRC in the Introduction, in this book (Chapter 2).

[20] The *Ongwen* case is the ICC's only case on public record from the situation in Uganda. For background on the case, see discussion of Uganda in the Introduction in this book (Chapter 2).

[21] League of Nations, Convention to Suppress the Slave Trade and Slavery, 60 LNTS 253, 25 September 1926 (entered into force 9 March 1927), Art. 1(2); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 UNS 3, 7 September 1956 (entered into force 30 April 1957), Art. 7(c).

inclusion of slave-trading as a war crime and as a crime against humanity in the Rome Statute, we could have understood this evidence in *Ongwen* as the slave-trading of children. *Ntaganda* gives us similar situations where children are abducted, kidnapped, transferred, and distributed.

Grey: And in your view, what are the stakes of the fact that slave-trading is not listed as a crime in the Rome Statute, that there isn't a legal lexicon to characterise that precursory conduct as 'slave-trading'. Could you explain, why does that matter?

Sellers: That is a good question. One could say 'it really doesn't matter because there was enough other evidence that led to convictions', or 'it really doesn't matter because there are other important precedents set by those ICC cases', or 'why don't we just call that "other inhumane acts?"' But I would say those are insufficient answers for three reasons.

First, if we could return to the women placed in Nazi households as domestic workers, or to the 'comfort women' or to the women in Foča, and decidedly describe what happened to them, I think it was just as terrifyingly criminal to be chosen and relocated, prior to any of the enslavement occurring. Those very acts – placing me on your battleship and transferring me from Okinawa to the Philippines – those are criminal acts and that should have been characterised as slave-trading. I was in essence a victim/survivor of an international crime in that very moment; but it is a crime that international courts have chosen to ignore. So, from the victim/survivor point of view, to say that we'll examine enslavement but not slave-trading really is not to undertake responsibility as a judicial actor in relationship to the survivor. So, the first reason is that we're denying the survivor recognition of the panoply of crimes that were committed against them.

Second, international criminal law has evolved to become a combination of [Continental] civil law and Anglo-Saxon law. Within that civil law aspect, the judges are to be presented with as full a rendition of the criminal conduct as possible. For example, in the Yugoslav context, we didn't omit the detention crimes of someone. If they're killed in detention, we did not only focus on the murder. We'd look at the whole sequence: they were forcefully transferred, they were detained, and then the killing occurred. No one would say 'Let's just get the killings'. Likewise, one has to question why, when it comes to enslavement, particularly of women and children, do we jump over slave-trading? What is the impact of jumping over that crime, especially from a gender point of view?

The third rationale is that it is completely contrary to the idea of using the entire panoply of available legal tools, if we are really serious about atrocity crimes. Right now, there is a lot of discussion about use of the crime of aggression from customary international law, since it can't come before the ICC. It shows the importance of understanding the legal tools that are available, even the customary legal tools. So, skipping over or ignoring other legal tools, like the customary international crime of slave-trading, seems discordant with the project of access to justice, to judicial remedies, and, eventually, to reparations.

One could say that it's only because the slave-trade jurisprudence is absent, as you and I have discussed. Well, that's still not a reason for not utilising customary international law, or indeed for amending the Rome Statute to insert slave-trading under Article 7 as a crime against humanity and slavery and the slave trade under Article 8 as war crimes. These are among our earliest international crimes. They continue to haunt parts of society and are among the most egregious long-term crimes that states have perpetrated. They should not be overlooked.

On the Bifurcation of 'Enslavement' and 'Sexual Slavery'

Grey: I wanted to ask you now about two crimes that *are* in the Rome Statute: 'sexual slavery' and 'enslavement'. As you know, there's been a tendency in ICC cases to bring charges of 'sexual slavery' where sexual violence happens to a person who is enslaved. The option of charging that as 'sexual slavery' didn't exist before the ICC, because previous tribunals didn't have that crime in their statutes. Therefore, they used 'enslavement', as you did in *Kunarac*. A lot of feminist scholars see it as a win that the Rome Statute recognises both 'sexual slavery' and 'enslavement', and the Women's Caucus pushed for this at Rome. But as you've written about before, this isn't necessarily a step forward in all respects. It implies that sexual and reproductive violence are separate to 'enslavement', when in reality, losing control over one's sexuality and reproductive capacity have always been part of what it means to be enslaved.[22] Can you say a few words

[22] P. Viseur Sellers, 'Wartime Female Slavery: Enslavement?' 44 *Cornell International Law Journal* (2011) 115–142; P. Viseur Sellers and J. Getgen Kestenbaum, 'The International Crimes of Slavery and the Slave Trade: A Feminist Critique' in I. Rosenthal, V. Oosterveld, and S. SáCouto (eds.), *Gender and International Criminal Law* (Oxford: Oxford University Press, 2022) 157–186.

on this? What is *lost*, in your view, when sexualised enslavement is charged as 'sexual slavery' rather than 'enslavement'?

Sellers: Under the Rome Statute we have the crime of sexual slavery. In many ways, that was a feminist victory. That victory was very much influenced by the *Kunarac* case. We'd brought the first indictment (which included the enslavement charge) before the Rome Conference preparatory meetings concluded. The *Kunarac* appeals jurisprudence was rendered after. When you look at how enslavement is defined under customary international law, in that case, the judges opine about the psychological control over the person, the physical control, the control of the sexual access to the person, and so forth. Thus, the crime of enslavement has many indicia of how the powers attaching to the rights of ownership were exercised over the person. At that time period, there was very much of a fixation of the sexualised nature of the enslavement of the Foča women. *That sexualised component of the crime of enslavement became, in some manner, reduced into sexual slavery in the Rome Statute, as opposed to being enlarged into understanding that enslavement is sexualised.*

In the Rome Statute, the provision of sexual slavery highlights certain sexual acts and *actually swallows up the wider enslavement, including other sexualised acts of enslavement.* The elements of 'sexual slavery' are that someone is exercising powers of ownership over the person, *and* causing the person to engage in 'acts of a sexual nature'. In essence, sexual slavery has the proverbial tail wagging the dog. Historically, enslavement usually involved sexual harms. So, I advance that we need to recapture the conceptualisation of the sexualised nature of 'enslavement' and eliminate the provision on 'sexual slavery'.

Even as we examine sexualised enslavement today, being held out for an 'act of a sexual nature' is a reduction of what enslaved persons undergo. The current evidence of the enslavement of women and children, whether it's Yazidis, or in ICC cases, we can understand that sexualised enslavement can mean that a person has powers attaching to any or all of the rights of ownership even without being caused to engage in an 'act of a sexual nature'. For example, in the *Ongwen* case, the women who were subjected to forced pregnancy were all enslaved. But being pregnant is not seen as being caused to engage in an 'act of a sexual nature', so forced pregnancy was not charged as part of the sexual slavery. Likewise, the *ting ting* girls who were groomed as future wives, but were pre-menstrual, and who had

not yet been raped, did not comprise part of the charges of sexual slavery either. Nevertheless, they endured sexualised enslavement because they *were* sexualised. Even while they were pre-menstrual, their enslavement was sexualised. They were guarded and watched to see what their physical sexual development would be, so that they could then be redistributed, that is slave-traded, as 'bush wives' when the time came. I think that boy soldiers are sexually enslaved also. They're told when they're allowed to rape, or be awarded a 'wife'.

Grey: I see your point. The crime of 'sexual slavery' as currently defined requires proof of an 'act of a sexual nature'. But there are ways that enslaved people are sexualised, even if they haven't been subjected to rape, or groping, etcetera, because their captivity is sexualised in other ways.

Sellers: Absolutely. And let me give you another historical example. When examining practices in what is referred to as the East African slave trade or Arab slave trade, very often boys under eighteen were slave-traded into the harems of the Ottoman empire. During a stage of the slave trade, these youthful males were castrated. The official word is gelded. Their enslavers wanted males whose physical reproductive system was neutered in order to interact with and guard the females of the harem, who also were sexually enslaved. So, in essence, both males and the females endured a sexualised enslavement. But one couldn't say these males would be victims under 'sexual slavery' in the ICC's definition, because they were not caused to engage in an 'act of a sexual nature' while enslaved as eunuchs.

On Feminist Judging

Grey: I have just loved what you've brought to this conversation, which is the idea of how a gap in the jurisprudence back in the 1940s can continue to limit our understanding of sexual and gender-based crimes. We've been talking mainly about the crimes most relevant to your current ICC advisory role, being slave-trading and enslavement. But your idea holds true for other crimes as well. My final question is about what feminist or gender-sensitive judging means to you. In a way this whole interview answers that question, by thinking about how judges could have been more gender-sensitive decades ago, and how that missing jurisprudence makes it even harder for judges to fill in those gaps now. But is there anything else you would like to add to that?

Sellers: I think if we start with the premise that judgments are supposed to render justice, then a feminist lens has actually enlarged our understanding of what justice is. A feminist judgment really centres the human being in their complexity to make sure that that human receives justice. As with many social movements – the movement for ability or disability, or the movement for the environment – they allow other human beings, who might not be involved in those movements, a fuller expression of their ability to enjoy rights.