The Justice of Humans?
Outline of a Feminist Social Theory of International Justice

In 2014, women peace activists from Syria and Bosnia met to discuss peace-building, gender-based violence, and justice. Their aim was ‘the exchange of ideas and experiences between women who have gone through and are going through war’. They met in Sarajevo in Bosnia and Herzegovina as part of the ‘Women Organising for Change in Bosnia and Syria’ initiative of the Women’s International League of Peace and Freedom. The question of justice was central to these discussions. What did it mean to the women of Bosnia following the war in the former Yugoslavia? And what might it mean for the women of Syria whose war has yet to end?

The peace activists wanted justice for international crimes committed during the Yugoslavian and Syrian conflicts. These included wars of aggression (crimes against peace), attacks on civilians (crimes against humanity), the destruction of ethnic, racial, religious, or national groups (genocide), and war crimes (violations of humanitarian law). They also wanted justice for the sexual and gender-based crimes committed during these conflicts. Justice for these gendered crimes was seen as an essential part of the wider cultural, economic, and social justice needed to build a sustainable peace in their war-affected societies. However, the peace activists also asked what forms that justice could, or should, take. How, then, to describe current forms of justice for international crimes? What ideas and practices of justice do they offer? What persons and societies do they envisage? And what prospects for social transformation do these forms of justice offer to victims of war and societies in conflict?

To answer these questions, this book develops a feminist social theory of justice for international crimes. It builds this social theory upon a case study of the justice that women peace activists are seeking in Bosnia and Syria, and on the feminist social theory of justice developed by Barbro Svedberg and Laila Alodaat and their colleagues in Women Organising for Change in Bosnia and Syria (Geneva: Women’s International League for Peace and Freedom, 2014).
study of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Women’s Court (Women’s Court). The book undertakes the first study of the completed proceedings of the ICTY and of the Women’s Court, focusing on their treatment of the international crime of sexual violence. The ICTY and the Women’s Court are two leading and contrasting examples of justice for international crimes committed in the Yugoslavian conflicts of the 1990s. They exemplify existing forms of ‘legal’ and ‘feminist’ justice, which are characterised by distinctive practices, values, and aims. The book analyses the different models of justice of the ICTY and the Women’s Court and examines what they offer to those seeking justice for international crimes.

The establishment in 1993 of the ICTY by the United Nations Security Council (UNSC) marked the emergence of international criminal law as the dominant form of international justice.² The ICTY was the first truly international criminal court established and mandated by the United Nations (UN).³ It was established on an ad hoc basis for the limited purpose of prosecuting serious violations of customary international humanitarian law committed during the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) into its constituent states. The ‘Yugoslavian’ wars were fought from 1991 to 2001, and so began over a year before the ICTY was established. They can be described as a series of interlocking conflicts, beginning with secessionist conflict in Croatia in May 1991, the secession of Slovenia in June 1991, and the outbreak of hostilities in Bosnia and Herzegovina (BiH) in April 1992, in Kosovo in February 1998, and in Macedonia in January 2001. Bosnia is generally regarded as the most conflict-affected country. Under the ICTY’s Statute, the violations criminalised under international law included war crimes (grave breaches of the Geneva Conventions and violations of the laws or customs of war), genocide, and crimes against humanity. These are considered the ‘core crimes’ prohibited by international law, together with the crime of aggression, which was not included in the ICTY’s subject jurisdiction. With the establishment of the ICTY, sexual violence as an object of international criminalisation also emerged. Sexual violence was charged in operative indictments or judicially considered in

³ The International Military Tribunals at Nuremberg and Tokyo were established by the major Allied powers, and not the UN as an international organisation.
43 of 61 completed cases under all core crime categories. By the time of the ICTY’s closure on 31 December 2017, its jurisprudence had established the legal basis of sexual violence as an international crime. The ICTY had shown that sexual violence was an integral part of the illegal conduct of these conflicts and that it could be successfully prosecuted.

The Women’s Court was the first women’s court held in Europe to address international crimes committed in a specific conflict and the first transitional justice mechanism established in the region of the former Yugoslavia. Crucial to its establishment was the perception that the ICTY had not provided justice to women victims of war or created a just peace for all – including women. In contrast, the Women’s Court aimed to make women, and their experiences of war, central to building an alternative form of feminist justice. Ultimately, the aim of the Women’s Court was to contribute to building a just peace in the region of the former Yugoslavia. The formal organisation of the Women’s Court by non-governmental organisations across the former Yugoslavia began in 2010. The formal proceedings of the Court were held in May 2015 in Sarajevo and consisted of two days of testimonies, with oral and written preliminary decisions issued by the Judicial Council. The ‘thematic crimes’ considered by the Women’s Court were: (1) ‘War against the civilian population (militaristic/ethnic/gender-based violence)’; (2) ‘Woman’s body – a battlefield (sexual violence in war zones)’; (3) ‘Militaristic violence and women’s resistance’; (4) ‘Persecution of those who are different, in war and in peace (ethnic violence)’; (5) ‘An undeclared war (social and economic violence, women’s resistance)’. Thirty-eight victim witnesses and twelve expert witnesses from the

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5 See: https://www.zenskisud.org/.

6 Women’s Court, Program May 7–10, 2015, Bosnian Cultural Centre, Sarajevo, on file with the author.
former Yugoslavia testified before some five hundred people attending the Court.

The book focuses upon the rapidly developing international crime of sexual violence as the most condensed expression of developments in international justice, rather than treating it as an exceptional crime of war in conflict or law. During the Yugoslavian conflicts, it is estimated that 12,000–50,000 women were victims of rape.\footnote{The estimate of 20,000 victims is generally accepted. It was first provided by the European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia, Warburton Report, (1993) E/CN.4/1993/92, para. 14, and is affirmed by Mahmoud Cherif Bassiouni in Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia (International Human Rights Law Institute, De Paul University College of Law, 1996), p. 10} Sexual violence against men was also a recognised feature of the conflict, although occurring at a significantly lower prevalence.\footnote{This is not challenged by the figure of 4800 male victims commonly cited from Lara Stemple’s work. The figure should have referred to women, and not men, and was a typographical error in Stemple’s source, an earlier UN Population Fund study, ‘Sexual and Gender-Based Violence in Post-Conflicts Regions’, authored by Zeljka Mudrovic. Personal communication, Zeljka Mudrovic, 2015.} While precise figures are unknown, it is generally accepted that sexual violence was the most pervasive and visible gender-based violence against women in the Yugoslavian conflict. It should also be considered a gender-based crime as the overwhelming majority of perpetrators were men.\footnote{For further discussion, see Chapter 4.} Sexual violence is also the area in which international criminal law claimed the most significant advances in offering justice for gender-based crimes. Sexual violence offences are a crucial but contentious category of international crimes, and evidence of sexual violence was considered by both the ICTY and the Women’s Court. The different approaches of the ICTY and the Women’s Court to sexual violence crimes reveal the different models of the self and of society that underlie their models of justice. They also exemplify the differences between legal and feminist models of justice as social repair or as transformation, revealing what is at stake in these different models of justice for societies in or emerging from conflict.

This book develops a feminist social theory of the existing legal and feminist forms of international justice and a socio-legal methodology for empirically investigating them. It argues that we need to understand these forms of justice for international crimes as the ‘justice of humans’. ‘Justice’ is a human activity, which expresses the relations and values of human society. Accordingly, we need to understand ‘international
justice’ as a form of human social life, rather than thinking it through abstract moral concepts or legal principles removed from social relations. Accordingly, the book focuses on understanding legal and feminist forms of international justice as social phenomena. It shows how ‘international justice’ is a human activity that expresses social relations and values and is an integral part of the constitution of modern global social relations. Accordingly, I use the analytic categories of social theory, the subject and the social, to capture the social dimensions of international justice.

The book examines two interrelated ‘social’ dimensions of international justice. The first ‘social’ dimension is its constitution of categories of persons and of society. These categories describe the specific construction of subjects (the characteristics attributed to personhood) and society (the organisation of social relations in collective social life) in legal and feminist forms of justice. The second ‘social’ dimension is that international justice is an integral part of transnational social processes and forces. International justice exists as a part of a global social system, which is ‘a world-scale complex of relational networks or social structures’.10 I take this important insight from world-system analysis, which uses the ‘world’ rather than nation-states as the appropriate unit of analysis for capturing interconnected social relations on a global scale.11 However, I use the idea of ‘global social system’ to capture the totality of transnational social relations rather than ‘world-system’, because of the economic reductionism, neglect of ‘cultural’ politics, and missing gender analysis in this approach.12 This idea of the global social system also emphasises that international justice is an integral part of wider shifts in transnational social relations. These transitional social relations are currently in transition in the social forces of globalisation, that is, the ‘intensification of global interconnectedness’.13

The book is divided into two parts. This introductory chapter outlines the feminist social theory and socio-legal methodology. Part I, Subjectivity and Sociality in Contemporary International Criminal Law, examines the ideas of persons and society that inform the foundational legal concepts of the international crime, the international legal

12 Discussed in Chapter 6.
subject, the international trial, and international justice in international
criminal law. Using the ICTY as a case study, this book shows how this
legal form expresses the hierarchies of harm, person, and state in the
contemporary international legal order and emerges in the broader
context of globalisation. I argue that international criminal law’s trans-
formative potential cannot be found in its models of international justice
as social repair. Part II, ‘The Women’s Court and Transformative
Feminist Justice’, examines alternative models of international justice.
Using the Women’s Court as a case study, the book sets out an alterna-
tive feminist approach to justice. I examine the concepts of harms, justice
proceedings, subjects of justice and transformative justice in this alterna-
tive model and show how it also emerges in the broader context of
globalisation. The book describes how legal and feminist forms of justice
build social relations in different ways and argues that the transformative
potential of the feminist approach to justice can be found in its model of
building emancipatory social relations. I argue that this alternative model
of justice offers the basis for developing a feminist approach to inter-
national criminal justice. The book concludes with strategies for building
a feminist approach to international criminal law in practice. The strate-
gies include developing an alternative legal framework, together with
framework principles for conflict-related sexual violence prosecutions
and for a draft international convention on sexual violence as an
international crime.

1.1 Building a Feminist Social Theory of International Justice

How do different forms of international justice construct what is to be a
person and the relations between members of a society? How do their
justice institutions and practices shape the social life of individuals and
collectives? And what do they imagine a just society to be? To answer
these questions, it is necessary to build a feminist social theory that can
describe the existing forms of legal and feminist justice and explain how
these forms express or transform global social relations and forces. Such
a theory needs to be able to describe these distinctive forms of justice,
explain why they take these forms in particular historical and social
conditions, and analyse whether they reproduce existing social orders
or produce new social relations.

The first step in building this social theoretical framework is to develop
a concept of international justice as a form of law. The fundamental
premise of the dominant contemporary form of international justice is
that it is legal. International criminal law is a body of formal legal rules, which prohibits certain categories of violence (but also permits others) at the international level. Its prohibitions are criminal, that is, they nominate certain acts as defined criminal offences with the juridical consequence of punishment, following determination of culpability at trial.\textsuperscript{14}

There are clearly many forms of international justice, actual and possible, legal and non-legal. To explain why the dominant form of international justice takes the form of international criminal law requires answering what the Marxist international legal theorist China Miéville describes as the ‘basic ontological question’: ‘why law?’ It involves explaining ‘how law can be a political process . . . and yet how there is something in the structure of the modern social relations which maintains the integrity of the peculiarly legal form of conceptualising and articulating claims’.\textsuperscript{15} The challenge, then, is how to address international criminal law ‘in its specificity as a historical practice which operates through particular forms and mechanisms which are real, effective and differentiated, and which are related but irreducible to broader social relations’.\textsuperscript{16}

To begin to answer this question, I draw on the legal form theory of the early Marxist legal theorist, Evgeny Pashukanis (as does Miéville). In his general theory of law, Pashukanis argues that it is not that law regulates social relations but that under certain conditions ‘the regulation of social relationships assumes a legal character’, that is, they assume a legal form.\textsuperscript{17} For Pashukanis, law is a specific set of social relations. His general theory of law develops a method of analysing the legal form, that is, a set of principles for undertaking a materialist analysis of law as specific form of social relationships. First, the analysis of the legal form identifies ‘the basic juridic abstractions’ of legal norms, subjects, and relations.\textsuperscript{18} Abstract legal categories, such as the legal person and contract, express the fundamental elements of the legal form, such as the autonomous individual able to enter into contractual relations of equal exchange. Second, the analysis examines the relationship between the

\textsuperscript{14} Kunarac et al., ICTY-96-23&23/1-T, Judgement, 22 February 2001, para. 470.
\textsuperscript{15} China Miéville, Between Equal Rights (London: Pluto, 2005), p. 43. Emphasis in quoted texts throughout the book is as in the original, unless otherwise specifically stated as added.
\textsuperscript{17} Evgeny Pashukanis, Law and Marxism (London: Ink Links, 1978), p. 79.
system of legal concepts and the concrete historical social relations from which they emerge. Abstract legal categories, ‘which are the closest definitions of the legal form, in general reflect specific and very complex social relations’. In this context, ‘abstract’ does not imply that legal categories exist as an ideal but rather that they express concrete social relations in an abstract form. Pashukanis argues that ‘the categories of law are objective forms of thought (objective for the historically given society) corresponding to the objective social relations’. His aim was to understand law as a ‘historical form of regulation’ that emerged from the social relations of capitalism. Accordingly, his analysis examines legal concepts as products of social orders and asks how their legal form expresses concrete social relations.

Legal form theory enables us to answer a fundamental question for a social theory of international justice: why does international justice take a legal form? Crucially, it provides the basis for an answer that avoids both idealist and economistic theories of law. This approach avoids an idealist conceptualisation of international criminal law, which presumes that it consists of moral values and legal norms, disconnected from their concrete existence in social institutions and practices and the social world that produces them. Instead, it asks under what specific historical conditions do global social relationships take the form of international criminal law. It also avoids an economist conceptualisation of international criminal law, which presumes that law simply reflects capitalist class interests. This is because, for Pashukanis, the legal form is an integral element of commodity exchange in capitalist social relations. The legal relation has actual concrete existence – in legal rules, institutions, and practices – which is an integral part of the production of capitalist social relations. The legal form is neither antecedent nor posterior to capitalist social relations. Rather, ‘the juridical moment [...] is a constitutive part of it’. For Pashukanis, the legal form is an integral part of the production of capitalist social relations.

The legal form theory, then, provides an analytic approach for describing the organising concepts of persons and social relations in legal and feminist forms of justice and for understanding why they take particular

19 Ibid.
20 Pashukanis, Law and Marxism, p. 74.
forms under specific historical conditions. In building on this analytic approach, I do not follow Miéville’s influential development of Pashukanis’ theory of modern international law as ‘the legal form of the struggle of capitalist states among themselves for domination over the rest of the world’.23 While recognising the importance of Miéville’s account of imperialism and international law, it does not develop a theory of international criminal law, other than briefly describing it as a form of hegemonic policing that enforces supposed international legal norms.24 Pashukanis himself did not provide such a theory, as international criminal law as such did not exist at that time. However, he did examine the distinct expression of the legal form in both international law and criminal law, analysing them as different areas of law with distinctive juridical categories. Accordingly, I follow Pashukanis in engaging with the distinctive juridical categories of international criminal law, which arise from its concern with individuals, rather than states, and international crime, rather than the ‘contractual’ relations between states. Finally, unlike Miéville (and Pashukanis), my approach does not assume that the imperialist state monopoly capitalism that international law is thought to express remains unchanged in our new global orders.

Equally importantly, a feminist social theory of international justice must engage with what Rada Iveković describes as ‘the social relations of sexes’.25 Iveković analyses violence against women in socialist and capitalist modernity, thereby situating it in the long-standing debate within socialist Yugoslavia concerning the priority of working-class or women’s emancipation and highlighting the problem of Marxist theory that does not engage with gender relations. Because of the book’s focus on sexual violence, addressing sexual social relations is crucial. Conflict-related sexual violence both makes visible gendered international violence and shows the ‘hidden gender’ of the supposedly gender-neutral international criminal law.26 However, to address sexual violence requires more than simply adding women to theories of legal subjects or adding gender to accounts of legal institutions or practices. Rather, it involves developing

23 Pashukanis, Selected Writings, p. 169.
an account of how not only capitalist social relations but also sexual social relations are part of systems of exploitation and commodification in the global order. As such, engaging with the social relations between the sexes must be an integral part of a feminist account of the legal form.

Accordingly, a feminist social theory of international justice needs to account for interlocking systems of exploitation in global social relations and to understand how these structures shape the global social system. Marxist theorists such as Wallerstein and Pashukanis emphasise capitalist economic relations (characterised by private ownership, exploitation and commodification of labour and resources, the exchange of commodities, and the accumulation of capital) and the political and economic domination and exploitation of states by other states (imperialism for Pashukanis or core-periphery state hierarchies for Wallerstein). However, feminist social reproduction theorists, such as Maria Mies, argue that such relations also involve patriarchal gender relations (the exploitation of women as a class by men). As Mariana Valverde describes, Mies’ important work ‘considered the scale now called transnational or global to be crucial to [her] analyses of gendered subjectivity and patriarchal power’ and is notable for her feminist reworking of Wallerstein’s world-system analysis. Mies proposes a triple system of intersecting structures of exploitation for understanding the globalising world system and offers a crucial reframing of global social relations for a feminist social theory of the legal form.

Building a feminist social theory of international justice requires explaining not only the legal form of justice of international criminal law but also the feminist form of justice of the Women’s Court. Iveković argues that the question of the social relations of the sexes is integral to the political challenge and possibility of developing the feminist approach to justice of the Women’s Court. Accordingly, my social theory needs to move beyond the limits of the legal form theory to include three characteristics of the Women’s Court. The first characteristic is that the Women’s Court is a form of non-state justice. It is not a form of state law, nor does it derive from sovereign power. Moreover, it

27 Marie Mies, Patriarchy and Accumulation on a World Scale (London: Zed Books, 1999), p. 36. This is known as the ‘dual systems’ debate, which concerns how to theorise patriarchy and capitalism as integrated rather than separate systems.