

Hidden Constructs of Sexual Victimization of Men and Boys in Armed Conflict: Prosecutorial and Jurisdictional Trajectories of the International Criminal Courts and Tribunals

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Abstract

During armed conflict, sexual violence against women regularly takes on different forms than against the male gender. Frequently, men and boys are attacked either by coercion to witness sexual violence committed against their family and community members, or to rape and sexually assault others. The shared feature of both forms of such victimization is that they rarely constitute an attack on the individual alone. Instead, they are utilized by perpetrators as a war tactic to debase entire communities. Protection for male victims of these forms of sexual violence is limited due to a disconnect between formal statutory provisions under International Criminal Law (ICL) criminalizing sexual violence and the jurisprudential interpretation thereof. The jurisprudence of the international criminal courts and tribunals has been widely criticized in academic literature for misclassifying sexual harm against men and accommodating it incoherently under various provisions other than the explicit sexual violence norms. The prosecutorial and jurisprudential dichotomy partly originates in the lack of clarity surrounding these selected forms of sexual violence. In light of their devastating impact on men and boys, this article aims to map the inconsistencies within and between selected international criminal courts and tribunals and prompts to rethink current international criminal jurisprudence to coherently address and condemn such forms of sexual violence.

I. Introduction

Traditionally, sexual violence has been considered as an offence committed by men against women. While sexual violence against women has thus received significant and almost exclusive attention within the international community, recognition and ‘intervention to address male-centred sexual harms remains elusive and marginalized’ despite constituting a frequent

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occurrence.¹ Only with the advent of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) the international community began to gain awareness of the heinousness with which the acts are committed. However, whilst the number of sexual crimes targeted against males is higher than ever presumed, the actual extent of the atrocities is unknown as it is dimmed by under-reporting.²

According to Petchesky, sexual violence against men takes on different forms than against women.³ Especially in armed conflict the most commonly prosecuted crimes are direct forms of sexual violence against men, such as rape, sterilization, castration and beatings of genitals. Much less recognized and addressed are instances where a man is forced to rape other men and women or forced to watch the rape and sexual assault of his relatives or community members. It is to such marginalized categories of sexual violence against men that this article is devoted to.

Oosterveld identifies three gaps that perpetuate male-targeted sexual violence:

- a. considerable under-reporting of sexual violence leads to an information gap,
- b. a social gap created by stereotypes deeply rooted in traditional ideas of masculinity silences male victims to speak out,
- c. additionally, due to a lack of a coherent prosecutorial and jurisdictional strategy, certain types of sexual violence against men are in practice misclassified as non-sexual and incoherently prosecuted under diverse labels by the international criminal courts and tribunals, thus creating a legal gap.⁴

The two forms of sexual violence under consideration contribute to the legal gap. This article contends that if the legal gap can be closed by devising a comprehensive policy under ICL, it can cause a shift in the other two interdependent gaps. However, before attempts can be made towards a coherent prosecutorial and jurisdictional practice, it is indispensable that a common understanding of sexual victimization of men and the need to hold perpetrators accountable for such forcing men to commit or witness sexual violence is reached.

¹ F Ni Aolain, C O'Rourke and A Swaine, 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2015) 28 *Harvard Human Rights Journal* 97, 109.

² ALM de Brouwer and I Ruiz, 'Male Victims and Female Perpetrators of Sexual Violence in Conflict', in S Mouthaan and O Jurasz (eds), *Gender and War: International and Transitional Justice Perspectives* (Intersentia 2019) 169, 169.

³ R Petchesky, 'Rights of the Body and Perversions of War: Sexual Rights and Wrongs Ten Years Past Beijing' (2005) 57 *International Social Science Journal* 301, 302.

⁴ V Oosterveld, 'Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals' (2014) 10 *Journal of International Law and International Relations* 107, 108.

Against this backdrop, section 2 of this article explores the prevalence of the selected forms of sexual violence against men in conflict and the underlying power dynamics that prompt perpetrators to commit such crimes. Section 3 maps the international criminal practice of the ICTY, ICTR, the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC). The analysis draws attention to the inconsistencies between and within the courts and tribunals and a tendency of misclassification that obscures the sexual nature of the crimes. Based thereon, section 4 discusses the need for conceptualizing sexual victimization against the male gender under ICL and offers deliberations of what might inform a common definition as a step forward to create coherence in international criminal jurisprudence. Finally, section 5 offers some concluding remarks.

The main focus of the paper is the undertaking of a systematic review of international case law at the ICTY, ICTR, SCSL and the ICC where evidence appeared of men being forced to witness sexual violence perpetrated against their family or community members or where men were coerced to engage in sexual acts with a third person. The study examines the interpretive developments, trends and divergences throughout international criminal jurisprudence in addressing both forms of sexual violence and maps thereby the existing legal gap.

Briefly, social dynamics are also touched upon in order to explain the ramifications legal inconsistencies have on male victims of sexual violence in conflict situations and to explain the motives of perpetrators to utilize sexual violence as a gendered tool of war.

2. Sexual and Gender-Based Violence Against Men in Armed Conflict

This chapter explores the coercion of witnessing or committing acts of sexual violence as two selected forms of sexual and gender-based violence (SGBV) committed against men and boys in conflict situations. After offering a brief outline of the problem, the underlying causes thereof are discussed: perpetrators frequently exploit familial relations and social stigma of sexual violence against the male gender in order to use sexual violence against men as a military strategy to destroy not only individual lives but to disrupt entire communities. In order to provide a wholesome picture of the issue, the most common dynamics underpinning sexual violence against men are explored.

2.1. Two selected under-studied forms of sexual victimization of men

Sexual violence against men and boys manifests in different forms of physical and mental abuse.⁵ While the most common forms include, for example, rape, castration and genital violence, sexual violence is a broad category.⁶ Among these more widely recognized and acknowledged and relatively undisputed forms of sexual victimization, there are more problematic instances in international criminal jurisprudence when men are coerced to rape or otherwise sexually abuse another person or forced to watch the commission of sexual violence.⁷

A contemporary example is the Bosnian conflict, where fathers and sons were forced to commit incest by raping each other and their female relatives, as well as witness the rape of family members by the perpetrators.⁸ Most recently, evidence has also surfaced in the Syrian conflict. The UN-appointed Independent International Commission of Inquiry on Syria released a report in 2013 that uncovered numerous accounts of sexual violence that took place in the Syrian conflict, mainly in detention centres as a method to extract information, humiliate or punish, and against family members to coerce male relatives fighting with anti-government armed groups into surrender in exchange for the release of other detainees.⁹ In addition, the Commission's Conference Room Paper issued in 2018, completes the picture by reporting that rapes of women regularly took place in front of family members, including their husbands and children, and that perpetrators forced male detainees to rape or otherwise sexually abuse fellow detainees.¹⁰ In more brutal cases, exploiting blood relations, an uncle and his nephew at the Halab prison in Aleppo and a father and son at the Damascus Political Intelligence branch were forced to have intercourse with one another.¹¹

⁵ DA Lewis, 'Unrecognised Victims: Sexual Violence Against Men in Conflict Settings Under International Law' (2009) 27 *Wisconsin International Law Journal* 1, 3.

⁶ VK Vojdik, 'Towards a Gender Analysis of Sexual Violence Against Men and Boys in Conflict: Incorporating Masculinities Theory into Feminist Theories of Sexual Violence Against Women' in S Mouthaan and O Jurasz (eds), *Gender and War: International and Transitional Justice Perspectives* (Intersentia 2019) 95, 98.

⁷ *ibid.*

⁸ CR Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations' (2006) 37 *Security Dialogue* 83, 95; see also EJ Wood, 'Variation in Sexual Violence During War' (2006) 34 *Politics and Society* 307, 314.

⁹ UN Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' UNHRCOR 22nd session Un Doc A/HRC/22/59 (2013) paras 106, 108, Annex IX para 5.

¹⁰ UN Human Rights Council, "'I Lost My Dignity": Sexual and Gender-Based Violence in the Syrian Arab Republic: Conference Room Paper of the Independent International Commission' UNHRC 37th session Un doc A/HRC/37/CPR.3 (2018) paras 14, 16, 23.

¹¹ *ibid* para 47.

Although sexual violence committed against men and boys is ubiquitous in armed conflict, it has largely remained absent in conflict narratives.¹² The Rome Statute, adopted in 2002, is the first international document to recognize explicitly SGBV as a crime against humanity and a war crime.¹³ The choice of gender-neutral and broad terminology allows the Statute to capture different categories of sexual violence against men.¹⁴ However, the international community walked an arduous path to recognize conflict-related sexual violence against men.

In 2000, UNSC Resolution 1325 exclusively addressed war-inflicted sexual violence as a crime against women and girls.¹⁵ Subsequently, Security Resolution 1820, adopted in 2008, maintained an emphasis on women to the exclusion of men and boys.¹⁶ Only in 2009, the UN Secretary-General issued a report that acknowledged men and boys as victims of sexual violence during conflict, observing that the case law of the ICTY and SCSL evidenced instances of sexual violence against men.¹⁷ In the same year, Security Resolution 1888 was issued with gender-neutral language to include *civilian* victims of wartime violence.¹⁸ However, effectively the Resolution excluded prisoners of war, members of the armed forces and child soldiers.¹⁹ Finally, in 2013, in its Resolution 2106 the Security Council explicitly recognized that ‘sexual violence in armed conflict and post-conflict situations (...) also affect[s] men and boys and those secondarily traumatized as forced witnesses of sexual violence against family members’.²⁰

The recentness of the recognition of men-targeted sexual violence during conflict by the international community explains why the international justice process is not up to par to recognize sexual violence against men in a full-fledged manner. If even the most common forms of sexual harm against men struggled for recognition by the international community, the two forms under reflection in this paper constitute to date among the most under-studied constructs of

¹² De Brouwer and Ruiz (n 2) 171.

¹³ ICC Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (2014) 5 <<https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf>> accessed 5 January 2020.

¹⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, last amended 2010) 2187 UNTS 3, arts 7(1)(g)1-5, 8(2)(b)(xxii)1-5, 8(b)(xxii), 8(e)(iv).

¹⁵ UNSC Res 1325 (31 October 2000) UN Doc/S/RES/1325.

¹⁶ UNSC Res 1820 (19 June 2008) UN Doc/S/RES/1820.

¹⁷ UNSC, ‘Report of the Secretary-General Pursuant to Security Council Resolution 1820’ (2009) UN Doc S/2009/362.

¹⁸ UNSC Res 1888 (30 September 2009) UN Doc/S/RES/1888, para 3.

¹⁹ S Sivakumaran, ‘Sexualized Violence against Men and Boys: Security Council Resolutions 1325, 1820 and 1888’ (Heinrich-Böll-Stiftung, 30 September 2010) <<https://www.gwi-boell.de/en/2010/09/30/sexualized-violence-against-men-and-boys>> accessed 13 April 2019.

²⁰ UNSC Res 2106 (24 June 2013) UN Doc/S/RES/2106.

sexual violence.²¹ A common denominator of the atrocities is the attack on social norms.²² Hence, the under-reporting of male-centred sexual violence and invisibility of male victimhood is largely attributed to social gender norms that define masculinity.²³

2.2. Power dynamics underlying sexual victimization of men

Various dynamics are at play when men are sexually abused during conflict situations. Vojdik argues that sexual violence must be considered as ‘a social practice that intersects with gender, ethnicity and national identities, deployed as a means to subordinate the male victim and his enemy group.’²⁴ This section does not seek to exhaustively study the different dynamics, rather it depicts the most prominent socially constructed norms of masculinity that perpetrators exploit as a gendered tool of war in the commission of selected sexual atrocities against men, namely the forcing of male victims to watch sexual violence or to engage in a sexual act with another person.

2.2.1. Underlying social conception of masculinity

According to Sivakumaran, sexual violence against men during conflict is not about sexual desire, but about asserting power and dominance.²⁵ In times of conflict, when law and order is dissolved and the balance of power undergoes a reconfiguration, perpetrators utilize sexual violence as a means to maintain or restore power balances.²⁶ The atrocities thus serve as a gendered function to symbolically masculinize the perpetrator through dominance, while stereotypically feminize, weaken and disempower men of the enemy group.²⁷ The traditional social construction of masculinity dictates that men cannot be victims of sexual violence as these forms of abuse are restricted to women.²⁸ Hence, when men experience sexual violence, their masculine attributes are dismantled in such a manner that they are no longer considered ‘real men’ in

²¹ See eg Carpenter (n 8) 96-97; S Mouthaan, ‘Sexual Violence against Men and International Law: Criminalising the Unmentionable’ (2013) 13 *Int’l Crim L Rev* 665, 676-678; Oosterveld (n 4) 114; Philipp Schulz and others, ‘Transitional Justice for Male Victims of Conflict-Related Sexual and Gender-Based Violence?’ (2015) available at <https://www.academia.edu/28147107/Transitional_Justice_for_Male_Victims_of_Conflict-Related_Sexual_and_Gender-Based_Violence> accessed 13 April 2019.

²² Vojdik (n 6) 98.

²³ De Brouwer and Ruiz (n 2) 175.

²⁴ Vojdik (n 6) 113.

²⁵ Sivakumaran, ‘Sexualized Violence against Men and Boys’ (n 19) 276

²⁶ S Sivakumaran, ‘Male/Male Rape and the “Taint” of Homosexuality’ (2005) 27 *Human Rights Quarterly* 1274, 1281-1282.

²⁷ Vojdik (n 6) 114.

²⁸ Sivakumaran, ‘Male/Male Rape’ (n 26) 1289.

their own society.²⁹ This very social idea of emasculation serves for the perpetrators as a reason to commit sexual violence against men with the intention to destroy the manhood of the victims.³⁰ Once the victims' masculine gender identity is lost, their communities will ostracize, stigmatize and reject them.³¹

Moreover, masculinity is deeply associated with heterosexuality in many societies. Because homosexuality is a taboo in many societies and often prohibited by law, forcing men to rape other male members of their community inflicts a heavy stigma discouraging the survivors not to report their abuse.³² The stigma is amplified when the forced rape amounts to incest of another male family member.

2.2.2. Gendered tactic of war

Oftentimes sexual victimization of men forms an attack on underlying cultural norms and has wide-ranging psycho-social impacts.³³ In effect, the socially construed understanding of masculinity provides a strong incentive for perpetrators to utilize certain forms of sexual violence against men not merely as an act against individual lives, but as a sophisticated military tactic against the wider community.³⁴

When sexual violence against women takes place in public and men are forced to witness the rapes of their wives, daughters, mothers and non-relatives from their communities, it communicates the message to men that they have failed in their role as protectors of their women.³⁵ The display of public sexual violence is thus deployed to spread fear and terror among the population, causing the vulnerability and displacement of entire communities.³⁶ In addition, if men are forced to rape or sexually assault their community members, the message of powerlessness is reinforced, indicating that men cannot even protect themselves, let alone their families or community.³⁷

Sexual violence of women thus becomes interlinked with sexual violence of men, as women are strategically raped and sexually assaulted with the objective to exercise a psycho-social attack on men.³⁸ The social stigmatization causes a deep trauma for both women and men. The Bosnian-Serb genocidal rape strategy

²⁹ *ibid* 270.

³⁰ *ibid*.

³¹ Vojdik (n 6) 114.

³² Sivakumaran (n 26) 272.

³³ Carpenter (n 8).

³⁴ Vojdik (n 6) 115.

³⁵ *ibid* 114; Sivakumaran, 'Male/Male Rape' (n 26) 268.

³⁶ Sivakumaran, 'Male/Male Rape', (n 26) 269.

³⁷ Vojdik (n 6) 116.

³⁸ *ibid*.

encompassed the destruction of men as a group.³⁹ The genocidal effect was achieved by making the rapes of women a public spectacle.⁴⁰ Considering such psycho-social consequences is key to deconstruct rape of women as a war strategy of perpetrators.⁴¹

The following section will showcase that the international justice process has not adapted to accommodate the categories of victimization of men including being forced to watch or to penetrate another person as a 'sexual' crime. The gendered nature and the intricate motives of perpetrators underlying these forms of sexual victimization of men in armed conflict can help understand the value of characterizing such crimes as sexual violence.

3. Lack of a Prosecutorial and Jurisdictional Policy at the International Criminal Courts and Tribunals

Gender-based violence resonates as a code phrase for sexual violence committed against women and girls.⁴² Provisions under ICL criminalizing SGBV have thus originated with the focus on women. Over time, ICL has developed to accommodate sexual violence crimes perpetrated against women and men. Despite gender-neutral terminology under formal law, the interpretation of the existing sexual violence provisions by international criminal jurisprudence creates legal gaps in practice.⁴³

Along with breakthroughs the international courts and tribunals have met with criticism for inadequate and inconsistent prosecution and jurisdictional policies. The policy was even less advanced in relation to forms of sexual victimization such as the coercion to witness or engage in a sexual act with another victim, albeit evidence appeared in the ICTY, ICTR, SCSL and ICC.⁴⁴ These failures arise partly out of the wrong perception that sexual violence instances constitute lesser crimes and a persistent tendency to mischaracterize sexual violence as incidental.⁴⁵ Learning from the inconsistencies of the jurisprudence of the ICTY, ICTR and SCSL, it is hoped that the ICC will attempt a more in-

³⁹ D Bergoffen, 'Exploiting the Dignity of the Vulnerable Body: Rape as a Weapon of War' (2009) 38(3) *Philosophical Papers* 117.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² P Viseur Sellers, *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation* (2007) 4 <https://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf> accessed 6 January 2020.

⁴³ Oosterveld (n 4) 109.

⁴⁴ ALM de Brouwer, 'The Importance of Understanding Sexual Violence in Conflict for Investigation and prosecution Purposes' (2015) 48 *Cornell International Law Journal* 639, 660; S Sivakumaran, 'Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict' (2010) 92 *Int'l Review of the Red Cross* 259, 272

⁴⁵ De Brouwer (n 44) 661.

clusive approach.⁴⁶ In order to improve the investigation and prosecution of sexual victimization of men and boys in relation to the two forms of coercion to witness and to engage in a sexual act with a third person, an analysis of the prosecutorial and jurisdictional strategies deployed by the international courts and tribunals may prove instructive on the way to reach a sound understanding of the challenges and importance of an inclusive approach.

3.1. International Criminal Tribunal for the Former Yugoslavia

In the wake of international and non-international armed conflicts, international criminal courts and tribunals have produced hard law to address gender-based crimes.⁴⁷ Parallel to the developments of IHL, rape was the first gender-based violence crime that has gained recognition as a crime against humanity and was enshrined as an international crime in the constitutive instruments of the international tribunals.⁴⁸ Therefore, the Statute of the ICTY lists solely rape as a crime against humanity under Article 5(g) to the exclusion of any additional sexual violence provision.⁴⁹

Nevertheless, the ICTY is the sole international tribunal that has achieved to provide a laudable degree of visibility to sexual violence against men.⁵⁰ In contrast to a general invisibility of sexual assault against men, the prosecution brought charges encompassing allegations of sexual violence concerning the coercion of witnessing or committing sexual acts against a third victim in a series of cases. The Trial Chamber had to accommodate occurrences of sexual violence that were not rape under provisions other than Article 5(g) and illustrated that sexual violence can underpin *sub-silencio* other prohibited acts.⁵¹

3.1.1. ICTY Jurisprudence

Tadić was the first trial before the ICTY and could have pioneered the prosecution of male-targeted sexual violence for its ground-breaking language. For forced sexual intercourse with a female detainee, *Tadić* was

⁴⁶ Sivakumaran, 'Lost in Translation' (n 44) 275.

⁴⁷ Viseur Sellers (n 42) 4.

⁴⁸ *ibid* 10.

⁴⁹ UNSC, 'Statute of the International Criminal Tribunal for the former Yugoslavia, attached to the Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808' (1993) UN Doc S/25704, Annex (hereinafter ICTY Statute).

⁵⁰ K Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1 *International Journal of Transitional Justice* 411, 423.

⁵¹ Viseur Sellers (n 42) 12.

charged with rape under Article 5(g) and inhuman and cruel treatment.⁵² However, when two male detainees were forced to commit oral sexual acts, the prosecution did not consider rape and instead decided to charge on counts of torture or inhuman treatment, wilfully causing great suffering or serious injury to body and health, cruel treatment and inhumane acts.⁵³ A definition of rape had not yet emerged in international criminal law, which might explain the uncertain stance of the prosecution at that time.⁵⁴

In *Mucić*, two brothers were forced to commit fellatio with each other, for which the Prosecutor charged the accused with inhuman treatment and cruel treatment.⁵⁵ In response, the Trial Chamber remarked that if pleaded appropriately the act could have been adjudicated as rape.⁵⁶ This showcases the prosecutorial tendency to circumvent the sexual nature of male-centred crimes. However, it also shows the awareness of the Trial Chamber of the inconsistency in practice to categorize sexual violence. Similarly, in *Simić*⁵⁷ and *Krajisnik*⁵⁸ the Trial Chamber classified enforced sexual acts between two male detainees as sexual assault falling under the prohibitions of torture and persecution in the former and as inhumane treatment in the latter case, instead of rape. In *Brdanin*, the Prosecutor failed to charge sexual violence committed against a man altogether who was forced to rape a female detainee, prompting the Trial Chamber to omit considering the act as a violation against the male victim.⁵⁹

By contrast, forced fellatio between two brothers was treated by the Prosecutor in *Češić* as rape under Article 5(g) of the ICTY Statute.⁶⁰ However, the indictment characterized the act more generally as sexual assault and clarified that Article 5(g) must be interpreted to include other forms of sexual violence other than rape.⁶¹ The Prosecution continued its practice in *Todorovic* and charged enforced fellatio between six prisoners as rape specifying that it should be understood to constitute other forms of sexual violence.⁶² However, unlike

⁵² *Prosecutor v Duško Tadić* (Second Amended Indictment) IT-94-1-I (14 December 1995), counts 2-4.

⁵³ *ibid* counts 8-11.

⁵⁴ M Jarvis and K Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases' in S Brammertz and M Jarvis (eds), *Prosecuting Conflict Related Sexual Violence at the ICTY* (OUP 2016) 33, 34.

⁵⁵ *Prosecutor v Zdravko Mucić et al* (Trial Judgement) IT-96-21-T (16 November 1998) paras 1060.

⁵⁶ *ibid* para 1066.

⁵⁷ *Prosecutor v Blagoje Simić* (Trial Judgement) IT-95-9-T (17 October 2003) paras 728, 772.

⁵⁸ *Prosecutor v Momčilo Krajisnik* (Trial Judgement) IT-00-39-T (27 September 2006) paras 304, 800, 745, 1126.

⁵⁹ *Prosecutor v Radoslav Brdanin* (Trial Judgement) IT-99-36-T (1 September 2004) para 516.

⁶⁰ *Prosecutor v Ranko Češić* (Third Amended Indictment) IT-95-10/1 (26 November 2002) count 8.

⁶¹ *ibid*.

⁶² *Prosecutor v Stevan Todorovic* (Second Amended Indictment) IT-95-9/1 (19 November 1998) counts 16, 19, 22.

in Češić, due to a plea agreement counts of sexual violence against *Todorovic* were eventually withdrawn.⁶³ De Brouwer and Ruiz accurately observe that rape should be charged as rape.⁶⁴ In both cases all accounts hinted towards rape, but were charged as sexual assault. Thereby, the Prosecution acknowledged the sexual nature of the crimes while showing insecurity to consider it as rape.

The other category of crimes where men were forced to witness the rape of family and community members faced even greater obstacles. When a man was forced to watch the rape of his female friend as a means to coerce him to admit allegations against her, the Tribunal stated that *Furundžija* had inflicted severe physical and mental suffering on both witnesses and thus found him guilty for torture.⁶⁵ In *Stanišić and Župljanin*, the Chamber convicted the accused for torture, inhumane acts and persecution when the witness was forced to watch the rape of his female relative.⁶⁶

In both cases, the Trial Chamber showed signs of ambivalence as to whether such acts constitute sexual violence at all or were to be classified as psychological torture or something else.⁶⁷

3.1.2. Conclusive remarks

On occasion, the Trial Chamber recognized the sexual nature inherent in certain acts and emphasized that the limitations of the Statute prompted it to categorize the acts under provisions other than sexual violence.⁶⁸ However, the overall trend of the ICTY is to treat sexual violence as torture, inhumane treatment, cruel treatment and persecution. Labels of ‘rape’ for enforced intercourse and ‘sexual violence’ for being forced to witness sexual assault are more apt to reflect the nature of the harms inflicted on the victims.⁶⁹ A mis-categorization of sexual crimes enhances the invisibility of male victims of sexual violence and affirms the traditional gender norms that perpetrators utilize as a tactic in conflict to attack men and entire communities in the first place. Regarding the described prosecutorial practice, Jarvis and Vigneswaran contend that the Prosecution’s misclassification stems from a misconception of the sexual nature of certain crimes. Indeed, studying the masculine gender roles and the underlying motives of perpetrators described in the previous

⁶³ *Prosecutor v Stevan Todorovic* (Sentencing Judgment) IT-95-9/1-S (31 July 2001) para 8.

⁶⁴ De Brouwer and Ruiz (n 2) 181.

⁶⁵ *Prosecutor v Anto Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) paras 127, 129, 267.

⁶⁶ *Prosecutor v Mičo Stanišić and Stojan Župljanin* (Judgment) IT-08-91-T (Vol I) (27 March 2013) para 1214.

⁶⁷ See Carpenter (n 8) 96-97.

⁶⁸ Cf *Prosecutor v Blagoje Simić* (Sentencing Judgment) IT-95-9/2 (17 October 2002) para 63.

⁶⁹ De Brouwer and Ruiz (n 2) 182.

section seem all the more significant in order to arrive at a coherent prosecutorial and jurisdictional approach.

3.2. International Criminal Tribunal for Rwanda

Similar to the ICTY, the mandate for sexual violence in the Statute of the ICTR is limited to rape as a crime against humanity under Article 3(g) of the Statute, and rape, indecent assault and prostitution as violations of common Article 3 to the Geneva Conventions and Additional Protocol II.⁷⁰ Unlike the ICTY, the jurisprudence on sexual violence against men is very sparse and is limited to only two occasions.

In *Bagosora*, male family members and priests were forced to watch women being sexually assaulted.⁷¹ However, without further explanation the Trial Chamber recognized rape only against women.⁷² The sexual victimization of the male victims is only contained in the factual findings without any legal consequences. The Trial Chamber merely treated the evidence as setting the scene to describe the scope and extent of killings and rapes taking place against women. The Tribunal also recorded instances where women were raped in front of their families in *Kayishema*.⁷³ Although the Chamber admitted the testimony, the Prosecutor did not enter charges of sexual violence.⁷⁴

The Tribunal's stance towards sexual violence against men is thus two-fold: On the one hand, the Office of the Prosecutor and Trial Chamber seem to have either ignored male-centred sexual violence or included the evidence in their records without attaching legal consequences. On the other hand, Chisebe Mibenge observes an unwillingness of the Tribunal to investigate or prosecute sexual violence against men.⁷⁵ The gendered idea that men cannot be victim of sexual crimes has led the ICTR to 'erase male sexual victimization from [its] jurisprudence'.⁷⁶

⁷⁰ Viseur Sellers (n 42) 12.

⁷¹ *Prosecutor v Bagosora et al* (Trial Judgement) Case No. ICTR-98-41-T (18 December 2008) para 976.

⁷² *Prosecutor v Bagosora et al* (Trial Chamber Decision on motions for judgement of acquittal) Case No. ICTR-98-41-T (2 February 2005) note 63.

⁷³ *Prosecutor v Kayishema et al* (Trial Judgement) Case No. ICTR-96-1-T (21 May 1999) paras 299, 532.

⁷⁴ *ibid* para 575.

⁷⁵ CS Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (University of Pennsylvania Press 2013) 81-82.

⁷⁶ *ibid*; see also De Brouwer and Ruiz (n 2) 184.

3.3. Special Court for Sierra Leone

The SCSL Statute included a specific mandate to prosecute sexual violence crimes as what they are, in contrast to the ICTY and ICTR that had to address such crimes under non-sexual violence provisions for the lack of explicit statutory provisions on forms of sexual violence other than rape. Alongside the enumeration of rape, sexual slavery, enforced prostitution and forced pregnancy, Article 2(g) of the Statute mentions 'other forms of sexual violence' as a residual category.⁷⁷ In addition, Article 3(e) includes outrages upon personal dignity, encompassing in particular rape, humiliating and degrading treatment, enforced prostitution and any form of indecent assault as serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II. Where the domestic law of Sierra Leone restricted prosecution of sexual violence crimes perpetrated against girls under its Prevention of Cruelty to Children Act of 1926, the SCSL Statute established the prosecution of sexual violence regardless of the gender of the children.⁷⁸ The domestic law thus indicates a gendered bias towards boys becoming the subject of sexual violence abuses. In reality, however, the conflict was marked by instances of sexual victimization of men and boys.

3.3.1. SCSL Jurisprudence

Evidence of the two forms of sexual victimization against men and boys under discussion arose in all four cases of the SCSL. The Prosecutor and Trial Chambers dealt with the evidence in different ways.

3311 *AFRC and CDF*

The Amended Indictment in the first case of the SCSL, known as *AFRC*, contained recounts of attacks of sexual nature against civilian men, women and children in its introductory paragraphs.⁷⁹ However, subsequently, without providing further explanation the counts charging sexual violence in the Indictment restrict their scope to women and girls.⁸⁰ Based on the charges brought forward by the Prosecution, the Trial Chamber did not entertain delib-

⁷⁷ UNSC, 'Report of the Secretary-General on the establishment of a Special Court for Sierra Leone: Statute of the Special Court for Sierra Leone' (2000) UN Doc. S/2000/915 (hereinafter SCSL Statute).

⁷⁸ Article 5(a) SCSL Statute.

⁷⁹ *Prosecutor v Alex Tamba Brima et al* (Further Amended Consolidated Indictment) Case No. SCSL-04-16-PT (18 February 2005) para 39.

⁸⁰ *ibid* para 51.

erations on sexual victimization of men and limited its legal findings to sexual violence against women and girls.⁸¹

CDF is the Court's second trial judgement.⁸² The Chamber systematically removed any evidence of gender-based violence, for which it was majorly criticized on appeal. Nevertheless, the Appeals Chamber declined to hear a new trial that would admit such evidence.⁸³

After these initial failed attempts to address sexual violence against men in the Sierra Leonean conflict, the Trial Chamber changed its course in *RUF*⁸⁴ and *Charles Taylor*⁸⁵. Both cases thus require a nuanced analysis.

3312 *Progressive approach in RUF*

With the *RUF* case, in 2009 the Trial Chamber issued a significant judgement that would advance the Court's jurisprudence and interpretations of gender-based crimes.⁸⁶ The Prosecutor successfully charged the accused with counts of rape, other inhumane acts, and outrages upon personal dignity under Article 3(e) of the Statute in the indictment⁸⁷, upon which the Chamber found the accused guilty for all these counts for their participation in a joint criminal enterprise.⁸⁸

The Trial Judgement succeeded to record many ways in which rapes were committed by the RUF. Evidence appeared where women were deliberately raped in public, in the view of other civilians and men testified how they and their children were forced to witness the rape of their wives and mothers.⁸⁹ Whilst the Chamber established rape against female victims without engaging explicitly in considerations of the sexual violence perpetrated against men, the Chamber recorded how rape became a tool of power and domination for the RUF and how women's bodies served as a battlefield with devastating effects on the entire community.⁹⁰

⁸¹ *Prosecutor v Alex Tamba Brima et al* (Judgement) Case No. SCSL-04-16-T (20 June 2007) paras 968-969.

⁸² *Prosecutor v Moinina Fofana and Allieu Kondewa* (Judgement) Case No. SCSL-04-14-T (2 August 2007).

⁸³ V Oosterveld, 'The Gendered Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgements' (2011) 105 *Cornell International Law Journal* 49, 51.

⁸⁴ *Prosecutor v Sesay, Kallon and Gbao* (Trial Judgement) Case No. SCSL-04-15-T (2 March 2009) [hereinafter RUF TJ].

⁸⁵ *Prosecutor v Charles Taylor* (Judgement) Case No. SCSL-03-01-T (18 May 2012).

⁸⁶ RUF TJ (n 84).

⁸⁷ *Prosecutor v Sesay, Kallon and Gbao* (Indictment) Case No. SCSL-04-15-PT (2 August 2006) para 60 [hereinafter RUF Indictment].

⁸⁸ RUF TJ n 84), at Disposition 678, 682, 685.

⁸⁹ *ibid* 1193.

⁹⁰ *ibid* 1602.

In a second step, the Trial Chamber turned to view the sexual acts through the lens of war crimes as an act of spreading terror and acknowledged that gender-based crimes such as rape underlie RUF's ideology.⁹¹ The Chamber concluded that sexual violence crimes against women were committed with the intent to attack the civilian population as a whole in order to disempower and instill fear on entire communities. The crimes were used by the RUF as a war tactic to systematically disrupt the family nucleus and social bonds and created 'an atmosphere of submission, oppression, helplessness, insecurity and lawlessness for the entire civilian population'.⁹² The Chamber noticed that the sexual acts on women inflicted physical and psychological harm on men.⁹³

Consequently, the way the Trial Chamber dealt with sexual victimization of men was to treat sexual violence as a weapon of terror and label it as inherently gendered acts of terrorism. The *RUF* judgement used the evidence of sexual victimization of men and boys to demonstrate how RUF fighters relied on the stigma attached to sexual violence in the Sierra Leonean society and to demonstrate that the fighters created a state of helplessness for male members who failed in their roles as protectors of their women.⁹⁴ The adaptation of a 'pattern and effects' analysis of female sexual violence thus enabled the Court to induce the visibility of male-centred sexual violence.⁹⁵

Although the Prosecution restricted the charges in the indictment to violence against women, the Trial Chamber found the defect corrected and was able to take the evidence of sexual victimization of men into account in the determination of the acts of terror.⁹⁶ Therefore, while sexual victimization of males has been peripheral in previous international criminal jurisprudence, the *RUF* judgement was progressive in acknowledging that female sexual violence constituted in effect gender-based violence against men and boys.⁹⁷

However, despite the significant contribution of the Court in the *RUF* case the Chambers nevertheless mislabeled the crimes under headings of inhumane acts and outrages on personal dignity instead of charging the acts as sexual violence under Article 2(g) and thereby failed to overtly recognize the coercion to witness sexual violence as sexual victimization of the male victim.

⁹¹ *ibid* para 1347-1352.

⁹² *ibid* 1350.

⁹³ *ibid* 1349.

⁹⁴ *ibid* 1350; cf also Oosterveld, 'The Gendered Jurisprudence of the SCSL' (n 83) 69.

⁹⁵ Oosterveld, 'The Gendered Jurisprudence of the SCSL' (n 83) 71.

⁹⁶ RUF TJ (n 84) 1304, 1308.

⁹⁷ Oosterveld, 'The Gendered Jurisprudence of the SCSL' (n 83) 71.

3313 *Regressive approach in Charles Taylor*

In April 2011, the Trial Chamber issued its final judgement in the *Charles Taylor* case.⁹⁸ The case benefitted from the analysis of the foregoing cases as it reaffirmed, expanded and clarified interpretations of gender-based crimes.

Similar to *AFRC*, the general charges of the original indictment of the Prosecutor made an explicit reference to sexual violence against civilian men.⁹⁹ However, the counts of the indictment relating to sexual violence did not mention men and referred explicitly solely to women. At a later stage, the original indictment was amended and the reference to sexual violence against men was removed from the general charges in both First and Second Amended Indictments.¹⁰⁰ The Prosecution Final Trial Brief treated the evidence of sexual victimization of men as a military strategy to cause terror by the perpetrators. Thus, women were publicly raped as a means to terrorize the communities and as a deliberate assault on cultural norms.¹⁰¹ The prosecution acknowledged the existence of sexual victimization of men but utilized the evidence merely as a basis to emphasize the brutality of sexual violence committed against women. Men were both forced to sexually abuse family members as well as watch them being raped by the perpetrators.¹⁰²

During the trial, the Prosecution submitted that the indictment uses inclusive language and captures sexual violence against men by the counts of rape, cruel and inhumane treatment.¹⁰³ However, the Trial Chamber argued that the indictment contained a restrictive reference to women and could not be considered corrected to include men, because the prosecutor did not provide the accused with subsequent timely, clear, and consistent notice that the charges included sexual violence against men.¹⁰⁴ This stance of the Trial Chamber sided with the *AFRC* case, but was opposite to its approach taken in the *RUF* judgement where the Chamber found that enough clear, timely and consistent notice of sexual violence against men was provided to cure the defect in the indictment.

The Trial Chamber in *Charles Taylor* cited that the only document containing notice of sexual violence committed against men was the original indictment; the removal of the reference to men in the charges in the amended indictments indicated that the Prosecution has discarded to proceed with this charge.¹⁰⁵

⁹⁸ *Prosecutor v Charles Ghankay Taylor* (Trial Judgement) Case No. SCSL-03-01-T-1283 (26 April 2012).

⁹⁹ *ibid* para 30.

¹⁰⁰ *Prosecutor v Charles Ghankay Taylor* (Indictment) Case No. SCSL-03-01-I3 (17 March 2006).

¹⁰¹ *Prosecutor v Charles Ghankay Taylor* (Prosecution Final Trial Brief) Case No. SCSL-03-01-T-1283 (8 April 2011).

¹⁰² *ibid*. 931.

¹⁰³ *Prosecutor v Charles Ghankay Taylor*, 'Trial Judgement' (n 98) 121.

¹⁰⁴ *ibid* 124.

¹⁰⁵ *ibid* 128.

Therefore, the Chamber argued it could not consider evidence of sexual victimization of men directly. Instead, when addressing the count of rape against women, the Chamber could only consider that the rebels used different forms of rape tactics, including gang rape in public and in front of family members as arbitrary terror.¹⁰⁶ The Chamber recognized the sexual victimization of men, but treated it merely as an aggravating factor of the outrages upon personal dignity *against women* by adding a public or additionally humiliating and degrading aspect to it.¹⁰⁷

In comparison, although the *RUF* trial judgement misclassified sexual violence against men as outrages upon personal dignity, it nevertheless included sexual violence against men, while the Court took a regressive step in the *Taylor* case by excluding men as victims of sexual violence altogether.

The closest that the Court came to recognize crimes committed against men was by treating sexual victimization as acts of terrorism. The Court established that when the specific intent to of terror accompanies rape and outrages on personal dignity against women, the crimes effectively amount to an act of terror.¹⁰⁸ The Chamber thus confirmed its interpretation in the *RUF* judgement that gender-based violence was entrenched in *RUF*'s overarching military and political strategy to induce a state of lawlessness and terror, and then stigmatize and ostracize male victims from their families as a method to destroy entire communities.¹⁰⁹ As a result, Charles Taylor was convicted for sexual victimization under the label of acts of terrorism pursuant to Article 3(d) of the SCSL Statute. The acts of terrorism were based on rape of women under Article 2(g) and outrages upon personal dignity under Article 3(e) of the Statute.

3.3.2. Conclusive remarks

Despite containing a specific sexual violence provision under Article 2(g) of the Statute, the Court failed to utilize it throughout its jurisprudence for sexual assaults on men and boys committed during the Sierra Leonean conflict in the form of coercion to witness or coercion to penetrate a third person. The Indictment in *AFRC* contained allegations for sexual violence against men, for which, however, the Prosecution failed to bring charges.

In the subsequent *RUF* judgement, the Court no longer ignored the gendered violence and took a progressive step to acknowledge instances of sexual violence against men and found the defects in the indictment, which again excluded charges for sexual violence against men, corrected. The Chamber innovatively

¹⁰⁶ *ibid* 876.

¹⁰⁷ *ibid* 1196.

¹⁰⁸ *ibid* 2035.

¹⁰⁹ *ibid* 2038.

considered the patterns of crimes and the terrorizing effect on communities and recognized how sexual violence against women was used by the perpetrators to disempower men who are the expected protectors of the family and community under the traditional gender-based norms. However, despite reaching an understanding of the sexual nature of forcing men to watch the rapes of women, the Court did not convict the accused under Article 2(g) but rather chose to label the crimes against men as inhumane acts and outrages upon personal dignity and terror contained under non-sexual provisions in the Statute. Despite its misclassification, the *RUF* judgement nevertheless helped to draw attention to these still overlooked forms of gender-based violence in armed conflict.

On the other hand, the *Taylor* judgement took a step back. While the judgement expanded on RUF as it confirmed that rebel groups used different forms of rape tactics and that the rapes were linked to military and political objectives, overall the Chamber considered the occurring sexual violence against men as an enhancement of sexual violence against women and prosecuted solely for terror.

Overall, the prosecutorial and jurisdictional strategy in the SCSL advanced to recognize the underlying motives of the perpetrators and the occurrence of sexual violence against men. However, the crimes were either not charged by the Prosecution or adjudicated by the Trial Chamber under more generic categories of crimes.¹¹⁰

3.4. International Criminal Court

Like the SCSL Statute, the Rome Statute allows the ICC to prosecute sexual violence explicitly under Article 7(1)(g) as crimes against humanity and Articles 8(2)(b)(xxii) and 8(e)(vi) as war crimes. Sexual violence is included in a residual clause, enabling the Court to capture any un-enumerated forms of sexual violence of comparable gravity to the other listed crimes. However, just like the other international criminal tribunals the ICC comparably struggles to apply a consistent classification and to recognize sexual victimization of men. Sexual violence against men was charged in only few cases.

The Office of the Prosecutor (OTP) charged *Mbarushimana* under the count of cruel treatment for forcing family members to witness rape and other sexual atrocities committed against their women and described the acts as an ‘assault’ without defining the term.¹¹¹ In response, the Pre-Trial Chamber (PTC) questioned whether such acts could be characterized as an assault and additionally

¹¹⁰ De Brouwer and Ruiz (n 2) 186.

¹¹¹ *Prosecutor v Mbarushimana* (Confirmation of Charges) Case No. ICC-01/04-01/1 (16 December 2011), paras 108-110.

pointed to a lack of evidence.¹¹² The case failed in prosecuting sexual victimization against men. The PTC noticed the misclassification of the crimes by the OTP and in return denied confirming the charges.

Bemba promised to be more successful: it represented a landmark judgement for the ICC, in which an accused was convicted for SGBV for the first time.¹¹³ The PTC confirmed the OTP's charges of rape committed against men, women and children.¹¹⁴ Men were both raped by the rebels and forced to watch the rapes of their female family members.¹¹⁵ Bemba was found guilty for rape against men as a war crime and crime against humanity,¹¹⁶ before the decision was reversed on appeal and Bemba was acquitted.¹¹⁷ Overall, however, it must be observed that although the testimony in the Trial Judgement included instances where men have been forced to witness sexual abuse, since such acts were regularly accompanied by rape against the male victims it is difficult to assess how the Court would have ruled had the victims been subjugated to watch the rapes without having been raped themselves.

The lack of willingness and investigation to consider the coercion to witness sexual violence continued in *Kenyatta*.¹¹⁸ The OTP recorded gang rapes of women in the presence of their husbands alongside the main crimes of forced circumcision and sexual mutilation of men for which it brought charges of rape and other sexual violence.¹¹⁹ The case illustrates the PTC's conservative approach. While the PTC proceeded to discuss sexual circumcision and mutilation, it ignored other instances of sexual victimization of men.

Thus far, the ICC has not made any progressive attempts to recognize the significance of the sexual nature of all sexual violence crimes and the nexus between socially constructed norms of masculinity and sexuality.

¹¹² *Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges) Case No. ICC-01/04-01/10 (16 December 2011).

¹¹³ *Prosecutor v Jean-Pierre Bemba* (Judgement) Case No. ICC-01/05-01/08 (21 March 2016).

¹¹⁴ *Prosecutor v Jean-Pierre Bemba* (Decision on the Charges) Case No. ICC-01/05-01/08 (15 June 2009) para 286.

¹¹⁵ *ibid* paras 172, 286.

¹¹⁶ *Prosecutor v Jean-Pierre Bemba* 'Judgement' (n 113).

¹¹⁷ *Prosecutor v Jean-Pierre Bemba* (Judgement on the Appeal) Case No. ICC-01/05-01/08 (8 June 2018).

¹¹⁸ *Prosecutor v Francis Krimu Muthaura and Uhuru Muigai Kenyatta* (Decision on the Confirmation of Charges) Case No. ICC-01/09-02/11 (23 January 2012) para 254.

¹¹⁹ *ibid*.

4. Conceptualizing Sexual Violence Against the Male Gender in Armed Conflict

Synthesizing the international criminal jurisprudence trajectories expounded on in the previous chapter, the following section seeks to explicate the need to conceptualize a coherent prosecutorial and jurisdictional strategy in order to address sexual victimization of men in conflict situations in a wholesome manner. The chapter closes by drawing on different elements that could inform such a conceptualization.

4.1. Need for a definition

The only form of sexual violence enshrined in the Statute of the ICTY is rape, while the ICTR Statute additionally allows to prosecute indecent assault and prostitution. Acknowledging the statutory limitations, the ICTY Prosecutors and Trial Judges found a way to maneuver by describing how on the face of it non-sexual acts were committed in a sexual manner.¹²⁰ However, the tribunals have been inconsistent in explaining the sexual nature of the acts.¹²¹ Addressing sexual violence inconsistently under different labels jeopardizes to obscure the sexual nature of male victimization. However, this is consequential as far as only a correct classification of the crimes can fully dispose the gendered war tactic deployed by perpetrators.

The Statutes of the SCSL and ICC are further developed as both enumerate ‘other sexual violence’ as a residual category. Thus today, the Rome Statute formally extends a full-fledged protection to capture a diverse array of sexual violence categories regardless of the gender. Despite such developments, the jurisprudential interpretation of existing sexual violence provisions creates legal gaps in practice. International criminal jurisprudence has received vehement criticism for its lack of systematic prosecution.¹²²

According to Sivakumaran, instances of male-targeted sexual violence in jurisprudence can be grouped into three:¹²³ sexual violence against men has either been mentioned but misclassified under a different label, or it was correctly classified, but the Prosecution or Trial Chamber failed to attach consequences to it. Rarely have the two forms of forcing a man to witness sexual violence or forced to penetrate a third person in the jurisdiction of the Tribunals and Courts fallen into the third category where it has been characterized appro-

¹²⁰ Oosterveld, ‘Sexual Violence Directed Against Men and Boys’ (n 4) 113.

¹²¹ *ibid.*

¹²² See eg MS Kelsall and S Stepakoff, ‘“When We Wanted to Talk about Rape”: Silencing Sexual Violence at the Special Court for Sierra Leone’ (2007) 1 *International Journal of Transitional Justice* 355.

¹²³ Sivakumaran (n 44) 272.

priately with consequences following therefrom. While most of the case law falls under the first category, only in *Češić* the ICTY reached an appropriate classification and prosecuted the forced rape between two brothers as ‘rape’. In the ICC, only the *Bemba* case followed the same line, before the case was reversed on appeal.

The disconnect between inclusive formal law and the elusive practice lies in the lack of a common understanding of sexual violence against men. The ICTR, and later confirmed by the ICTY, has defined the term ‘sexual violence’ in *Akayesu* as ‘any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact’.¹²⁴ However, the prosecutors and judges have not agreed on the actual meaning of the term ‘sexual’, therefore the prosecutorial and jurisdictional approaches have resulted in interpretative discrepancies in determining which instances are captured by this clause. Since a clear definition is missing, the courts and tribunals are inflicted by insecurity and inconsistencies in addressing selected forms of sexual violence against men.¹²⁵ There is a lack of agreement on whether certain forms of sexual victimization of men constitutes sexual violence in the first place, or whether such violations are best considered as psychological torture or other prohibited acts of non-sexual nature.¹²⁶ Therefore, this paper argues that a determination of the meaning of the term ‘sexual’ could be determinative for the understanding of sexual victimization of men and boys.

Although gender-neutral terminology has been chosen for the enumerated list of sexual crimes in Article 7(1)(g) and Article 8(2)(b)(xxii) and (e)(vi) of the Rome Statute, in practice the list matches and addresses rather violations against women rather than men as men experience often different unconventional forms of sexual violence than women, including forcefully raping another person or the coercion to witness sexual violence. Mouthaan suggests considering the psycho-social effects of sexual violence.¹²⁷ Understanding socially constructed norms and the connected underlying motives of the perpetrators will help to capture specific forms of sexual violence against men and will help to complete the list and address crimes specifically suffered by men.¹²⁸

A clear definition of ‘sexual’ violence has not yet crystallized. However, different nuances hint towards the need and substance of a comprehensive definition of sexual victimization of men. Since a definition is absent, the courts have not conclusively determined how to interpret the residual category of

¹²⁴ *Prosecutor v Akayesu* (Judgement) Case No. ICTR-96-4-T (2 September 1998).

¹²⁵ Oosterveld, ‘Sexual Violence Directed Against Men and Boys’ (n 4) 114.

¹²⁶ *ibid* 121.

¹²⁷ Mouthaan (n 21) 678; Oosterveld, ‘Sexual Violence Directed Against Men and Boys’ (n 4) 121.

¹²⁸ *ibid*.

‘other forms of sexual violence’. The lack of a definition is therefore associated with a lack of an overarching prosecutorial policy and inconsistent judicial analysis.¹²⁹

The diverging jurisprudence between the international criminal tribunals and courts and the inconsistencies within each court demonstrate that a solid understanding of the full spectrum of forms of sexual violence against men is absent in ICL. The value of reaching a common understanding of what sexual violence against the male gender involves will not only benefit individual lives, but in fact will simultaneously address sexual violence committed against women and communities as targeting women is deeply intertwined with traditional gender-based norms.

4.2. Attempts towards a definition

Different aspects can inform a potential definition and subsume more comprehensively diverse forms of sexual crimes under the statutory residual sexual violence provision of the courts. Academic literature mentions examples of men being forced to watch the rape or sexual abuse of a woman and instances of men being forced to commit sexual assault, inconsistently categorizing these forms of sexual violence as ‘secondary victimization’ and ‘enforced rape’ respectively.¹³⁰

Both forms are interrelated as they involve a third person and are essentially used as a gendered war tool for perpetrators to communicate messages of their own domination and powerlessness of the enemy group. A family or community member is sexually abused with the intent to create a pernicious effect on the male victim or the male body is used as a weapon to attack a third person. In both cases, with a varying degree, the man becomes the victim. This article further proposes that the definition must agree on two other components, namely ‘sexual’ and ‘gendered’.

4.2.1. ‘Sexual’

The jurisprudence of the international courts and tribunals demonstrated that while in some cases the courts struggled to understand the sexual nature of forcing a man to witness sexual violence, they acknowledged the sexual nature of ‘enforced rape’ but failed to consider it as rape.¹³¹ However, in other cases also coercing a man to rape was adjudicated under non-sexual

¹²⁹ *ibid.*

¹³⁰ See eg Lewis (n 5).

¹³¹ Eg *Prosecutor v Zdravko Mucić et al* (Trial Judgement) IT-96-21-T (16 November 1998) para 1060.

crimes provisions without recognition of the sexual nature of the crime.¹³² The question remains if both forms of victimization of men under discussion constitute 'sexual' violence for the purpose of the statutory provisions of the judicial bodies. Several factors hint towards an affirmation of such an inclusion. UN Security Council Resolution 2106 makes reference to the fact that sexual violence in conflict and post-conflict situations also affects men and boys and those 'secondarily traumatized as forced witnesses of sexual violence against family members' and impede peace and security.¹³³ It can thus be induced that also men who are forced to watch sexual violence are in fact themselves affected by sexual violence.

Perhaps the closest indication of the meaning of 'sexual violence' is provided by the UN Special Rapporteur on systematic rape, sexual slavery and slavery-like practices which defines the term as 'any violence, physical or psychological, carried out through sexual means or by targeting sexuality'.¹³⁴ Such a definition necessarily includes situations where victims are forced to harm each other in a sexual manner or perform sexual acts on one another.¹³⁵ The Special Rapporteur did not define the meaning of the term 'sexual' per se, but identified that sexual violence encompasses (1) physical or psychological violence 'carried out through sexual means or by targeting sexuality', or (2) situations where a victim is forced to perform sexual acts on another person.¹³⁶ This elucidation would in fact capture both forms of sexual victimization of men under scrutiny.

There is nothing that could even remotely justify a consideration of forcing a man to rape to fall under any non-sexual provisions. However, also the position that circumvents considering forcing a man to rape as rape is untenable. Undoubtedly, had the perpetrator forced the victim to penetrate the perpetrator himself, he would have been considered a victim of rape. Physically, nothing changes for the victim if he is forced to rape a third person. Psychologically, the harm is even graver if a man is forced to sexually harm a community or family member.

Further, more than 50 civil society organizations came together to draft The Hague Principles on Sexual Violence, consisting of the Civil Society Declaration on Sexual Violence, the ICC Guidelines on Sexual Violence and the Key Principles on Sexual Violence for Policy Makers, which albeit non-binding, nevertheless offer a critical point of reference for the interpretation of the concept of sexual violence. Principle 7(f) of the ICL Guidelines includes as a representative

¹³² *Prosecutor v Duško Tadić* (Second Amended Indictment) Case No. IT-94-I-I (14 December 1995).

¹³³ UNSC Res 2106 (24 June 2013) UN Doc S/RES/2016.

¹³⁴ UNHCR Sub-Commission on the Promotion and Protection of Human Rights, 'Systematic rape, sexual slavery and slavery-like practices pursued during armed conflict: Final report submitted by Gay J. McDougall, Special Rapporteur' (1998) UN Doc E/CN.4/Sub.2/1998/13.

¹³⁵ *ibid.*

¹³⁶ *ibid* paras 21-22.

example of an act that is ‘sexual’ in nature the coercion to witness sexual acts. This is complemented by Principle 5 of the Civil Society Declaration, stating that the mere absence of physical contact does not equate to an act not being sexual. Principle 7 adds that the sexual nature of an act is not only determined by individual factors but also by intersecting contextual factors such as culture and religion. It follows that sexual violence must be understood in a broader sense to be linked with socially-constructed norms of what ‘sexual’ means.¹³⁷ International criminal courts and tribunals must reach a comprehensive understanding of what makes a prohibited act ‘sexual’ in order to be able to accommodate physical, psychological and sociological factors.¹³⁸

Other academic discussions propose that a sufficient definition of sexual violence must necessarily include acts targeting a victim’s sexuality, whether perceived, actual or imputed, in order to comprehensively address sexual violence against men in armed conflict.¹³⁹ When men are forced to perform sexual acts on each other, stereotypes pertaining to homosexuality come into play and are often the root cause of such violence against the male gender, in particular in regions where homosexuality is prohibited under domestic jurisdictions. When men are forced to sexually abuse each other, they become not only victims but also victimizers.¹⁴⁰ A comprehensive definition of sexual violence has the power to delegitimize the causes of such acts of violence.¹⁴¹

4.2.2. ‘Gendered’

In 2014, the OTP of the ICC issued a Policy Paper on Sexual and Gender-Based Crimes.¹⁴² Within the Policy Paper the OTP acknowledged that sexual crimes against males are used systematically as a military strategy and committed to a gender perspective in its prosecutorial work. However, it failed to establish the gendered nature and effects of sexual violence against men.

The Policy Paper proposes a broad definition on sexual violence, including physical and non-physical harm targeting ‘sexual characteristics.’¹⁴³ Such a definition is both inclusive as it is restrictive. Broadening the scope of sexual violence to capture non-physical acts has the capacity to capture a wide array of harms against men in conflict situations.

¹³⁷ Oosterveld, ‘Sexual Violence Directed Against Men and Boys’ (n 4).

¹³⁸ *ibid.*

¹³⁹ Lewis (n 5).

¹⁴⁰ A Manivannan, ‘Seeking Justice for Male Victims of Sexual Violence in Armed Conflict’ (2013) 46 *NYUJ Int’l L. & Pol.* 635.

¹⁴¹ Lewis (n 5) 10.

¹⁴² ICC Office of the Prosecutor (n 13).

¹⁴³ *ibid* para 17.

On the other hand, Vojdik observes that attacks on sexual characteristics are not the same as violence against one's gender.¹⁴⁴ The OTP's definition falls short to address sexual violence that attacks socially constructed norms of gender such as masculinity and heterosexuality, meaning that in practice forced rape would be excluded from its scope.¹⁴⁵

The focus of the Policy Paper was aimed at balancing gender inequalities between males and females. Drawing on this insight, a comprehensive definition with the potential to create coherence in ICL for sexual violence against men should thus necessarily consider the gendered dynamics, including the specifics of enforced male-male rape and incest during armed conflict.

4.3. Effects of coherence

When international criminal courts and tribunals choose to code sexual violence against men under different categories, such as torture or terror, the sexual nature of the offences is tarnished and contributes in effect to a lack of data and statistics on sexual victimization of men.¹⁴⁶ Oosterveld suggests that three deficiencies underpin sexual violence against men in conflict settings: under-reporting and the lack of systematic data of sexual violence against men and boys create a factual gap, resulting in an obscured awareness of the prevalence, patterns and effects of the problem.¹⁴⁷ The factual gap is enhanced by a social gap that disempowers men to report their victimhood. Due to social stigma attached, male victims avoid to describe themselves as victims of sexual violence.¹⁴⁸ Also, on the other side of the spectrum, legal, humanitarian and medical personnel often are untrained and unable to pick up signs of sexual violence.¹⁴⁹ In addition, the incoherence in international criminal jurisprudence and lack of a common prosecutorial and jurisdictional policy creates a legal gap which completes the cycle. These three gaps reciprocally perpetuate each other. The gap of overt recognition of certain types of sexual violence by international criminal jurisprudence combined with the social gap has led the international courts and tribunals to misclassify sexual harms under general headings, such as torture, inhumane acts, cruel treatment and acts of terror.¹⁵⁰

Transforming deeply rooted gendered social norms or encouraging victims to report sexual violence in an isolated approach is not only a cumbersome but also impossible endeavor. However, the cycle of the three gaps can be broken

¹⁴⁴ Vojdik (n 6) 109.

¹⁴⁵ *ibid.*

¹⁴⁶ Manivannan (n 140).

¹⁴⁷ Oosterveld, 'Sexual Violence Directed Against Men and Boys' (n 4) 108.

¹⁴⁸ *ibid* 108-109.

¹⁴⁹ *ibid* 109.

¹⁵⁰ *ibid.*

if the legal gap is addressed first through an international criminal jurisprudence that reaches the capacity to accommodate the diverse forms of sexual violence against men as *sexual* and *gendered* violence. The first step forward is thus to devise a sound definition capable of creating a flawless prosecutorial and jurisdictional policy for the ICC and future international criminal tribunals.

Instead of considering sexual violence as torture, outrages upon personal dignity and as other on the face non-sexual crimes, it would be more accurate to first acknowledge that certain acts constitute sexual violence. The crime of sexual violence is further aggravated by other categories of crimes such as torture. The successful charging and adjudication of sexual violence against men as 'sexual' crimes will prompt victims to disclose their experiences and generate more reporting, as well as gradually dismantle stereotypes surrounding sexual violence against men.

5. Conclusion

Despite the development of gender-inclusive statutory provisions of the international courts, the practice of the ICTY, ICTR, SCSL and ICC has been ambivalent in adjudicating forms of sexual victimization of men such as coercion witness sexual violence or to rape or otherwise sexually assault a third person. Often, sexual violence against men has remained unprosecuted or has been miscategorized under non-sexual generic provisions such as torture or inhumane treatment. However, particularly forcing a man to witness sexual violence or forcing him to engage in a sexual act with another constitute forms of sexual violence against men that serve as a gendered tool of war for perpetrators in conflict situations as sexual attacks on men are used to debase entire populations in exploitation of the underlying socially constructed understanding of masculinity. Creating a coherent international criminal prosecutorial and jurisdictional policy that comprehends the gendered nature of the crimes and accurately re-classifies the acts as sexual violence is critical to address impunity for hidden sexual victimization of men and boys.