

Colofon JHEC

The Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence (JHEC) is a multi- and interdisciplinary journal on the nexus between and the individual crimes of human trafficking, enslavement and conflict-related sexual violence.

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Editorial

Dr Eefje de Volder and dr Anne-Marie de Brouwer

Chief Editors Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence (JHEC)

We are very pleased and proud to present to you the very first issue of the Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence (JHEC), a multi- and interdisciplinary journal on the nexus between human trafficking (THB – Trafficking in Human Beings), enslavement and conflict-related sexual violence (CRSV). Twice a year we bring to you a general issue with contributions on the nexus between these three crimes and/or on one or two crimes individually (in August) as well as a special issue addressing a specific theme (in December), such as this year's theme 'sexual terrorism'. JHEC uses a double-blind peer review process and contains high quality articles, book reviews, case notes and/or discussion statements of interest to academics and practitioners alike.

Surely, we could not have started this adventure without Paris Legal Publishers as they believed in this journal right from the start. And of course, we are thankful to our highly esteemed editorial board members to take on this journey with us. The editorial board members represent different disciplines in the field of addressing human trafficking, enslavement and conflict-related sexual violence, and include both practitioners and academics. We are honored to work closely with them. For this first issue of the journal we asked them to respond to the statement '*The Nexus between Human Trafficking, Enslavement and Conflict-Related Sexual Violence is Obvious*' as a way to kick-off the debate on the nexus between the crimes. As will also become apparent from the views of our editorial board, the nexus may be clear to some, but it certainly is not for others. It is probably safe to say that generally speaking, human trafficking, enslavement and conflict-related sexual violence have an obvious close connection. However, in reality, and in light of the differing legal regimes, the nexus is less evident. This requires more clarification and implementation. It is for this reason that we felt this journal is direly needed.

Background to the Nexus between Human Trafficking, Enslavement and Conflict-Related Sexual Violence

Indeed, in the past years, the UN Secretary-General has continuously stressed the urgency of addressing the nexus between human trafficking and conflict-related sexual violence.¹ Although most of the time both crimes are looked upon separately, there are many similarities between them.

¹ UNSC, 'Report of the Secretary-General on Conflict-Related Sexual Violence (Violence' (2017) UN Doc S/2017/249), 15 April 2017; b; UNSC, 'Report of the Secretary-General on Conflict-Related Sexual Violence, UN Doc. S/2017/249, 15 April 2017, § 2. See also *Report of the Secretary General on Conflict Related Sexual Violence*' (2018) UN Doc. S/2018/250, 16 April 2018, § 2; Report

One can think of the sexual nature that can be found in both crimes, the taboos and stigmas surrounding both crimes, the difficulty in defining the crimes, the focus on law enforcement (prosecution) rather than on protection and prevention, prosecutorial challenges (e.g. victim/witness protection, secondary victimization, reliance on victims' testimonies), lack of comprehensibly understanding victims' rights and needs, misconceptions about perpetrators and victims, the fluidity of victim and perpetrator's roles, the consequences of both crimes (e.g. trauma, children born as a result), the causes and purposes of the crimes, to name a few. Human trafficking and conflict-related sexual violence 'meet' in the crime of enslavement, but to what extent? Again, there are significant overlaps, although the crimes do not seem to fully coincide.

Human trafficking, enslavement and conflict-related sexual violence take place in times of peace, conflict and post-conflict; the crimes can take place at the same time or follow each other consecutively. In the context of mass migration, men, women and children affected by conflict, displacement or violent extremism are particularly at risk of falling prey to traffickers or other perpetrators of these crimes owing to the collapse of protective political, legal, economic and social systems.

In its report on conflict-related sexual violence of 15 April 2017 the UN Secretary General reported for the first time about the link between conflict-related sexual violence and trafficking in persons.² It was held that the term conflict-related sexual violence also encompasses trafficking in persons when committed in situations of conflict for the purpose of sexual violence/exploitation. Developments during the year 2016, including the rise in violent extremism and mass migration, drew attention to the attendant risk of trafficking in persons for the purpose of sexual violence/exploitation. Moreover, in UN Security Council Resolution 2331 (2016) of 20 December 2016, the nexus between human trafficking, sexual violence, terrorism and transnational organized crime was for the first time addressed.³ With this resolution, sexual violence as a tactic of terrorism was officially acknowledged. Ever since these developments, the three crimes and the nexus between them has been on the agenda of the UN.

While its importance is time and again stressed, the nexus between human trafficking, enslavement and conflict-related sexual violence is up until now still largely underexplored. JHEC aims to fill this gap by researching both the nexus between these crimes and studying the crimes individually.

of the Secretary General on Conflict Related Sexual Violence, UN Doc. S/2019/280, 29 March 2019/S/2019/280, 29 March 2019; Report of the Secretary-General on Conflict Related Sexual Violence, UN Doc S/2020/487/UN Doc 17 July 2020.

² UN Security Council, *Report of the Secretary-General on Conflict-Related Sexual Violence* (S/2017/249), 15 April 2017.

³ UNSC Res 2331 (20 December 2016) S/RES/2331.

The first issue

Apart from discussing the statement on the nexus between human trafficking, enslavement and conflict-related sexual violence by the editorial board members, this first issue also contains four thought-provoking articles, each dealing with one of the three crimes.

The first article in this journal is from Hannah Baumeister. She analyzes in her contribution how the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court construct and reconstruct the concepts of a 'real' and 'simple forced marriage'. She argues that the difference lies in the elements of consent, coercion, duration and purpose. The article highlights the gendered everyday realities in which myths surrounding conflict-related forced marriage are embedded and taken for granted and accepted as normal, contributing to the denial, downplay or justification of acts of violence against women. It argues that by reinforcing these concepts, the courts miss an opportunity to educate the legal community and the public about women's experiences in peace and wartime and to develop a definition of the crime of forced marriage that reflects women's realities.

Amy Weatherburn looks into the increasing number of identified victims of human trafficking for labor exploitation and the low number of associated prosecutions which calls into question the effective implementation of anti-trafficking measures in European countries. She focuses on two European jurisdictions (England and Wales and Belgium). According to her, the low prosecution rates for human trafficking for labor exploitation has to do with the complexity of the human trafficking phenomenon which creates challenges for the investigatory and judicial process. In particular the following: the operationalization of the principle of irrelevance of consent, where the victim demonstrates apparent consent to exploitative working conditions, the participation of victims in criminal proceedings, and the complexity of the factual circumstances. She provides insight into what is needed to secure more effective access to justice for victims of human trafficking.

Kimberley Anderson, Ivan Komproe, Amra Delić, Esmina Avdibegović, Elisa van Ee and Heide Glaesmer discuss in their article how posttraumatic stress disorder (PTSD) and posttraumatic growth (PTG) – psychological outcomes that can co-occur in the aftermath of a traumatic event – interact for female survivors of conflict-related sexual violence from Bosnia and Herzegovina. Their results show that through multiple indirect relationships, CRSV survivors respond to their trauma with both PTSD and PTG, suggesting a dual PTSD-PTG mechanism. As for coping strategies, positive reinterpretation predicted greater PTG, and behavioral disengagement predicted greater PTSD. They concluded that positive reinterpretation as a coping strategy appears to be a stable characteristic that independently predicts PTG, irrespective of trauma type. According to them, mental health professionals should take into account this mechanism when addressing the needs of CRSV survivors, but also war

survivors more generally. Reframing traumatic events and post-trauma sequelae during treatment could lead to PTG and enhance recovery.

The final contribution in the first issue is written by Tamara Frunse on the topic of sexual violence against men and boys. She argues that during armed conflict, men and boys are frequently 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 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 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. Frunse prompts us to rethink current international criminal jurisprudence to coherently address and condemn such forms of sexual violence.

While we are at the start of clarifying the nexus between human trafficking, enslavement and conflict-related sexual violence, as the above articles show, we can say that the first steps have been taken, and we will continue to contribute to this endeavor with this new and thought-provoking journal.

‘The Nexus between Human Trafficking, Enslavement and Conflict-Related Sexual Violence is Obvious’: Views of the Editorial Board

JHEC Editorial Board

Abstract

The editorial board of JHEC consists of highly esteemed scholars and practitioners in the field of CRSV, THB and/or enslavement. What better way to introduce the Editorial Board and to off-set this new journal and discussions than by offering their reflections on a thought-provoking statement: ‘the nexus between human trafficking, enslavement and conflict-related sexual violence is obvious’.

- 1. ‘The nexus is found in the vulnerability of those affected: Address the vulnerabilities and promote the role of female peacekeepers to prevent and address atrocities.’**

Patrick Cammaert (Major General ret.)

The breeding ground for human trafficking, enslavement and conflict-related sexual violence is poverty. Women and girls but also men and boys in armed conflict related areas often live in extreme poverty and must endure extreme hardship. That makes them vulnerable for being lured away from their homes under the false pretext of a better future and a secure and safe environment but ending up being trafficked, many times enslaved and sexually violated. Some of these people try to escape the unsafe conflict area to what they hope a safe environment but end up in refugee or displaced people’s camps where they are still vulnerable and repeatedly violated by host government authorities. In areas such as Myanmar, Syria, Iraq, Libya, Mali, Democratic Republic of the Congo (DRC), Darfur, South Sudan and the Sahel region, this is very much the case. The international community is aware of this but shows little political interest to really do something about it. However, lifting people out of poverty is the first step to make them less vulnerable.

These criminal practices can only be stopped if impunity of the perpetrators will be addressed. As a former general officer commanding the Easter Division in MONUC in the DRC, I saw first-hand the nexus between human trafficking, enslavement and conflict-related sexual violence, whilst facing the results of the horrific practices of an armed group, the Lord’s Resistance Army (LRA) in the DRC. The UN tried to bring the perpetrators of these crimes to justice. Sometimes peacekeepers succeed, sometimes they fail. The UN troops deployed

in these conflict areas must show the will and the skill to protect the local population left vulnerable by their own governments.

An important factor in addressing human trafficking, enslavement and conflict-related sexual violence, is the role that women in civil society and female peacekeepers can play. I also saw first-hand the effect that the presence of women could have in building the trust of the community and the positive image and posture of the UN, both paramount to the success of an operation. As a UN female military officer deployed in the field once said: ‘What I have experienced is that when local women see you are a woman, their faces light up. It is like they get a connection, they relate’.

Evidence shows that increasing the number of female peacekeepers provides greater access to communities for protection and early warning information, increases the reporting of sexual and gender-based violence, and decreases incidences of sexual exploitation and abuse. It could make our peacekeepers more approachable to women, which increases situational awareness and leads to a more sophisticated and nuanced understanding of what is needed to protect civilians.

I have witnessed so many times in the field how important women are for the cohesion of communities, the growth of local economies, the social and political stability and sustainable peace, or the huge difference it makes to empower women to play a prominent role in peacebuilding programmes, disarmament, demobilisation, and reintegration (DDR), community violence reduction, small loan programmes or in particular cash-for-work programmes, as well as intra- and inter-community reconciliation.

For me the nexus between lifting people out of poverty, fighting impunity and empowering women is needed to stop human trafficking, enslavement and conflict-related sexual violence.

2. ‘While the nexus is obvious, its recognition, documentation and tackling is not.’

Dr Chris Dolan (Refugee Law Project, Makerere University; and Ulster University)

The Rome Statute of the International Criminal Court recognises sexual violence as an element of war crimes, crimes against humanity and genocide, and sexual slavery as one form such violence can take. There thus seems little doubt about the enslavement – conflict-related sexual violence (CRSV) nexus. Allegations that ISIL funded some of its operations through trafficking of women seem to further exemplify a human trafficking – enslavement – CRSV nexus. The 2020 Trafficking in Persons Report notes that ‘the United States considers “trafficking in persons”, “human trafficking” and “modern slavery” to be interchangeable umbrella terms that, furthermore, refer

to both sex and labor trafficking'. It further highlights the role of peacekeepers (in conflict settings) in both sexual exploitation and abuse and, at times, trafficking. Again, the nexus seems obvious.

And yet, it is not necessarily the case that, even where there *may well be* a nexus, all aspects of it are obvious, recognised or documented, let alone tackled. To mention but a few: The ways in which CRSV can heighten vulnerability to trafficking need to be highlighted. Post-CRSV feelings of shame and worthlessness and desperation, coupled with livelihood challenges, may lead survivors to agree to sexual exploitation under trafficking conditions. Equally, the extent to which those fleeing conflict violence are exploited sexually in the course of flight, is under-explored. We must also recognise that conflict-related sexual violence impacts on those close to the immediate victim, particularly their children; where adult survivors are dysfunctional in the wake of violence, their children are at heightened risk of being trafficked and drawn into sexual abuse and exploitation, including slavery. High levels of disappearance of refugee children and young adults from refugee hosting areas go largely unreported, particularly in urban areas where some of the most vulnerable seek refuge, but where humanitarian protection policies and regimes have little traction.

A number of discursive tropes also mask probable nexi. CRSV is most frequently understood as a 'weapon of war', a strategic tool for pursuit of military objectives. The economic benefits from human trafficking, and how these may intertwine with military objectives, has received little attention in the literature, notwithstanding recent allegations against ISIL. Equally, mainstream 'gender' discourses, through silencing the sexual victimisation of men in conflict settings, have masked the enslavement/sexual violence nexus insofar as it involves adult men – though acknowledging that when it comes to male child soldiers, such enslavement is possible.

A further largely ignored potential nexus involves armed men. The majority of alleged perpetrators of conflict-related sexual violence are men in uniform. Little thought is given to the fact that very often such men in uniform have themselves been abducted or forcibly conscripted, and subsequently coerced into committing violent sexual acts. In such acts, even as such men appear to be perpetrators, they are themselves being victimised. This particular human trafficking – enslavement – CRSV nexus is just waiting to be drawn – but only by those who dare challenge dearly held scripts about militarisation, toxic masculinities and sexual violence.

3. **'The nexus is obvious: We have to focus on commonalities rather than differences.'**

Rina Ghafoerkhan (Mental Health Practitioner and Researcher ARQ National Psychotrauma Centre; and Utrecht University)

As a mental health practitioner and researcher, I want to urge all of us to look beyond the individual narratives of sexual trauma. Instead, our focus should lie on the commonalities between these individuals and their adverse experiences. By putting up barriers between types of sexual violence, we lose sight of the bigger picture and as a result we fail to address the root causes of sexual violence.

I work with victims of conflict-related sexual violence and human trafficking at an outpatient mental health clinic based in the capital region of the Netherlands. When it comes to mental health complaints there are little to no differences between these groups. In many cases, those who are most vulnerable and part of systematically oppressed groups fall victim to human trafficking, enslavement, and conflict-related sexual violence. Often, these individuals have been part of marginalized group(s) from birth because of their ethnicity, religion, socio-economic status or gender at birth. Others have become part of a marginalized group throughout the course of their lives based on their sexual orientation, changes in gender identity, profession, losing their primary caretakers, or changes in political climate, making them an outcast. These marginalized groups are systematically oppressed, for instance by denial of citizenship, lack of healthcare, and limited access to education and resources for livelihood. These groups often exist at the intersection of poverty, discrimination, and stigmatization. Unsurprisingly, their social position makes these individuals vulnerable to (repeated) sexual victimization, and afterwards prevents them from seeking and receiving legal justice.

When armed conflict and war arise, the pre-existing discrepancy between marginalized groups and dominant groups are exacerbated. This, in combination with state collapse and a climate of impunity, offers an optimal setting that enables (further) sexual violence towards marginalized groups. Trauma survivors and oppression survivors are often one and the same.¹

Focusing on human trafficking, enslavement, and conflict-related sexual violence as distinct experiences does not benefit sexual violence prevention, mitigation, and response programming. For mental health professionals in particular, I would like to bring forward the discussion of how we could better address the psychological consequences of systematic oppression, marginaliz-

¹ R Ghafoerkhan, W Scholte, E de Volder and A de Brouwer, 'The Nexus between Conflict-Related Sexual Violence and Trafficking for Sexual Exploitation in Times of Conflict (2019) 3 Journal of Trafficking and Human Exploitation 9.

ation, continuous traumatic stress, and sexual revictimization in our mental health services. There seems to be little attention in mental health programming for social and systemic causes of continuous traumatic stress.² The often-individualistic medical approach does not represent the scope of traumatic and oppressive experiences that sexual violence victims have often faced throughout their lives. Moreover, current practice unrightfully fails to hold members of dominant groups accountable for their role in upholding systems of oppression, giving rise to the idea that sexual violence should mainly be considered as a distinct individualistic experience.³ In conclusion, I agree with the given statement: the nexus between human trafficking, enslavement, and conflict-related sexual violence is obvious and needs to be addressed in mental health programming.

4. 'The nexus is obvious from a human rights based perspective.'

Dr Chiseche Salome Mibenge (Director of Gender Initiatives at Episcopal Relief & Development)

Human rights-based approaches to end trafficking, enslavement and Conflict-Related Sexual Violence (CRSV) invoke the inviolability of man and the inalienable nature of rights and dignity.⁴ Those who traffic, enslave and sexually assault others are aware of the moral and spiritual value of a human body, and this is apparent in their methodological demeaning of human dignity even as they carefully preserve the economic value of the human body. They develop a set of methodologies, seemingly intuitive but also unmistakably epistemological when one encounters them replicated across transnational planes.

The violator administers torture and other inhuman or degrading treatment or punishment against the transacted body, until it is psychologically and/or physically 'broken', 'broken down', 'broken in'. This is an essential element of the crimes of human trafficking, enslavement and CRSV.⁵ Thus, we can resolve

² V Matthies-Boon, 'Towards a Critical Trauma Studies: A Response to Felix Lang' (2018) 11 Middle East – Topics and Arguments 159-162.

³ G Wekker, *White Innocence: Paradoxes of Colonialism and Race* (Duke University Press 2016).

⁴ C Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (UPenn Press 2013).

⁵ According to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 86: 'the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

the apparent paradoxes of the owners of a meat processing plant that brand the arms of underage and trafficked workers with a hot iron, but are careful not to hurt their fingers; or the enslaved person who will not escape even when the abuser leaves the door ajar, or else might jump to their death through an open window in order to elude a rescuer.

Trafficking, enslavement and CRSV depend on punishments and treatment that can rise to the level of torture, and *they are discriminatory*. And those bodies that represent an affiliation with ‘others’ and subaltern groups, are exceedingly vulnerable to exploitation. Human rights treaty bodies elaborate on the ways in which discrimination on grounds such as caste or descent, class and social status, sex, gender and sexual orientation, race and ethnic based discrimination are integral features of systemic and organized crimes, including war crimes. Those who target bodies for ownership apply a discriminatory lens as it reveals the indicators for vulnerabilities, disposability and exclusion from legal protections in hegemonic societies. The Boston Review highlights American poverty and disenfranchisement (in the context of the Atlanta child murders of the early 1980s) and the ways in which they made the disappearance of poor Black children invisible and the disappearance of a white middle-class child hypervisible, the latter eliciting the full response of law enforcement.⁶

Enslavement, trafficking and CRSV are extraordinary forms of abuse, adopting inhuman or degrading treatment or punishment for the alienation of individual rights and transfers of ownership. Rohingya refugees in Bangladesh; Yazidi children in Iraq; Korean women in Long Island, Queens; Filipino workers repatriated from the United Arab Emirates; queer and transgender ‘throw-away’ youth traversing rural borders for big cities across the US. These and other groups existing in liminal spaces beyond the reach of justice that is promised to citizens of humanity are easy pickings for abusers and their tools of coercion and intimidation.

5. ‘The nexus is obvious: Addressing underlying factors requires a multifaceted and global approach.’

Jean Bosco Mutangana (Tilburg University; former Prosecutor General of the Republic of Rwanda)

The inextricable link between human trafficking and enslavement as one of its components has continued to be central to Conflict-Related Sexual Violence (CRSV). The prosecutions and judgments by post conflict do-

⁶ J Levine, ‘Still Missing: Etan Patz—and Others’ (Boston Review 2020) <<http://bostonreview.net/blog/judith-levine-etan-patz-missing-children-race>> accessed 27 May 2016.

mestic criminal courts including but not limited to Rwanda, as well as the International Criminal Tribunals, greatly contributed in highlighting the widespread and extremely grave nature of CRSV with recognition of rape as an act of genocide, leaving behind jurisprudential legacy of sexual violence which amounted to international crimes.⁷ On the other hand, the evolution of legislating human trafficking for the last 20 years has contributed to an internationally accepted definition for “human trafficking” since the year 2000, when the United Nations published a definition of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (also known as the *Palermo Protocol*).⁸

Human rights violations in the midst of the nexus cannot be ignored. Human trafficking involves controlling, exploiting people and transporting them to a new location, often beyond the borders of their homeland,⁹ and continues to be a global issue affecting millions of people on an annual basis. ‘Human trafficking is a modern-day form of slavery involving the illegal trade of people for exploitation or commercial gain’,¹⁰ and continues to be one of the most lucrative forms of business in the world. It is generally considered an extreme form of exploitation where women, men, and children are recruited or obtained and then forced to labor against their will through force, fraud, or coercion.¹¹ Caused by gender inequalities that have greatly impacted on women in terms of status and opportunities worldwide, women have been particularly vulnerable to these inequalities ranging from poverty, gender discrimination, and regional conflicts that lead to sexual violence, and a lack of job opportunities that affects their socio-economic self-sustainability.

Under circumstances above, the acts of making a slave of someone, or being reduced to slavery especially to women, is more likely and has continued unabated during armed conflicts in different parts of the world which has been

⁷ *The Prosecutor v Jean-Paul Akayesu* (Appeals Chamber Judgement) ICTR-96-4-A (1 June 2001).

⁸ M Madden Dempsey, C Hoyle and M Bosworth, ‘Defining Sex Trafficking in International and Domestic Law: Mind the Gaps’ (2012) 26(1) *Emory International Law Review* 137.

⁹ F Laczo, ‘Human Trafficking: The Need for Better Data’ (Migration Policy Institute, November 2002) <<https://www.migrationpolicy.org/article/human-trafficking-need-better-data>> accessed 10 May 2016. For discussions on trafficking and human rights, see also: T Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Brill 2014) pp 32-33. D Worden, ‘Sex Trafficking: Towards a Human Rights Paradigm’ (2018) 22 *The International Journal of Human Rights* 709.

¹⁰ E Proctor, ‘Human Trafficking continues to be a Global Issue’ (Michigan State University, 2015) <https://www.canr.msu.edu/news/human_trafficking_continues_to_be_a_global_issue> accessed 10 May 2020.

¹¹ Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol).

widely covered in some international media.¹² Such conditions pressure women to migrate and make them particularly trafficking victims to unscrupulous recruiters or employers who, through force, fraud, or coercion, or taking advantage of their vulnerabilities. Human trafficking within and into conflict areas takes several forms.¹³ Over the last two decades, there has been increasing recognition of one in particular: trafficking for sexual exploitation by a range of armed groups, including non-state armed groups, state forces and, tragically, international peacekeepers.¹⁴ International criminal tribunals have identified instances of enslavement, sexual slavery and forced marriage in the Balkans, Sierra Leone and Uganda.¹⁵ Between 1987 and 2006, the Lord's Resistance Army, a Ugandan rebel outfit is thought to have kidnapped over 20,000 children in Uganda, many of them for sexual enslavement and domestic servitude.¹⁶

In conclusion, it could therefore arguably be debated, that the inextricable link between the trio is real and obvious and requires a multifaceted and global approach to address underlying factors that cause conflict, poverty and gender inequalities.

6. 'The nexus is obvious to those who apply a gender lens to conflict and mass atrocities.'

*Professor Valerie Oosterveld (University of Western Ontario
Faculty of Law)*

The nexus between human trafficking, enslavement and conflict-related sexual violence is obvious to those who apply a gender lens to situations of conflict and mass atrocity. The context of war is gendered in many ways, including in its effects on civilians. Sexual violence is used by combatants

¹² C Otten, 'Slaves of ISIS: The long walk of the Yazidi women' (the long read) *The Guardian* (London, 15 July 2017) <<https://www.theguardian.com/world/2017/jul/25/slaves-of-isis-the-long-walk-of-the-yazidi-women>> accessed 10 May 2020.

¹³ See especially Human Rights Council, 'Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children' (3 May 2016) UN Doc. A/HRC/32/41.

¹⁴ Fighting human trafficking in conflict, 10 Ideas for Action by the United Nations Security Council, Workshop Report | September 2016 accessible at <https://reliefweb.int/sites/reliefweb.int/files/resources/UNUReport_Pages.pdf>

¹⁵ H van der Wilt, 'Slavery Prosecutions in International Criminal Jurisdictions' (2016) 14 *Journal of International Criminal Justice* 269; and KL Corrie, 'Could the International Criminal Court Strategically Prosecute Modern Day Slavery' (2016) 14 *Journal of International Criminal Justice* 285.

¹⁶ Human Rights Watch, 'Q&A on Joseph Kony and the Lord's Resistance Army' (News, 21 March 2012) <<https://www.hrw.org/news/2012/03/21/qa-joseph-kony-and-lords-resistance-army#4>> accessed 10 May 2020; E Batha, "'Rape was on a daily basis", former child sex slave tells Angelina Jolie' (Thomson Reuters Foundation, 11 June 2014) <<http://news.trust.org/item/2014061153723-rd021/>> accessed 10 May 2020.

for gendered reasons or to achieve gendered ends. For example, Syrian government officials use sexual violence to torture and humiliate male detainees in prisons, and non-state militia in the Democratic Republic of the Congo use sexual violence to target women and girls for forced ‘marriage’ or sexual slavery. Conflict-related sexual violence is also used by perpetrators as an unfortunately effective method of terrorizing and tearing apart communities.

Conflict-related sexual violence can – and often does – take place in situations of enslavement, including forced domestic work, forced food provision and other forms of forced caregiving. This combination of conflict-related sexual violence and enslavement exists within a power scenario in which enslavers dominate the sexual and physical autonomy of the enslaved. Enslavers prey upon the vulnerability of the enslaved by trafficking them for financial profit or other gain, including for the purposes of further sexual violence. The enslavers may be combatants, or they may be connected to organized crime rings which work alongside combatants, taking advantage of the absence of the rule of law.

Study of the interconnections between human trafficking, enslavement and conflict-related sexual violence is important. For too long, the field of international law has treated these issues as existing in separate silos and therefore addressed through different legal frameworks. Conflict-related sexual violence was considered within international criminal law circles, human trafficking within transnational criminal law discussions, and enslavement within the international humanitarian and human rights law disciplines. We know, from decades of experience, that the interactions between these three forms of violation can deepen the harms done to individuals and societies. We also know that one can beget the other: wartime enslavement can create the setting that allows repeated sexual violence to occur, and human traffickers prey upon the most vulnerable individuals in armed conflicts, including victims of sexual violence.

The relationship between human trafficking, enslavement and conflict-related sexual violence deserves greater scrutiny and understanding. The *Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence* provides the perfect venue for this deeper exploration.

7. ‘There is no such thing as *the* nexus and therefore this Journal is so needed.’

*Dr Christophe Paulussen (T.M.C. Asser Institute; and
International Centre for Counter-Terrorism, The Hague)*

No, the nexus between human trafficking, enslavement and conflict-related sexual violence is not obvious. This is because conflict-related sexual violence, for example, may be committed as a stand-alone crime, without any connection to the other two forms of criminality. Moreover, there is no such thing as *the* nexus: if connections exist between human trafficking, enslave-

ment and conflict-related sexual violence – and that is of course very well possible, as also recognised by, for example, UNSC Resolution 2331 of 20 December 2016 – these connections will vary, depending on the exact (local) circumstances.¹⁷

In a similar vein, we cannot talk about *the* crime-terror nexus, to mention another nexus that has been increasingly put on the agenda of both scholars and practitioners in the past few years. Indeed, *a* crime-terror nexus can for instance be identified in prisons in Western Europe, but that nexus is obviously very distinct from the crime-terror nexus in Colombia, where guerrillas and drug traffickers cooperate in joint criminal activities.

However, the fact that the nexus between human trafficking, enslavement and conflict-related sexual violence is not obvious is *exactly* the reason why this Journal is so much needed. Only detailed analyses of the complexities and dynamics involved in the various manifestations of the different connections between human trafficking, enslavement and conflict-related sexual violence can lead to meaningful, context-specific assessments. And only these, in turn, can engender tailored responses that can have an impact on the ground, for the victims of these crimes.

8. ‘The nexus is obvious, but we must be careful not to make easy assumptions.’

Professor Ryszard Pitrowicz FLSW (Professor of Law at the Department of Law and Criminology, Aberystwyth University; Adjunct Professor at the University of South Australia; and the First Vice-President of GRETA, Council of Europe Group of Experts on Action against Trafficking in Human Beings)

There is indeed a clear, even obvious, connection between human trafficking and enslavement, and between those crimes and sexual violence in armed conflict. But not all sexual violence in armed conflict arises out of trafficking or enslavement. And not all trafficking is enslavement.

We must be careful not to make easy assumptions. Trafficking in human beings (THB) is often referred to as ‘modern day slavery’. It’s a very catchy slogan, and it gets attention, but it does not always help trafficked people if the general public associates all trafficking as meaning the victims being held in chains and treated in the most egregious manner possible. Of course, this can happen, but THB can involve exploitation that is simultaneously less invidious

¹⁷ UNSC Res 2331 (20 December 2016) UN Doc/S/RES/2331.

and more mundane, yet still a major crime against the victim. Let us not forget those begging outside churches or working on fruit farms.

Nor should we think only about sexual violence when we think about the exploitation arising out of trafficking. So many women, men and children are trafficked for different forms of labour exploitation, for forced criminality and forced begging, even sometimes for their body parts.

In times of armed conflict, civilians can be very vulnerable, and women and girls particularly so. It is right that we seek to expose this, when so much else competes for the world's attention. While in 2019 Europe spoke about Brexit and in 2020 the whole world (some populist politicians notwithstanding) fears the impact of Covid-19, the mass rapes carry on in the Democratic Republic of Congo. We never hear about it these days, while we worry about when we can get a haircut, or where we can go on holiday. And in warfare, the weak and the vulnerable are even less able to defend themselves, which means that women and children are trafficked: by the Russians in Germany in 1945; by Nazi Germany and Japan throughout the Second World War, by members of ISIS much more recently.

It never seems to stop. That is why we should expose these connections, while not allowing ourselves to forget that THB happens outside armed conflict too; that people are exploited for their labour as well as for sex; and that these awful crimes give rise to human rights obligations of States to protect, support and assist not only those who are victims, but also those who are at risk of becoming victims.

9. 'The nexus is particularly obvious in times of conflict.'

Dr Julia Planitzer (Ludwig Boltzmann Institute of Human Rights; member of GRETA; and Council of Europe Group of Experts on Action against Trafficking in Human Beings)

The central term in my point of view in this statement is 'conflict', which forms to a certain extent the nexus between for instance human trafficking or enslavement. Conflict-related trafficking concerns women, men and children and includes for instance forced military recruitment of children or kidnapping of adults. Conflict is one of the drivers of displacement. As shown in CEDAW's general recommendation No. 35 (2017) on gender-based violence against women, gender-based violence against women and girls including trafficking is often exacerbated by for instance armed conflict, displacement

and migration.¹⁸ In the current Draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration of CEDAW, rights of women and girls in the context of forced displacement are also addressed. Strengthening rights of displaced persons, in particular ensuring access to asylum procedures, is essential and should be at the centre of measures against conflict-related trafficking.¹⁹ As stated by the UN Special Rapporteur on trafficking in persons, especially women and children (A/71/303), 'conflict-related trafficking is rarely detected (...) and even less addressed'.²⁰ I am glad to see that the Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence will address this gap and contribute to an enhanced awareness of these matters.

10. 'The nexus is both obvious and not: These are similar yet distinct crimes.'

Professor Conny Rijken (Tilburg Law School, Tilburg University)

The trafficking protocol not only created an awfully complicated definition of human trafficking but set aside two important historical distinctions: first, between the process (back then referred to as trafficking) and exploitation and second, between sexual exploitation and labour exploitation (including forced labour and slavery). The former, in my view, is regrettable whilst the latter is an advantage. Distinguishing between the process and the act of exploitation, comparable to the distinction in the slavery convention between slave trade and slavery, reflects the different nature of these two criminal acts and enables the prosecution of a broader range of perpetrators, albeit for different criminal acts. It furthermore puts emphasis on the most objectionable element of trafficking, namely, the exploitation of the person with slavery as the most severe form of exploitation. Nowadays, slavery or modern slavery is often used to invigorate the severity of human trafficking because it is often associated with the practices of the black slave trade. But it actually narrows the concept of exploitation. Indeed, some forms of human trafficking can be qualified as (modern) slavery because some traffickers act as the owners of their victims, but this is not necessarily the case. It would be a shame if these cases

¹⁸ CEDAW, 'General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19' (14 July 2017) CEDAW/C/GC/35.

¹⁹ CEDAW, 'Draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration' (2019).

²⁰ HRC, 'Report of the Special Rapporteur of the Human Rights Council on Trafficking in Persons, especially Women and Children (5 August 2016) A/71/303.

were not identified as cases of human trafficking. Another important reason to hold on to the use of human trafficking is the victim protection accompanying to the identification of trafficking victims. Unless this protection is granted to victims of all forms of exploitation thus including slavery, modern slavery, forced labour, servitude, we should cherish what has been achieved in terms of victim protection. The use of the term 'enslavement' instead of 'slavery' is interesting. Those who want a further deepening of this terminology should read Nicole Siller's dissertation in which she concludes that '... the law has incorporated trafficking in persons within the material elements of this international offense [of enslavement]'.²¹ Enslavement is primarily used in the context of international crimes, namely, war crimes and crimes against humanity, and according to Siller, includes the crime of trafficking as how it is defined in international law. Interestingly, in national contexts 'enslavement' is often incorrectly translated as slavery, disregarding that 'enslavement' encompasses both crimes of slavery and 'the bringing into slavery'. Given the use of 'enslavement' in the field of international humanitarian law the link in the Journal's title with armed conflict is an obvious one. The limitation to conflict-related sexual violence is bringing back a limitation which we had done away with in the trafficking protocol, albeit in this context a well-chosen focus for the journal and a topic that deserves wider scrutiny. As a specialised and interdisciplinary journal, it will importantly contribute to our knowledge and understanding of the three topics separately and to further unravel the nexus between these. Looking forward to reading it!

II. 'The nexus is obvious: The Entanglement comes down to the issue of power.'

Dr Pim Scholte (Laguna Collective; and Amsterdam University Medical Centers)

To me, the nexus between human trafficking, enslavement and conflict-related sexual violence is obvious indeed. By definition, during large scale conflicts the power of one group over the other is fought over. Sexual violence is an extremely effective weapon, as it destroys its victims' integrity, sense of dignity and agency, psychological and physical wellbeing, and full reproductive capacity. When committed against many, sexual violence affects the social fabric and potential of a whole community, resulting in large scale disempowerment. Once a community has been defeated it falls prey to any

²¹ N Siller, *Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity* (PhD University of Groningen 2017) 273.

conqueror's actions, which may be particularly degrading as the defeated were probably considered an inferior group even before the conflict. Thus, sexual violence coloured the recent past, and enslavement and further sexual violence may lay ahead. These may easily take the form of exploitation and trafficking, as the money involved warrants the exploiters' survival and wealth, and possibly the purchase of new arms.

In all aspects, the entanglement of human trafficking, enslavement and conflict-related sexual violence comes down to the power issue. Violence, enslavement and exploitation are an extension of any person's power – that is just how we are. No human being should ever have absolute power over another individual, for the very reason of being human.

12. 'Despite some distinctions, the nexus is obvious because of the many commonalities.'

Dr Kim Thuy Seelinger JD (Washington University in St. Louis)

Despite some distinction between legal frameworks and traditionally implicated actors, these harms are all serious human rights violations, they are all crimes under international law, and they all too frequently have gendered roots, manifestations, and impacts. Vulnerability to one can be related to vulnerability to the others. Most importantly, these overlapping forms of harm all demand a survivor-centred, evidence-based, and multi-disciplinary approach to prevention and response.

13. 'Colloquially the nexus is obvious but in reality, further distillation, clarification and implementation are needed.'

Patricia Viseur Sellers (Special Advisor to the Prosecutor of the International Criminal Court; Oxford University; and London School of Economics)

Since antiquity, enslaving a defeated enemy was a commonplace, intentional outcome of waging war. Sociologist Orlando Paterson observed that, circa 700 BC, the Greek city-states would capture enemy females in order to replenish the slave population that was overwhelmingly female. Thus, wartime female slavery is an arcane form of enslavement. The nexus between conflict-related sexual violence and enslavement relentlessly persistent. Modern examples abound from sexualized enslavement of the Comfort Women of World War II, the females of the town of Foča in the former-Yugoslavia, the child soldiers of

Sierra Leone, Uganda or the Democratic Republic of Congo to the Yazidi females and children enslaved under the IS Caliphate.

To unveil the nexus between conflict-related sexual slavery and human trafficking, first, the following must be understood: how does reduction to enslavement happen? When are powers attaching to rights of ownership exercised over a person? To transit from being ‘un-enslave’ to being enslaved could entail acts of capture, transport, exchange, sale, barter, transfer, recruitment, abduction, deception, inheritance, gifting or birth. Such pre-cursory conduct to slavery might constitute human trafficking or, under humanitarian and international criminal law, the prohibition of the slave trade. Curiously, human trafficking and the slave trade have escaped concerted legal examination in conflict-related enslavement and sexual violence cases.

In *Ntaganda*, a recent ICC case, the Trial Chamber observed that after a ‘mop-up’ operation in Kobu, Commander Simba committed sexual slavery against an eleven-year-old girl because he ‘exercised powers attached to the right of ownership over the girl’, starting with her capture and deprivation of liberty.²² The Trial Chamber did not refer to her capture and reduction to slavery as a form of human trafficking or an act of the slave trade. In a subsequent finding, the *Ntaganda* Trial Chamber held that the capture of another girl who was then raped was not a deprivation of liberty tantamount to exercising powers attaching to the rights of ownership, although, it found ‘her capture and having been made to carry items were not lawful, this conduct is not separately charged’.²³ The Trial Chamber, in essence signalled an impunity gap but refrained from assigning a specific criminal character to the conduct.

When conduct that reduces a person to slavery comprises the exercise of powers attaching to the rights of ownership, then, the entirety of those acts constitute enslavement. Such conduct is not human trafficking, except in the lay sense of the term: it does not constitute the transnational crime or the human rights violation of trafficking. Although human trafficking might find berth in national penal codes, it is rarely subsumed under provisions that govern armed conflict. Precursory conduct to in *Ntaganda* might have been charged as the slave trade as a war crime or a crime against humanity under customary international law, however the Rome Statue is silent in regard to the slave trade.

Colloquially speaking, human trafficking has an obvious close nexus to enslavement and conflict-related sexual violence. In reality, and amid the differing legal regimes, such a nexus is not so obvious. It requires further distillation, clarification and implementation.

²² *The Prosecutor v Bosco Ntaganda* (Judgment Trial Chamber VI) ICC-01/04-02/06 (8 July 2019) para 961.

²³ *ibid* para 957.

14. 'The nexus is visible in the disintegration of legal boundaries between the crimes.'

Dr Nicole Siller (Deakin University)

From its inception in the last years of the nineteenth century and throughout the twentieth century, international law addressing human trafficking has evolved resulting in the production of a series of instruments. Whether the inundation of international law on the subject can be considered as *progress* is a matter of perspective and opinion; but objectivity requires one to admit that each of these instruments sheds light on the legal construct of human trafficking as an international legal concept, culminating with the current definition of 'trafficking in persons', found in Article 3 of the Palermo Protocol.

It is the handling of these instruments by domestic, regional, international, hybrid and symbolic judicial institutions, as well as by practitioners and scholars which confirms, at a minimum, the existence of a nexus between human trafficking, enslavement and conflict-related sexual violence – if not the disintegration of legal boundaries between the crimes of enslavement, sexual slavery and trafficking.

For example, a review of the judicial methodology used to make a finding of enslavement or sexual slavery reveals each international or hybrid court or tribunal to-date has largely strayed from explicitly identifying 'powers attaching to the right of ownership', the central components of the international legal definition of slavery. Instead, these institutions have favored utilizing a judicially constructed test ('indicia of enslavement').

Among others, this test espouses the key relevant legal considerations one would make when determining the perpetration of trafficking (as defined in the Palermo Protocol). Specifically, the most apparent indicia include: (1) the importance in methods and manners of victim acquisition; and (2) considerations of consent. Each and every International Criminal Law (ICL) institution has held that the circumstances by which a person was acquired for their enslavement/sexual slavery are relevant and aids in determining whether the elements of the crime were committed. These factors are also the first two elements of human trafficking. Moreover, in each enslavement/sexual slavery case, victim acquisition was performed for the purpose of subjecting those persons acquired into forced or compulsory labor and/or sexual exploitation (eg rape, sexual slavery and/or forced 'marriage') thereby satisfying the third and final element of trafficking in persons.

This consistency in legal application evidences a common understanding in the interpretation of the crimes of enslavement and sexual slavery and the obvious nexus that exists with those offences and human trafficking. Because the relied upon indicia of enslavement essentially comprises the elements of trafficking in persons as codified in the Palermo Protocol, it may even be con-

cluded that ICL institutions already consider the incorporation of trafficking within the international crimes of enslavement and sexual slavery.

15. ‘The nexus is particularly obvious, but largely overlooked, during refugees’ flight.’

Dr Marian Tankink (Medical anthropologist and Consultant Anthropological Research & Training on Gender, Violence and Mental Health)

Human trafficking, enslavement and sexual violence are elements that exist in all conflict situations, as also the contributions in our first issue showed. Conflicts force people to flee their homes and seek refugee elsewhere, which destroys the social and economic safety networks of families and communities and makes individuals vulnerable to being trafficked or enslaved.²⁴ In this piece I would like to focus on the situation of refugees that are under protection of UNHCR, the European Union (EU) and/or specific countries such as Greece.

Refugees who have fled to other countries in order to avoid conflict-related gender-based violence (GBV), may nonetheless continue to face other forms of GBV including: domestic violence, sexual violence, early marriage, harassment and isolation, exploitation, and survival sex.²⁵ Conflict-related sexual violence, enslavement and trafficking travel with the refugees through counties and to refugee camps or asylum settlements. In my opinion, there is insufficient attention paid to refugees’ specific vulnerabilities and need for psychosocial support and protection. In what follows, I will only mention a few examples.²⁶

Last year, I was assessing the mental health and psychosocial support situation in the refugee camps on the Greek islands and in Athens. Many refugees told me that, while crossing through Turkey, they had become victims of human trafficking and enslavement before they managed to reach Greece. Upon their arrival in Greece, an EU country, and telling their stories to aid and health workers, they were met with reactions ranging from ignorance, helplessness, as well as outright disbelief.

²⁴ RKQ Akee and others, ‘Ethnic Fragmentation, Conflict, Displaced Persons and Human Trafficking: An Empirical Analysis’ (IZA Discussion Papers no 5142, 2010) <<http://nbn-resolving.org/urn:nbn:de:1011-201010133345>> accessed 14 May 2020.

²⁵ G Hassan and others, ‘Mental Health and Psychosocial Wellbeing of Syrians affected by Armed Conflict’ (2016) 25 *Epidemiology and Psychiatric Sciences* 129.

²⁶ M Tankink, “‘We are trying to create a hole in the water.’ An integrated assessment of refugees and forcibly displaced persons’ mental health, psychosocial support services and experiences with gender-based violence in Athens, Lesvos and Samos, Greece’ (HIAS, *forthcoming*).

One woman I spoke with was taken out the camp by traffickers and forced into prostitution. When she managed to escape, the police officers she turned to for help did not take her case seriously, assuming that she was making up this story in an attempt to receive a residence permit. They also could not believe that this could happen on their island.

Refugees mentioned the existence of an illegal brothel in their camp in which women and girls were forced to work at night. As far as they could tell, camp authorities took no action against these practices.

In another camp several boys were picked up by a man driving a car in order to take them to have sex with men in exchange for a packet of cigarettes. This story is known to the police, there even exists an accurate description of the car, but no action was taken.

In Athens, about 3,500 unregistered refugee children or children from 'safe countries' are homeless, with no support and forced to have survival sex. Teenage boys, in particular, are sexually abused by older men in exchange for money.²⁷

The refugees in these examples are scarcely the focus of policy discussions and are consistently left out of violence-prevention and response efforts.²⁸ This happens in camps in Europe, under protection of Greece and the European Union and our international law. Policy makers look away and organisations supporting refugees are severely understaffed and frustrated. What should be our role as social scientists and practitioners?

16. 'The nexus is obvious since victims face similar conditions.'

*Linda Verhaak (Clinical Psychologist at Arq Centrum 45
(The Netherlands) and ARQ International)*

In our work with victims of human trafficking there is an obvious connection between working in forced prostitution or the sex industry and enslavement. Most of the victims have been literally bereft of their freedom of movement or choice, either by physical violence and threat, drugs and alcohol or by psychological mechanisms of threat or dependency, or in the case of many African victims, by voodoo rituals in which a curse that affects the psychological wellbeing of the victim and that of their family. The psychological aspect of

²⁷ OS Kotsiou and others, 'Impact of the Refugee Crisis on the Greek Healthcare System: A Long Road to Ithaca' (2018) 15 International Journal of Environmental Research and Public Health 1790.

²⁸ J Freccero and others, 'Sexual Exploitation of Unaccompanied Migrant and Refugee Boys in Greece: Approaches to Prevention' (2017) 14 PLOS Medicine e1002438.

enslavement in love relationships is yet a more subtle way of dependency that we see more often in (Eastern) European victims. Conflict related violence has a big effect on the need for people to flee from their original home area, making them vulnerable to human traffickers who promise work and a better living abroad, and by that means making the victim vulnerable and totally dependent on the trafficker, which in turn will facilitate enslavement mechanisms.

Forced Marriage Real Simple

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Abstract

The concepts of ‘real rape’ and ‘real rape victim’ play a key role in the reporting and prosecution of rape cases and strongly influence their outcomes. Similar biases and misconceptions obscure other acts of gender-based violence such as forced marriage in times of armed conflict. This paper analyses how the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court construct and reconstruct the concepts of a ‘real’ and ‘simple forced marriage’. It argues that the difference lies in the elements of consent, coercion, duration and purpose. The paper highlights the gendered everyday realities in which myths surrounding conflict-related forced marriage are embedded and then taken for granted and accepted as normal, contributing to the denial, downplay or justification of acts of violence against women. It argues that by reinforcing these concepts, courts miss an opportunity to educate the legal community and the public about women’s experiences in peace and wartime and to develop a definition of the crime of forced marriage that reflects women’s realities.

I. Introduction

The concepts of ‘real rape’ and ‘real rape victim’ play a key role in the reporting and prosecution of rape cases and strongly influence their outcomes.¹ Encompassed within these concepts is the idea that ‘real rape’ is perpetrated in a surprise attack at night in a public, deserted place by a male stranger who uses physical violence against a young, respectable, white, female victim who resists but is overpowered and sustains multiple injuries. ‘Simple

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¹ K Weis and SS Borges, ‘Victimology and Rape: The Case of the Legitimate Victim’ (1973) 8(2) Issues in Criminology 71; LS Williams, ‘The Classic Rape: When Do Victims Report?’ (1984) 31 Social Problems 459; RT Andrias, ‘Rape Myths: A Persistent Problem in Defining and Prosecuting Rape’ (1992) 7 Criminal Justice 2; M White Stewart, SA Dobbin and SI Gatowski, ‘“Real Rapes” and “Real Victims”: The Shared Reliance in Common Cultural Definitions of Rape’ (1996) 4 Feminist Legal Studies 159; J Du Mont, K Miller and TL Myhr, ‘The Role of “Real Rape” and “Real Victim” Stereotypes in the Police Reporting Practices of Sexually Assaulted Women’ (2003) 9 Violence Against Women 466; S Estrich, ‘Real Rape’ in B Arrighi (ed), *Inequality: The Intersection of Race/Ethnicity, Class, and Gender* (Rowman and Littlefield Publisher 2007); L Ellison and VE Munro, ‘A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study’ (2010) 13 New Criminal Law Review: An International and Interdisciplinary Journal 781; L Ellison and VE Munro, ‘Better Than the Devil You Know: Real Rape Stereotypes and the

rape', in contrast, occurs within the private sphere and is perpetrated by a man known to the victim who shows no obvious signs of resistance or violence.² The pervasiveness of these concepts in and outside of the criminal justice system results in the disqualification of, and underreporting by, women who do not consider themselves 'real victims' and their experiences 'real rape'.³ It shifts the focus from the acts of the perpetrator to those of the survivor who is treated with suspicion and a lack of sensitivity, faced with victim blaming attitudes and subjected to intrusive questioning about their state of mind based on their actions and inactions.⁴ This leads to a majority of rapes being disregarded as the grave harm, injury to personal integrity and act of aggression that they are.⁵

Similar biases and misconceptions exist in relation to other acts of gender-based violence, forced marriage in times of armed conflict being one of them. Stories of women in Sierra Leone and Uganda invoke images of conflicts where male fighters abduct women and girls, take them to their camp, label them a fighter's wife and subsequently subject them to various acts of physical, sexual and psychological violence, including rape, forced pregnancy, forced labour, corporal punishment and enslavement.⁶ Similarly, stories of Malian women call attention to the highly coercive environment of cities under armed occupation that pervert traditional marriage practices.⁷ Stories of women and men in Cambodia highlight the brutality and all-encompassing ideological rigidity of

Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 International Journal of Evidence & Proof 299.

² Williams (n 1); Andrias (n 1); Du Mont, Miller and Myhr (n 1); Estrich (n 1); Ellison and Munro, 'Better Than the Devil You Know' (n 1); Eithne Dowds, 'Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force' (2020) 83 Modern Law Review 35.

³ Williams (n 1); Stewart, Dobbin and Gatowski (n 1); Du Mont, Miller and Mhyr (n 1); Dowds (n 2).

⁴ Andrias (n 1); Dowds (n 2).

⁵ Williams (n 1); Stewart, Dobbin and Gatowski (n 1); Du Mont, Miller and Mhyr (n 1).

⁶ K Carlson and D Mazurana, 'Forced Marriage within the Lord's Resistance Army, Uganda' (2008) Tufts University Feinstein International Center <<https://fic.tufts.edu/wp-content/uploads/Forced+Marriage+within+the+LRA-2008.pdf>> accessed 27 April 2020; C Coulter, *Bush Wives and Girl Soldiers: Women's Lives through War and Peace in Sierra Leone* (Cornell University Press 2009); J Annan and C Blattman, 'On the Nature and Causes of LRA Abduction: What the Abductees Say' in B Allen and K Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (Zed Books 2010); A Bunting, 'Forced Marriage' in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes' (2012) Canadian Journal of Human Rights 165; S Kramer, 'Forced Marriage and the Absence of Gang Rape: Explaining Sexual Violence by the Lord's Resistance Army in Northern Uganda' (2012) 23(1) Columbia University Journal of Politics and Society 11.

⁷ KK Paterson, 'Mali Conflict is Latest to Employ Forced Marriage as Tool of War' (4 June 2013) Women's Media Centre <<https://www.womensmediacenter.com/women-under-siege/mali-conflict-is-latest-to-employ-forced-marriage-as-tool-of-war>> accessed 29 April 2020; R de Jorio, 'Conflict-Related Gender-Based Violence in Mali and the Limits of the Global System of Law' (2019) 21 Mande Studies 33; V Oosterveld, 'Forced Marriage: Terminological Coherence and Dissonance in International Criminal Law' (2019) 27 William & Mary Bill of Rights Journal 1263.

the Khmer Rouge regime that married strangers in mass ceremonies and forced them to consummate their marriage and procreate as a step in their socialist revolution and creation of a new society.⁸ Their stories become stories of ‘real forced marriage’.

Comparatively, stories of Cambodian men and women who consented to marriage,⁹ of Malian women who were temporarily married to members of Ansar Eddine and Al Qaeda in the Islamic Maghreb with the apparent consent of their families to allow sexual intercourse,¹⁰ of Malian and Sierra Leonean women who arguably married, or were married off, for survival, protection and access to resources,¹¹ and of Sierra Leonean women who were forced into marriage with fighters of the Armed Forces Revolutionary Council (AFRC) or the Revolutionary United Front (RUF) and stayed with their forced husband without attempting to escape¹² become stories of ‘simple forced marriage’.

This article analyses how the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Court (ICC) construct and reconstruct the concepts of a conflict-related ‘real’ and ‘simple forced marriage’. It highlights the gendered everyday realities in which those concepts are embedded and then taken for granted and accepted as normal, contributing to the denial, downplay or justification of acts of violence against women.¹³ By reinforcing these concepts, the courts miss an opportunity to educate the legal community and the public about women’s ex-

⁸ B Ye, ‘Forced Marriages as Mirrors of Cambodian Conflict Transformation’ (2011) 23 Peace Review 469; S Studzinsky, ‘Neglected Crimes: The Challenge of Raising Sexual and Gender-Based Crimes before the Extraordinary Chambers in the Courts of Cambodia’ in S Buckley-Zistel and R Stanley (eds), *Gender in Transitional Justice* (Palgrave Macmillan 2012); S Studzinsky, ‘Victims of Sexual and Gender-Based Crimes before the Extraordinary Chambers in the Courts of Cambodia: Challenges of Rights to Participation and Protection’ in ALM de Brouwer and others (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013); Oosterveld, ‘Forced Marriage’ (n 7).

⁹ *Co-Prosecutor v Chea Nuon and Samphan Kieu* (Trial Judgment) 002/19-09-2007/ECCC/TC ‘Case 002’ (16 November 2018) para 3617ff.

¹⁰ *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud) ICC-01/12-01/18 ‘Al Hassan’ (13 November 2018) para 563ff.

¹¹ *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Trial Transcript) SCSL-2004-15-T ‘RUF Case’ (23 November 2005); *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Trial Judgment) SCSL-04-15-T ‘RUF Case’ (2 March 2009) para 1413; *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Public Redacted Version of the ‘Prosecution’s Final Written Observations Regarding Confirmation of the Charges’, 24 July 2019, ICC-01/12-01/18-430-Conf) ICC-01/12-01/18 ‘Al Hassan’ (13 November 2018) para 42.

¹² *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Prosecution Filing of Expert Report Pursuant to Rule 94(bis) and Decision of Prosecution Request for Leave to Call an Additional Expert Witness) SCSL-04-16-T ‘AFRC Case’ (8 August 2005); *RUF*, ‘Trial Judgment’ (n 11) paras 1293, 1407-1408, 1467.

¹³ Stewart, Dobbin and Gatowski (n 1); Ellison and Munro, ‘A Stranger in the Bushes’ (n 1).

periences in peace and wartime and to develop adequate definitions of crimes that reflect women's realities.¹⁴

2. The Cases

Since the SCSL took up its work in 2002,¹⁵ international and hybrid courts have addressed forced marriage in the context of different conflicts and have categorised, defined and understood the crime in different ways.

The SCSL dealt with cases of forced marriage committed by the AFRC and RUF during the civil war in Sierra Leone between 1991 and 2002. Members of fighting groups abducted or captured civilian women and girls, forced them into unlawful marriages to fighters and subsequently subjected them to various acts of gender-based psychological, physical and sexual violence.¹⁶ In an attempt to explain the perpetration of conflict-related forced marriages in Sierra Leone, they are compared to peacetime conventions of marriage by capture that are pushed into the context of conflict. However, a more nuanced understanding would consider the lack of material wealth of fighting groups. In this context, forced wives are used as a low-cost payment system and seen as remuneration for fighters' bravery. The number of forced wives then also becomes a status symbol with higher ranking fighters being assigned, or allowed to choose, more wives than fighters of lower rank. In addition to indicating a fighter's social status, forced marriage also indicates his status as an adult man by providing an opportunity to fulfil a masculine ideal of marriage, parenthood and being the provider for, and protector of, wives and children. Forced wives, in turn, become an inherent part of a fighting group's organisational structure and are coerced into participating in direct combat, performing domestic work and acting as wives to their forced husbands and as mothers to the children born into forced marriages. This indicates that their presence in fighting groups is of vital importance for the creation of bonds and dependency structures that are intended to advance the creation of a new social order, increase unit cohesion and stability, and reduce the likelihood of escape in an already extremely coercive environment. Contrary to this, forced marriage also strategically serves the

¹⁴ Andrias (n 1).

¹⁵ The Residual Special Court for Sierra Leone and the SCSL Public Archives <<http://www.rscsl.org/>> accessed 15 April 2020.

¹⁶ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Trial Judgment) SCSL-04-16-T 'AFRC Case' (20 June 2007) para 701ff; *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Appeals Chamber Judgment) SCSL SLS-2004-16-A 'AFRC Case' (22 February 2008) para 175ff; *RUF*, 'Trial Judgment' (n 11) paras 1291ff, 1460ff; *Prosecutor v Charles Taylor* (Trial Judgment) SCSL-03-01-T (18 May 2012) paras 418-421; The Residual Special Court for Sierra Leone and the SCSL Public Archives (n 15).

military objective of demoralising and disabling the opponent by dissolving social bonds in families and communities.¹⁷

In addition to the SCSL, the ECCC addressed forced marriages that were perpetrated as part of a nationwide policy during the 1975-1979 reign of the Khmer Rouge. Here, the regime held mass ceremonies in which it forced men and women into lawful marriages. Often the spouses were strangers who were matched based on their similar backgrounds and married without advance notice or a way to refuse. They were then pressured to consummate the marriage and to have children. In Cambodia, forced marriages were part of the ruling party's socio-economic programme to reconstruct the country and its society as part of a socialist revolution. Forced marriages were a means to control sexual relations between men and women with the goal to rapidly increase the population of 'desirable citizens' through births in an attempt to socially engineer the future population through forced procreation.¹⁸

Thirdly, the ICC currently deals with forced marriages perpetrated during the armed conflicts in Uganda since 2002 and Mali in 2012/13 in the cases against Dominic Ongwen¹⁹ and Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud²⁰ respectively. In regard to forced marriage, the situation in Uganda is similar to that in Sierra Leone. A fighting group, the Lord's Resistance Army (LRA), abducts or captures civilian women and girls, forces them into marriage with fighters and subjects them to acts of sexualised violence and forced labour. This is done to control a person's sexuality, to reward fighters and to demonstrate and increase their status in the group, to keep the fighting group operational, to demoralise and disable the opponent, and to create bonds within the fighting group and a new social order in the wider society.²¹

¹⁷ LL Amowitz and others, 'Prevalence of War-Related Sexual Violence and Other Human Rights Abuses Among Internally Displaced Persons in Sierra Leone' (2002) 287 *Journal of the American Medical Association* 513; Coulter (n 6); V Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties' (2011) 2 *Journal of International Humanitarian Legal Studies* 127; Bunting (n 6).

¹⁸ *Co-Prosecutor v Chea Nuon, Sary Ieng, Samphan Khieu and Thirith Ieng* (Closing Order) 002/19-09-2007-ECCC-OCIJ 'Case 002' (15 September 2010) para 216ff; *Case 002*, 'Trial Judgment' (n 9) para 3522ff; Studzinsky, 'Neglected Crimes' (n 8); Studzinsky, 'Victims of Sexual and Gender-Based Crimes' (n 8); Oosterveld, 'Forced Marriage' (n 7).

¹⁹ *Prosecutor v Dominic Ongwen* (Decision on the Confirmation of Charges Against Dominic Ongwen) ICC-02/04-01/15 (23 March 2016) para 87ff.

²⁰ *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 563ff.

²¹ *Ongwen*, 'Decision on the Confirmation of Charges' (n 19) para 87ff; Amowitz and others (n 17); T Allen and M Schomerus, 'A Hard Homecoming: Lessons Learned from the Reception Center Process in Northern Uganda: An Independent Study' (2006) <http://pdf.usaid.gov/pdf_docs/PNADI241.pdf> accessed 27 April 2020; Carlson and Mazurana (n 6); Annan and Blattman (n 6); C Dauvergne and J Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 *Modern Law Review* 57; J Annan and others, 'Civil War, Reintegration, and Gender in Northern Uganda' (2011) 55 *Journal of Conflict Resolution* 877; B Beber and C Blattman, 'The Logic of Child Soldiering and Coercion' (2011) <<http://chrisblattman.com/documents/research/2011.LogicOfChildSoldiering.pdf>> accessed 29 April 2020; JL Leatherman, *Sexual Violence and Armed Conflict* (Polity Press 2011); K Chantler,

In Mali, the city of Timbuktu was seized and fell under the control of Ansar Eddine and Al Qaeda in the Islamic Maghreb. In this context, women were forced into marriage through intimidation by armed men who used threats and physical violence if the victim or her parents refused their propositions and offers of money. Once married, women were subjected to acts of sexualised violence and in some cases raped repeatedly by several men in fighters' camps before they were swiftly divorced again. Some women also had to perform domestic tasks. In Mali, forced marriages were used as a means to gain and exercise control over the local population and their land. Like in Sierra Leone and Uganda, forced marriage was a way to form ties between members of the fighting group and the local population, to reward fighters and to allow sexual intercourse between members of the armed groups and local women and girls to create a new society.²²

3. Real Simple

In *AFRC, RUF, Case 002, Ongwen and Al Hassan*, the SCSL, ECCC and the ICC discussed the difference between forced and traditional marriages in Sierra Leone, Cambodia, Uganda and Mali. They also considered apparent benefits such as protection, socio-economic support and payments of money forced wives or their families received from forced husbands or through the marriage. Those relative benefits prompted some forced wives to stay with their forced husband sometimes even after the conflict had ended and deterred them from attempting to escape, something that was further discouraged through intimidation and threats of physical punishment and death. Through discussions of the differences between forced and traditional marriages, relative benefits and possibilities of escape, the courts examined the state of mind of the survivor rather than the actions of the perpetrators, indirectly asking if forced wives or their families consented to the forced marriage. An element of consent would mark a forced marriage as a 'simple' rather than 'real forced marriage'. However, the courts also recognised that coercive circumstances vitiate consent, making a forced marriage a 'real forced marriage'. Taking into account pre-existing as well as purposively created coercive environments returned the focus to the words and conduct of perpetrators. However, courts neglected wider historic, socio-political, and economic circumstances and their impact on interpersonal relationships in fighting groups. In addition to consent

'Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse' (2012) 13 *Trauma, Violence and Abuse* 176; Kramer (n 6).

²² *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 563ff; *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 8ff.

and coercion, the SCSL, ECCC and ICC indicated that the nature of a forced marriage determines if a forced marriage is a ‘real’ or a ‘simple forced marriage’. Temporarily limited unions that were formed predominantly for sexual purposes, for example, are seen as ‘simple’ rather than ‘real forced marriages’ because they were never meant to be a lifelong sacrosanct union²³ of two people that creates mutual obligations.²⁴

The following part of the article elaborates on these points. It argues that the courts’ construction of conflict-related ‘real’ and ‘simple forced marriages’ is based on biases and misconceptions that are embedded in taken-for-granted gendered everyday realities that contribute to the denial, downplay or justification of acts of violence against women. They have to be taken into consideration when developing a definition of the crime of forced marriage for the purpose of International Criminal Law to prevent patriarchal stereotypes from being enshrined in law and to ensure an appropriate reflection of survivors’ experiences.

3.1. Traditions as Proxies for Consent

In the *AFRC*²⁵ case, the SCSL considered the differences between traditional and early marriages on the one hand and conflict-related forced marriage on the other in an effort to understand the context, socio-cultural meaning and long-term consequences of forced marriages formed during the conflict in Sierra Leone. In doing so, they intended to highlight differences between acts they considered criminal and those locally accepted as normal. Based on the expert testimony of Zainab Bangura, the court stressed the importance of familial consent and marriage ceremonies in customary marriages and the absence of both in conflict-related forced marriages.

In *Case 002*, the ECCC distinguished traditional and forced marriages in Cambodia. It highlighted that traditional marriages were arranged by the

²³ Taylor, ‘Trial Judgment’ (n 16) para 427.

²⁴ *AFRC*, ‘Trial Judgment’ (n 16) para 711.

²⁵ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangura) Pursuant to Rule 73 bis (E), and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) Pursuant to Rule 94 bis) SCSL-04-16-T ‘AFRC Case’ (5 August 2005); *AFRC*, ‘Prosecution Filing of Expert Report’ (n 12); *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Joint Defence Disclosure of Expert Report on Forced Marriages by Dr. Dorte Thorsen) SCSL-04-16-T ‘AFRC Case’ (21 August 2006); *AFRC*, ‘Trial Judgment’ (n 16) Judge Sebutinde Separate Concurring Opinion paras 10, 12; *AFRC* ‘Trial Judgment’ (n 16) Judge Doherty Partly Dissenting Opinion para 36; *AFRC*, ‘Appeals Chamber Judgment’ (n 16) para 194; J Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Brill 2013) 294-324; MC Ferme, ‘Consent, Custom, and the Law in Debates Around Forced Marriage at the Special Court for Sierra Leone’ in A Bunting, BN Lawrence and RN Roberts (eds), *Marriage by Force? Contestation over Consent and Coercion in Africa* (Ohio University Press 2016) 229-230.

spouses' parents with the consent or acquiescence of the bride and groom. They included a payment of a dowry and a wedding ceremony marked by communal and religious elements. In forced marriages, the Khmer Rouge regime took the place of the parents and authorised marriages of men and women who were matched based on age, class, status, location and ethnicity. Here, collective consent took priority over familial and individual consent. Couples were married in mass ceremonies in which spouses would 'make a resolution announcing their biographies and their loyalty to one another'²⁶ as well as to the regime. Once married, members of the regime forced or coerced them to consummate their marriage and procreate. While spouses lived separated, they were pressured to meet regularly for reproductive purposes. They could not refuse to marry or to consummate the marriage for fear of violence and death and they did not have the right to divorce.²⁷

The ICC discussed the difference between traditional and conflict-related forced marriages in *Ongwen* and *Al Hassan*. In the case against Dominic Ongwen, the Prosecutor highlighted the difference between traditional and conflict-related forced marriages in Uganda. She emphasised rites of courtship, the payment of a dowry and social benefits resulting from traditional marriages, and the absence of these elements in conflict-related forced marriages.²⁸

In the case against Al Hassan, the ICC began to explore the difference between traditional Malian marriages, temporary marriages recognised under Islamic law and forced marriage as allegedly perpetrated by members of Ansar Eddine and Al Qaeda in the Islamic Maghreb during the armed conflict in Timbuktu. Similar to traditional marriages in Sierra Leone, the court stressed that traditional forms of marriage in Mali are marked by individual or familial consent, the offer or payment of a dowry and the performance of a marriage ceremony.²⁹ In temporary marriages, the spouses are married for a limited period of time, sometimes with an exchange of money, with an easy way to divorce.³⁰ Conflict-related forced marriages in Mali were temporary marriages that involved a payment of a sum of money. Therefore, they included elements of traditional and temporary marriages. However, the ICC Prosecutor described

²⁶ SAO Sarun Interview Record as quoted in *Case 002*, 'Trial Judgment' (n 9) para 3567.

²⁷ *Case 002*, 'Trial Judgment' (n 9) paras 265-273, 3522ff.

²⁸ *Prosecutor v Dominic Ongwen* (Public Redacted Version of 'Prosecution Closing Brief') ICC-02/04-01/15 (24 February 2020) paras 162, 172.

²⁹ *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 565; *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 12.

³⁰ *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) paras 572, 581; JJ Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation* (Graham and Trotman 1990); H Ahmed, 'Iraq' in J Breslin and S Kelly (eds), *Women's Rights in the Middle East and North Africa: Progress Amid Resistance* (Freedom House/ Rowman & Littlefield Publishers 2010).

forced marriage in Mali as ‘inherently coercive’³¹ as they were formed through intimidation and the use of physical violence in the context of an armed conflict by members of feared, armed and violent groups without the option to refuse.³²

In these cases, the courts indirectly raised questions about the lawfulness of the marriages and the state of mind of survivors and their families. If conflict-related forced marriages would be comparable to traditional marriages that are in accordance with domestic or customary law, they might not amount to ‘real forced marriages’. However, according to the ICC Pre-Trial Chamber II in *Ongwen*, the lawfulness or unlawfulness of a marriage is not an element of the crime of forced marriage.³³ This is supported by the findings of the SCSL³⁴ and the ECCC³⁵ as they determined that unlawful forced marriages in Sierra Leone as well as lawful forced marriages in Cambodia amounted to ‘real forced marriages’. As mentioned above, in Sierra Leone, members of fighting groups captured or abducted women and group leaders subsequently assigned them as wives to particular fighters. This indicates that conflict-related forced marriages disregarded domestic and customary laws that emphasised a period of courtship, individual or familial consent, the payment of a dowry and the holding of a marriage ceremony. Consequently, they were unlawful. Independent of this, the SCSL found that members of the AFRC as well as the RUF perpetrated ‘real forced marriages’.³⁶ In Cambodia, the Khmer Rouge regime developed a government policy on marriage that underlined the importance of the family as the basis for the development of a new society in accord with the ideology of its socialist revolution. The implementation of this policy meant a clear departure from traditional marriages based on children’s respect for their parents and religious beliefs and a move towards the subordination of the individual and familial to the collective that took a parental position and authorised, organised and monitored marriages. This policy was enforced, including by violent means, throughout Cambodia and the spouses and their families viewed these conflict-related forced marriages as fully valid. Nevertheless, the ECCC determined that they amounted to ‘real forced marriages’.³⁷

³¹ *Al Hassan*, ‘Prosecution’s Final Written Observations Regarding Confirmation of the Charges’ (n 11) para 163.

³² *Al Hassan*, ‘Rectificatif à la décision relative à la confirmation des charges portées’ (n 10) paras 564-582; *Al Hassan*, ‘Prosecution’s Final Written Observations Regarding Confirmation of the Charges’ (n 11) paras 12, 161.

³³ *Ongwen*, ‘Decision on the Confirmation of Charges’ (n 19) para 93.

³⁴ AFRC, ‘Appeals Chamber Judgment’ (n 16); RUF, ‘Trial Judgment’ (n 11).

³⁵ *Case 002*, ‘Trial Judgment’ (n 9).

³⁶ AFRC, ‘Prosecution Filing of Expert Report’ (n 12); AFRC, ‘Trial Judgment’ (n 16) para 701ff; AFRC, ‘Appeals Chamber Judgment’ (n 16) para 175ff; RUF, ‘Trial Judgment’ (n 11) paras 1291ff, 1460ff; *Taylor*, ‘Trial Judgment’ (n 16) paras 418-421; O Aijazi and E Baines, ‘Relationality, Culpability and Consent in Wartime: Men’s Experiences of Forced Marriage’ (2017) 11 *International Journal of Transitional Justice* 463, 471.

³⁷ *Case 002*, ‘Trial Judgment’ (n 9) para 3539; Ye (n 8); Oosterveld, ‘Forced Marriage’ (n 7) 1276.

While the lawfulness or unlawfulness of a conflict-related forced marriage does not appear to influence its classification as a ‘simple’ or ‘real forced marriage’, consent makes a difference and situations where victims or their families consented to the marriage might not be understood as ‘real forced marriages’.

In contrasting forced and traditional marriages in Sierra Leone³⁸ and Cambodia³⁹ as well as forced and temporary marriages in Mali,⁴⁰ the SCSL, ECCC and ICC emphasised and privileged familial over individual consent. Consequently, a marriage with the consent of the bride’s family but without the assent of the bride herself would be a ‘simple’ rather than a ‘real forced marriage’ as the element of familial consent is met and individual consent is optional.⁴¹ Here, the courts moved away from a liberal and Western individualistic notion of consent as enshrined for example in Article 16(2) of the Universal Declaration of Human Rights⁴² and began to recognise the existence and validity of some alternative types of consent.⁴³ However, by prioritising familial over individual consent, they built on and perpetuated the erasure of peacetime violations of women’s right to consent to marriage and assumed a benign nature of communities.⁴⁴

In *Ongwen*, the ICC Pre-Trial Chamber II took a different approach to consent and stressed that the ‘central element of forced marriage is the imposition of “marriage” on the victim, i.e. the imposition, regardless of the *will of the victim*, of duties that are associated with marriage, as well as of a social status of the perpetrator’s “wife” (emphasis added).⁴⁵ By emphasising ‘the will of the vic-

³⁸ AFRC, ‘Decision on Prosecution Request for Leave’ (n 25); AFRC ‘Prosecution Filing of Expert Report’ (n 12); AFRC, ‘Joint Defence Disclosure’ (n 25); AFRC, ‘Trial Judgment’ (n 16) Judge Sebutinde Separate Concurring Opinion paras 10, 12; AFRC, ‘Trial Judgment’ (n 16) Judge Doherty Partly Dissenting Opinion para 36; AFRC, ‘Appeals Chamber Judgment’ (n 16) para 194.

³⁹ Case 002, ‘Trial Judgment’ (n 9) paras 265-273, 3522ff.

⁴⁰ *Al Hassan*, ‘Rectificatif à la décision relative à la confirmation des charges portées’ (n 10) para 565; *Al Hassan*, ‘Prosecution’s Final Written Observations Regarding Confirmation of the Charges’ (n 11) para 12.

⁴¹ United Nations Committee on the Elimination of Discrimination Against Women ‘Consideration of Reports Submitted by States Parties Under Article 19 of the Convention on the Elimination of All Forms of Discrimination against Women: 4th Periodic Reports of States Parties/Benin’ (21 March 2012) UN Doc CEDAW/C/BEN/4, 6; A Azonhoume, ‘Criminal Abuse of Women and Children in Benin’ in ONI Ebbe and DK Das (eds), *Criminal Abuse of Women and Children: An International Perspective* (CRC Press 2009) 140; J Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill 2015) 466-474; Ferme (n 25) 233.

⁴² Universal Declaration of Human Rights (10 December 1948) UN Doc A/RES/217 A (III).

⁴³ N Mkhize, ‘Communal Personhood and the Principle of Autonomy: The Ethical Challenges’ (2006) 24(1) CME 26, 28; A Bunting, BN Lawrence and RN Roberts (eds), *Marriage by Force? Contestation over Consent and Coercion in Africa* (Ohio University Press 2016) 15-17; Ferme (n 25) 230, 233-234; Aijazi and Baines (n 36) 465; SB Adjei, ‘Conceptualising Personhood, Agency, and Morality for African Psychology’ (2019) 29 Theory & Psychology 484.

⁴⁴ Allain, ‘Slavery in International Law’ (n 25); Ferme (n 25) 230.

⁴⁵ *Ongwen*, ‘Decision on the Confirmation of Charges’ (n 19) para 93.

tim',⁴⁶ the court focused on individual consent to marriage. In doing so, it suggested that a conflict-related forced marriage is a 'real forced marriage' if it is formed against the bride's will.

By extension, a forced marriage would also be a 'real forced marriage' if the victim is considered legally incapable of giving genuine consent to the marriage, for example because of their age.⁴⁷ Furthermore, minors exemplify 'real victims' who are young, vulnerable, helpless and in need of protection, making it more likely that their experiences of forced marriage are classified as 'real forced marriages'.⁴⁸ As demonstrated above, a focus on familial consent evades the classification of an early marriage as a 'real forced marriage' as the spouses' individual consent, or their inability to give genuine consent, is superseded by the consent of their families. The SCSL touched upon questions related to the minimum age for marriage especially in the *AFRC* case. However, these were subsumed under the more general distinction between traditional and conflict-related forced marriages in Sierra Leone and not explored further.⁴⁹

At trial stage in the *AFRC* case⁵⁰ as well as in the case against Charles Taylor,⁵¹ the court circumvented questions related to consent to marriage altogether by establishing conflict-related forced marriage as a form of the *jus cogens* crimes of sexual slavery and conjugal enslavement respectively.⁵² In addition to situating forced marriage in the context of historical and modern slavery and the struggle for its abolition and decolonialisation that highlights the seriousness

⁴⁶ *ibid.*

⁴⁷ *AFRC*, 'Trial Judgment' (n 16) para 1106; *AFRC*, 'Prosecution Filing of Expert Report' (n 12) 10-11; UNdata, 'Legal Age for Marriage' (11 July 2013) <<http://data.un.org/DocumentData.aspx?q=United+Kingdom+of+Great+Britain+and+Northern+Ireland&id=336>> accessed 21 April 2020; ICC Office of the Prosecutor, 'Policy on Children' (November 2016) <https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF> accessed 21 April 2020: The ICC considers children to be any person under the age of eighteen. Child soldiers, however, are persons under the age of fifteen who are enlisted, conscripted and participate actively in hostilities. Zainab Bangura explains in her expert testimony before the SCSL that Sierra Leone does not have an express legal minimum age stipulation for marriage. Instead, the minimum age for marriage depends on whether a woman is married under general, customary or Islamic law and in practice ranges from ten to eighteen years of age. According to data collected by the UN, the minimum age for marriage in Mali is fifteen for women and eighteen for men. In Uganda, the minimum age is eighteen for both spouses. However, as Bangura's analysis suggests, the minimum age for marriage in Mali and Uganda might be different in different legal systems.

⁴⁸ Williams (n 1); Andrias (n 1); Du Mont, Miller and Myhr (n 1); Dowds (n 2).

⁴⁹ *AFRC*, 'Prosecution Filing of Expert Report' (n 12).

⁵⁰ *AFRC*, 'Trial Judgment' (n 16) paras 704, 713.

⁵¹ *Taylor*, 'Trial Judgment' (n 16) para 427.

⁵² *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (New Application, 1962), Judgment, Merits, Second Phase, ICJ GL No 50, ICJ Rep 3 (1970) 9 ILM 227, ICJ 152 (ICJ 1970) (05 February 1970).

of the conduct, legally and socially, both categorisations signal a lack of consent.⁵³ Consequently, the state of mind of the survivor does not need to be examined and the investigatory focus is placed on the actions of the perpetrator. Moreover, under this label, the question of whether or not a conflict-related forced marriage is a 'real' or 'simple forced marriage' does not arise as the conduct is not seen as forced marriage in the first place and as a form of slavery or enslavement instead. Despite these advantages of categorising conflict-related forced marriage as a form of slavery or enslavement and despite forced marriages meeting the necessary element of perpetrators exercising powers attaching to the right of ownership over victims,⁵⁴ this categorisation does not fully address the unique and complex experiences of forced spouses, 'the harms and abuses suffered and the conditions or terms in which the harms occurred'.⁵⁵ Women were enslaved for purposes of forced marriage, including forced labour and impregnation. In the same vein, the victims were not only subjected to repeated sexual abuses in conditions in which they were deprived of their freedom, they suffered additional injuries such as stigmatisation and ostracisation arising from being labelled 'wives' and made to engage in duties associated with marriage.⁵⁶

⁵³ AFRC, 'Prosecution Filing of Expert Report' (n 12); AFRC, 'Trial Judgment' (n 16) paras 145-146; RUF, 'Trial Judgment' (n 11) paras 200, 1120; DS Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine' (2005) 15 Duke Journal of Comparative and International Law 219; H Baumeister, *Sexualised Crimes, Armed Conflict and the Law: The International Criminal Court and the Definitions of Rape and Forced Marriage* (Routledge 2018) 66-70, 193-194; A Raab and S Hobbs, 'Forced Relationships: Prosecutorial Discretion as a Pathway to Survivor-Centric Justice' (OpinioJuris, 13 September 2018) <<http://opiniojuris.org/2018/09/13/forced-relationships-prosecutorial-discretion-as-a-pathway-to-survivor-centric-justice>> accessed 21 April 2020.

⁵⁴ Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Registered No. 1414 art 1(1); Assembly of States Parties to the Rome Statute of the International Criminal Court 'Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002' (9 September 2002) ICC-ASP/1/3 (Part II.B) art 7(1)(c), art 7(1)(g)(2), art 8(2)(b)(xxii)(2), art 8(2)(e)(vi)(2); *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (Trial Judgment) ICTY IT-96-23-T and IT-96-23/1-T 'Foča Case' (22 February 2001) para 543; J Gong-Gershowitz, 'Forced Marriage: A "New" Crime Against Humanity?' (2009) 8 Northwestern Journal of International Human Rights 53; Allain, *The Law and Slavery* (n 41); Allain, 'Slavery in International Law' (n 25).

⁵⁵ A Bunting and IK Ikimiukor, 'The Expressive Nature of Law: What We Learn from Conjugal Slavery to Forced Marriage in International Criminal Law' (2018) 18 International Criminal Law Review 331, 350. See also S Mattler and MP Scharf, 'Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime against Humanity' (2005) Case Research Paper Series in Legal Studies, Working Paper 05-35 <<http://ssrn.com/abstract=824291>> accessed 8 June 2020; Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 17); K Stout, 'What's in a Name? The Feasibility and Desirability of Naming Forced Marriage as a Separate Crime under International Humanitarian Law' (8 May 2012) <<http://de.scribd.com/doc/94709906/3/III-The-Constituent-Crimes-that-Underpin-the-Crime-of-Forced-Marriage>> accessed 8 June 2020.

⁵⁶ Bunting and Ikimiukor (n 55) 349.

To summarise, an element of consent shaped the SCSL's, ECCC's and ICC's understanding of a conflict-related forced marriage as a 'real' or 'simple forced marriage' albeit in different ways depending on the approach to consent. If a focus is placed on familial consent to marriage, the absence thereof is a marker of a 'real forced marriage'. In a 'simple forced marriage', in contrast, the individual spouses are married against their will but with the consent of their families. However, if the courts emphasise individual consent, a 'real forced marriage' is marked by the lack of consent of the individual spouses. This includes situations where one or both spouses are deemed incapable of giving genuine consent. To determine individual or familial consent, the courts have to confirm the survivor's state of mind. This unduly moves the focus of the inquiry away from the words and conduct of the perpetrator and the context in which they acted and places an emphasis on the actions or inactions of the victim. Often inappropriate, punitive questioning during investigations and at trial contributes to secondary victimisation of those the police, lawyers and courts set out to protect. Only patriarchal stereotypes of, and attitudes to, women remain safe and guarded.⁵⁷

3.2. Benefits as Proxies for Consent

Continuing in this line, in the *AFRC*⁵⁸ as well as the *RUF* case,⁵⁹ the court also deliberated whether, despite being abducted, forced into marriage and coerced to perform sexual and other services for their forced husbands and the fighting group, forced wives benefitted from the forced marriage because they received protection, food and access to looted goods and consequently might not have attempted to escape and in some cases stayed with their forced husband even after the conflict had ended.

The Defence teams in *RUF*⁶⁰ and *Al Hassan*⁶¹ appeared to suggest that the relative benefits forced wives or their families received from their forced husband in the form of protection and access to resources during their forced marriage or as a payment of a sum of money at the outset signified their consent to the marriage. Furthermore, by accepting those alleged benefits, forced wives arguably demonstrated tactical agency under coercive circumstances. Consequently, they are not seen as 'real victims'.⁶² As demonstrated above, consent of 'simple

⁵⁷ Andrias (n 1); Estrich (n 1); Dowds (n 2).

⁵⁸ *AFRC*, 'Prosecution Filing of Expert Report' (n 12); *AFRC*, 'Trial Judgment' (n 16) paras 1157, 1161; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty's Partly Dissenting Opinion paras 48-49.

⁵⁹ *RUF*, 'Trial Transcript' (n 11); *RUF*, 'Trial Judgment' (n 11) para 1413.

⁶⁰ *ibid.*

⁶¹ *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 42.

⁶² Williams (n 1); Andrias (n 1); Du Mont, Miller and Myhr (n 1); Dowds (n 2).

victims' who act strategically to improve their situation would lead to the classification of these forced marriages as 'simple' rather than 'real forced marriages'.

In the *RUF* case, the SCSL considered situations where women were forced into marriage and subsequently gained access to resources and protection from their forced husband. Some forced wives also stayed with their forced husband after the conflict had ended, often out of socio-economic necessity.⁶³ The Defence appeared to suggest that an initially forced marriage can become consensual through even a coerced exchange of goods and services that arguably could take on the form of mutual conjugal obligations in the form of loyalty and the provision of sexual, reproductive, domestic and support services of the wife in exchange for the protection and provision of material resources by the husband.⁶⁴ As demonstrated above, an element of consent, possibly even reluctant agreement or survival consent given under highly coercive circumstances, transforms a conflict-related forced marriage from a 'real' into a 'simple forced marriage'. Importantly however, following this interpretation would reverse the understanding that coercive circumstances make genuine consent impossible.⁶⁵ It would also dispute the court's previous determination in the *AFRC* case. Here, the SCSL found that any reluctant agreement given or any benefit received during the forced marriage does not vitiate the criminal nature of the initial action of forcing a person into marriage.⁶⁶ Following this, situations where forced wives receive a relative benefit from their forced husband or through their forced marriage are still categorised as a 'real forced marriage'. Similarly, the court also stated that forced wives holding positions of respect, wives of commanders and Mammy Queens for example, does not detract from having been coerced into a 'real forced marriage'.⁶⁷ The ICC's decision on questions of consent and culpability in the case against Dominic Ongwen might prove illuminating in this debate. Ongwen was abducted and made a child soldier and was therefore initially forced into the LRA. Eventually, however, he became a commander of the group and allegedly chose to participate in their criminal

⁶³ *AFRC*, 'Decision on Prosecution Request for Leave' (n 25); *RUF*, 'Trial Transcript' (n 11); *RUF*, 'Trial Judgment' (n 11) para 1413; Coulter (n 6); Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 17).

⁶⁴ *RUF*, 'Trial Transcript' (n 11); *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Trial Transcript) SCSL-2004-15-T 'RUF Case' (3 May 2007); *RUF*, 'Trial Judgment' (n 11) para 1413.

⁶⁵ ICC, 'Rules of Procedure and Evidence' (September 2002) UN Doc ICC-ASP/1/3 Rule 70; SCSL, 'Rules of Procedure and Evidence' (31 May 2012) Rule 96; International Criminal Tribunal for Rwanda (ICTR), 'Rules of Procedure and Evidence' (13 May 2015) ITR/3/REV.24 Rule 96; International Criminal Tribunal for the Former Yugoslavia (ICTY), 'Rules of Procedure and Evidence' (8 July 2015) UN Doc IT/32/Rev.50 Rule 96.

⁶⁶ *AFRC*, 'Trial Judgment' (n 16) para 1081; *AFRC*, 'Appeals Chamber Judgment' (n 16) para 190.

⁶⁷ *AFRC*, 'Trial Judgment' (n 16) paras 1124, 1156; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion para 41; *AFRC*, 'Appeals Chamber Judgment' (n 16) para 191.

actions⁶⁸ possibly because he was socialised into the LRA and became a victim of circumstances.⁶⁹ His participation might also have been a strategic choice and a means of survival.⁷⁰ However, Ongwen's continued active participation in the LRA and his rise in their ranks might also have been motivated by feelings of loyalty towards the group, a shared ideology and a wish to gain power, status and influence.⁷¹ Depending on the court's decision on questions of mental capacity and duress, Ongwen might be held responsible for his actions and the initial violation of his rights might be superseded by his later wilful participation in the LRA. Following this line of argument without intending to equate the experience of Dominic Ongwen with that of forced wives, women who are initially forced into a marriage and subsequently gain a relative benefit from, and therefore might be said to have consented to and wilfully participated in, the union might not be seen as 'real victims' and their experiences not categorised as 'real forced marriages', as the Defence in the *RUF* case suggests.

Additionally, the ICC might refer to the *AFRC* or *RUF* case and the SCSL's considerations of forced marriage with relative benefits in its deliberations in *Al Hassan*. Here, conflict-related forced temporary marriages in Mali included a payment of a sum of money to the bride or her family.⁷² Accepting the payment, albeit under coercion, could be interpreted as individual or familial consent to the marriage. Again, this would lead to its categorisation as a 'simple' rather than 'real forced marriage'. However, compared to conflict-related forced marriages in Sierra Leone, consent would have been given at the beginning of the marriage rather than later in its course. Taking this into account, a conservative reading by the court might not recognise acts of violence perpetrated within the marriage as crimes. However, taking into consideration the ECCC's finding that rape in the context of forced marriage amounts to another inhumane

⁶⁸ *Prosecutor v Dominic Ongwen* (Public Redacted Version of 'Corrected Version of "Defence Closing Brief"', filed on 24 February 2020) ICC-02/04-01/15 (13 March 2020) paras 11-21; E Baines, 'Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen' (July 2008) JRP Fieldnote 7; G Kan, 'The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen' (2018) 5 SOAS Law Journal 70; R Lorenzo and A Pangalangan, 'Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals' (2018) 33 American University International Law Review 605.

⁶⁹ *Prosecutor v Dominic Ongwen* (Third Public Redacted Version of 'Defence Brief for the Confirmation of Charges Hearing') ICC-02/04-01/15 (25 May 2016) paras 36-49; *Ongwen*, 'Defence Closing Brief' (n 68) para 474; Lorenzo and Pangalangan (n 68).

⁷⁰ *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 475-477; Kan (n 68).

⁷¹ *Prosecutor v Dominic Ongwen* (Public Redacted Version of the 'Corrected Version of the "Victims' Closing Brief"' filed on 24 February 2020, ICC-02/04-01/15-1721-Conf) ICC-02/04-01/15 (13 March 2019) para 304; *Ongwen*, 'Prosecution Closing Brief' (n 28) para 477.

⁷² *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 565; *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 12.

act,⁷³ it is unlikely that the ICC would go back on the progress that has been made, for example, regarding the concept of continuous consent and the criminalisation of marital rape. However, it might follow the SCSL in *Taylor*⁷⁴ and separate an ‘interrelated whole conduct’⁷⁵ into the initial act of forcing or coercing a person into a conjugal association without their consent on the one hand, and the acts of gendered physical, sexual and psychological violence perpetrated within that union on the other. This would not fully capture survivors’ experiences and the nature of forced marriage as a process and a ‘larger overarching [gendered] harm associated with [this] particular collection of [sexual and non-sexual] offences (...) that other international criminal law terms [such as sexual slavery or enslavement] do not adequately or fully capture.’⁷⁶ As the Prosecution in the *AFRC* case stressed:

Sexual slavery does not necessarily amount to forced marriage, in that a sexual slave is not necessarily obliged to pretend that she is the wife of the perpetrator. Similarly, a victim of sexual violence is not necessarily obliged to perform all the tasks attached to a marriage.⁷⁷

The label ‘marriage’ attached to this coerced, involuntary relationship marked by gender-based violence can manipulate forced spouses into loyalty towards each other or create a feeling of commitment between them. It can result in mutual obligations and long-term socio-economic dependency that extend beyond the end of the conflict. This is further influenced by traditional gender and family norms that prescribe women’s subordination and a collective lifestyle that discourages single motherhood. Moreover, it is affected by the social stigmatisation that portrays survivors of forced marriage as willing collaborators.⁷⁸ This indicates that a forced marriage is more than the sum of its parts. The totality makes it a distinct crime that cannot be adequately captured by existing categories of international crimes or in a collection of separate charges.⁷⁹ Consequently, if the ICC in *Al Hassan* follows the SCSL’s determination in *Taylor*, it would not fully address the crime of conflict-related forced marriage and its consequences. However, the Prosecutor in *Al Hassan* appeared to aim for a more just outcome when she stressed that the harm and stigmatisation that

⁷³ *Case 002*, ‘Closing Order’ (n 18) para 1545; *Case 002*, ‘Trial Judgment’ (n 9) para 3695 ff.

⁷⁴ *Taylor*, ‘Trial Judgment’ (n 16) paras 427, 429.

⁷⁵ Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 17) 142.

⁷⁶ *ibid* 144.

⁷⁷ *AFRC*, ‘Trial Judgment’ (n 16) para 701.

⁷⁸ *AFRC*, ‘Prosecution Filing of Expert Report’ (n 12); *AFRC*, ‘Trial Judgment’ (n 16) para 711; Dauvergne and Millbank (n 21); BA Toy-Cronin, ‘What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime against Humanity’ (2010) 19 *Columbia Journal of Gender and Law* 539; Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 17); Bunting (n 6); Stout (n 55); Aijazi and Baines (n 36); Baumeister (n 53) 69; Bunting and Ikhimiukor (n 55).

⁷⁹ Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 17).

forced wives experience is different from, and in addition to, that resulting from sexual violence.⁸⁰ While a separate crime of forced marriage would do important work to address the injustices forced spouses have experienced in the past, categorising it as a form of slavery or enslavement to highlight the absence of consent of victims might work towards changing social perceptions of the conduct and consequently survivors' experiences in the future, serving the broader women's rights agenda.⁸¹ However, the same could be achieved by developing a fuller, less patriarchal understanding of forced marriage as the conflict-related gender-based violation of a person's autonomy that it is.

Developing the previous conclusion further, a conflict-related forced marriage is a 'simple' rather than a 'real forced marriage' if an element of consent is met, be it familial or individual consent, possibly even if given once under coercive circumstances and in exchange for a relative material or immaterial benefit.

3.3. A Lack of Resistance as Consent

In addition to questions about individual and familial consent raised by inquiries into the differences between traditional and conflict-related forced marriages and relative benefits victims receive through a forced marriage, an apparent lack of resistance could be interpreted as consent.⁸² Consequently, courts might interpret a conflict-related forced marriage as a 'simple' rather than a 'real forced marriage' if a forced wife did not attempt to escape and misplace the focus of the inquiry on the actions or inactions of the survivor rather than the words and conduct of the perpetrator. However, the SCSL, ECCC and ICC all emphasised the futility of escape as victims had nowhere to go and risked severe physical punishment and even death if they were caught.⁸³ Similarly, the courts stressed that victims were severely punished for refusing to get married or to consummate the marriage, for breaking the rules and disobedience.⁸⁴ This demonstrates that a lack of resistance, including attempts to escape,

⁸⁰ *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 15.

⁸¹ A Adams, 'Sexual Slavery: Do We Need This Crime in Addition to Enslavement' (2018) 29 Criminal Law Forum 279, 312.

⁸² *Foča*, 'Trial Judgment' (n 54); *RUF*, 'Trial Transcript' (n 11); *Estrich* (n 1); *Dowds* (n 2).

⁸³ *AFRC*, 'Prosecution Filing of Expert Report' (n 12); *RUF*, 'Trial Transcript' (n 11); *AFRC*, 'Trial Judgment' (n 16) para 709; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion para 32; *RUF*, 'Trial Judgment' (n 11) paras 1293, 1407-1408, 1467; *Taylor*, 'Trial Judgment' (n 16) para 1019; *Ongwen*, 'Victims' Closing Brief' (n 71) paras 99, 213, 216, 2018, 220, 238; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 167, 475.

⁸⁴ *AFRC*, 'Prosecution Filing of Expert Report' (n 12); *AFRC*, 'Trial Judgment' (n 16) para 1184; *AFRC*, 'Appeals Chamber Judgment' (n 16) para 191; *RUF*, 'Trial Judgment' (n 11) para 1467; *Taylor*, 'Trial Judgment' (n 16) para 1019; *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 651; *Case 002*, 'Trial Judgment' (n 9) para 3686; *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 12; *Ongwen*, 'Victims' Closing Brief' (n 71) paras 99, 213; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 111, 118-119, 161, 167, 171.

does not indicate consent of the victims to the marriage. Rather, it highlights that forced wives and forced husbands lived in highly coercive environments that deprived them of their liberty and autonomy. In addition to the absence of consent, it is those coercive circumstances that make a conflict-related forced marriage a 'real forced marriage'.

3.4. A Coercive Environment

As discussed above, the *AFRC* and *RUF* cases before the SCSL, *Case 002* before the ECCC and the *Al Hassan* and *Ongwen* cases before the ICC suggest that an element of consent makes a conflict-related forced marriage a 'simple' rather than a 'real forced marriage'. They also stress that coercive circumstances vitiate consent.⁸⁵ Therefore, the existence of a coercive environment marks a conflict-related forced marriage as a 'real forced marriage'. Placing a focus on coercive circumstances surrounding a forced marriage has the potential to prevent an undue focus on the actions or inactions of the survivors and avoid inappropriate questioning and secondary victimisation. This highlights the importance of analysing the contextual dimension, the everyday constraints as well as the broader surrounding circumstances of a marriage. Crucially, this analysis has to go beyond an application of concepts like freedom and voluntariness that would return the focus to the survivor's state of mind, relative gains and escape routes. It is crucial to apply a broad understanding of coercive circumstances that cannot be reduced to a list of examples. An analysis of coercive circumstances must consider pre-existing as well as purposively created formal and informal power disparities that have a compelling effect on the victim and make the threat and use of force unnecessary. It also has to take into account the victim's perception of the perpetrator's power and how this impacts their ability to consent. Therefore, a broad understanding of coercive environments and circumstances better reflects the nature and impact of the acts of the perpetrator and has the potential to direct attention to their actions rather than those of the victim. The key question then becomes whether the victim could exercise their free choice and the perpetrator's awareness of and role in it.⁸⁶ This in turn would inform a better understanding of who a 'real victim' of a 'real forced marriage' is.

⁸⁵ *AFRC*, 'Trial Judgment' (n 16) paras 114, 694, 712, 745; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion para 17; *AFRC*, 'Appeals Chamber Judgment' (n 16) para 191; *RUF*, 'Trial Judgment' (n 11) paras 162, 200, 1287, 1290, 1460, 1463, 1466, 1470; *Ongwen*, 'Defence Brief for the Confirmation of Charges Hearing' (n 69) para 474; *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 549; *Case 002*, 'Trial Judgment' (n 9) para 3690; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 160-161.

⁸⁶ Dowds (n 2).

The SCSL, ECCC and ICC demonstrated a relatively broad understanding of coercion and acknowledged that it includes pre-existing as well as purposively created physical and non-physical elements. They recognised that a person can be coerced into a conflict-related forced marriage and into performing conjugal duties, for example, through threats and the use of physical or sexual violence against the victim or a third person, abduction, detention, enslavement, intimidation, duress, psychological oppression, the abuse of power and taking advantage of a coercive (conflict) environment.⁸⁷ Building on this, the courts' definitions of the crime of forced marriage moved towards the inclusion of a general element of coercion rather than a list of examples.⁸⁸ They recognised that 'forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner'.⁸⁹ This definition indicates that, in the cases discussed above, the courts arguably took a perpetrator-centric approach⁹⁰ to the assessment of coercive circumstances by focusing on the actions of the accused and of those under their command, stressing that actual and perceived power disparities between victims and perpetrators made the threat and use of direct force unnecessary and impacted victims' ability to act autonomously. However, the courts did not consider the wider coercive context of a world shaped by deep, intersecting inequalities, circumventing discussions about race, class and sexuality, amongst others.⁹¹ Arguably with the exception of *Case 002*, this led to, amongst others, a disregard of the fact that men as well as women live in coercive environments. Therefore, neither women nor men are free agents with a full capacity for action in this context. However, men have relative agency compared to women. Consequently, some men willingly participate in conflict-related forced marriages and freely

⁸⁷ *AFRC*, 'Trial Judgment' (n 16) paras 114, 233, 694, 720, 734, 745, 1078, 1081, 1093, 1184; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion paras 17, 27, 46, 53; *AFRC*, 'Appeals Chamber Judgment' (n 16) paras 190-191; *RUF*, 'Trial Judgment' (n 11) paras 1287, 1290, 1408, 1463, 1467-1468; *Ongwen*, 'Defence Brief for the Confirmation of Charges Hearing' (n 69) para 474; *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) para 12; *Case 002*, 'Trial Judgment' (n 9) paras 682, 742, 751, 1147, 3692; *Ongwen*, 'Victims' Closing Brief' (n 71) para 101; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 111, 118-119, 160-164.

⁸⁸ *AFRC*, 'Trial Judgment' (n 16) para 701; *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion para 53; *AFRC*, 'Appeals Chamber Judgment' (n 16) para 196; *RUF*, 'Trial Judgment' (n 11) paras 1293, 1295; *Case 002*, 'Closing Order' (n 18) para 1443; *Ongwen*, 'Decision on the Confirmation of Charges' (n 19) para 93; *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) para 599; *Ongwen*, 'Victims' Closing Brief' (n 71) para 98.

⁸⁹ *AFRC*, 'Appeals Chamber Judgment' (n 16) para 196.

⁹⁰ Women's Initiative for Gender Justice, 'Gender Report Card on the International Criminal Court 2018' (2018) 156 <https://4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf> accessed 24 April 2020.

⁹¹ Bunting, Lawrence and Roberts (n 43) 15-17.

select wives or have wives selected for them.⁹² Some approach or pressure their superiors to give them a wife and can negotiate the choice of a wife.⁹³ Some men, however, strategically marry, for example to protect themselves and dispel rumours of actual or imagined adultery or impotence. Yet others are ordered to marry.⁹⁴ However, again with the exception of the ECCC, the courts did not question forced husbands' consent to marriage or the lack thereof and feminised conflict-related forced marriage. This indicates that they maintain a gendered victim-perpetrator dichotomy that is built on ideas of absolute freedoms. This again obscures the wider coercive circumstances and their impact on individuals and prevents consent and responsibility from being seen in a dynamic, active and relational sense.⁹⁵

3.5. Duration and Purpose

In addition to coercion and consent, the duration and purpose of a conflict-related forced marriage impact its classification as a 'real' or 'simple forced marriage'.

In *Al Hassan*, the temporary nature of forced marriages and their strategic and sexual purpose marks them as 'simple forced marriages'⁹⁶ as they were never meant to be sacrosanct unions⁹⁷ of two people that create lifelong mutual conjugal obligations.⁹⁸ However, this interpretation would ignore the long-lasting stigmatisation that ex-forced wives experience as a consequence of even temporary forced marriages that were intended as a reward for fighters, a way for them to satisfy their sexual needs, to procreate and build a new society.⁹⁹ Mirroring the above-mentioned judicial interpretation of a relative benefit as a sign of consent, community members accused ex-forced wives of marrying members of Ansar Eddine and Al Qaeda in the Islamic Maghreb for financial gain, impacting their ability to consensually marry and start a family in the future.¹⁰⁰ This demonstrates that, comparable to forced marriages in Sierra Leone,

⁹² *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 130, 135.

⁹³ *Case 002*, 'Trial Judgment' (n 9) paras 3543, 3592-3593, 3599-3602, 3623; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 116, 131, 144-145; Aijazi and Baines (n 36) 476-477.

⁹⁴ *Case 002*, 'Trial Judgment' (n 9) paras 3539, 3620; *Ongwen*, 'Prosecution Closing Brief' (n 28) paras 116, 131, 144-145; Ye (n 8); Aijazi and Baines (n 36) 476-477.

⁹⁵ Mkhize (n 43) 28; Bunting, Lawrence and Roberts (n 43) 15-17; Ferme (n 25) 230, 233-234; Aijazi and Baines (n 36) 465, 481-483; Adams (n 81); Adjei (n 43) 484.

⁹⁶ *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) paras 570-571.

⁹⁷ *Taylor*, 'Trial Judgment' (n 16) para 427.

⁹⁸ *AFRC*, 'Trial Judgment' (n 16) para 711.

⁹⁹ *Al Hassan*, 'Rectificatif à la décision relative à la confirmation des charges portées' (n 10) paras 649, 701.

¹⁰⁰ *Al Hassan*, 'Prosecution's Final Written Observations Regarding Confirmation of the Charges' (n 11) paras 15-16, 97.

Uganda and Cambodia,¹⁰¹ even temporary forced marriages do not simply end when a couple divorces or separates but have complex, long-lasting consequences.

The ICC's discussions about the purpose of a conflict-related forced marriage in *Al Hassan* could be guided by the SCSL's deliberations in the *AFRC* case¹⁰² and the submissions of the Defence in *Ongwen*.¹⁰³ Both suggest that a conflict-related forced marriage primarily for the purpose of sex is not a 'real forced marriage' and possibly not a 'simple forced marriage' either but rather a form of sexual slavery. In the *AFRC* case, the SCSL Trial Chamber found that even though at first glance there was evidence that a forced marriage also consists of non-sexual elements, it was 'not satisfied that the evidence adduced by the Prosecution was capable of establishing [these] elements (...) of "forced marriage" independent of the crime of sexual slavery'.¹⁰⁴ Building on this, the Defence in *Ongwen* understood forced marriage and forced labour involving compulsory sexual activity to be encompassed by the crime of sexual slavery.¹⁰⁵ However, considering Justice Doherty's partly dissenting opinion in the *AFRC* case,¹⁰⁶ the *RUF* case¹⁰⁷ and the decision of Pre-Trial Chamber II on the confirmation of charges in *Ongwen*,¹⁰⁸ exclusivity, at least for the forced wife, would render the forced marriage 'not predominantly a sexual crime'¹⁰⁹ and therefore a 'real forced marriage'. Here, the fact that, in Sierra Leone and Uganda, forced husbands often had more than one wife and therefore forced marriages not being exclusive unions on their part, while arguably still not being predominantly sexual, does not appear to impact their classification as 'real forced marriages'.¹¹⁰ Acknowledging the gendered sexual and non-sexual elements of conflict-related forced marriage as the basis for establishing it as an independent crime is crucial

¹⁰¹ *AFRC*, 'Prosecution Filing of Expert Report' (n 12); Allen and Schomerus (n 21); Carlson and Mazurana (n 6); Coulter (n 6); Ye (n 8).

¹⁰² *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Decision on Prosecution Request for Leave to Amend the Indictment) SCSL SLS-2004-16-PT 'AFRC Case' (6 May 2004) paras 51-52; *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Separate Concurring Opinion on the Trial Chamber's Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98) SCSL-04-16-T 'AFRC Case' (31 March 2006) para 19(iii); *AFRC*, 'Trial Judgment' (n 16) paras 704-705.

¹⁰³ *Ongwen*, 'Defence Brief for the Confirmation of Charges Hearing' (n 69) paras 128-130; *Prosecutor v Dominic Ongwen* (Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision) ICC-02/04-01/15 (29 March 2016) paras 40-44.

¹⁰⁴ *AFRC*, 'Trial Judgment' (n 16) para 704.

¹⁰⁵ *Ongwen*, 'Defence Brief for the Confirmation of Charges Hearing' (n 69) para 128; *Ongwen*, 'Defence Request for Leave' (n 103) para 41.

¹⁰⁶ *AFRC*, 'Trial Judgment' (n 16) Judge Doherty Partly Dissenting Opinion paras 50-53, 69-70.

¹⁰⁷ *RUF*, 'Trial Judgment' (n 11) paras 1351, 1472.

¹⁰⁸ *Ongwen*, 'Decision on the Confirmation of Charges' (n 19) 93.

¹⁰⁹ *AFRC*, 'Appeals Chamber Judgment' (n 16) para 195; *RUF*, 'Trial Judgment' (n 11) paras 466-467; *Ongwen*, 'Decision on the Confirmation of Charges' (n 19) para 93.

¹¹⁰ Carlson and Mazurana (n 6) 23; Coulter (n 6); Kramer (n 6) 25.

to counter myths that women primarily experience conflicts as victims of sexual violence when they are targeted because of their broader gender roles that make them not only sexual beings but (domestic) workers and caretakers as well.¹¹¹ Importantly, this has to be done without enshrining patriarchal stereotypes into law. Arguable, the label of slavery or enslavement would achieve this and additionally avoid the use of the language and acceptance of the perspective of the perpetrators that legitimises the conduct, serving the wider women's rights agenda. However, it might also mask elements of sex and gender completely.¹¹²

4. Conclusion

This article discussed the SCSL's, ECCC's and ICC's construction and reconstruction of the concepts of a 'real' and 'simple forced marriage'. An analysis of the *AFRC*, *RUF*, *Case 002*, *Ongwen* and *Al Hassan* cases suggests that indicators of a 'simple forced marriage' are:

- familial or individual consent, possibly even if given once, reluctantly, under coercive circumstances and in exchange for a relative material or immaterial benefit;
- a lack of resistance;
- temporariness;
- a predominantly sexual purpose.

Contrastingly, markers of a 'real forced marriage' are:

- pre-existing and/or purposively created physical and non-physical coercion;
- a lack of consent;
- exclusivity of the forced wife;
- a sexual and non-sexual purpose.

The courts' discussions of 'real' and 'simple forced marriages' generally indicate a focus on the words and conduct of the perpetrator. However, they built on and perpetuated biases and misconceptions related to the benign nature of tradition and familial consent, and the optionality of individual consent. This denies women agency and constructs them as passive victims. However, the courts allowed inquiries into survivors' lack of resistance and acceptance of relative benefits, tactically interpreting both as possible signs of agency and consequently consent. This in turn indicates an expectation that women have to,

¹¹¹ Stout (n 55) 23.

¹¹² Gong-Gershowitz (n 54); R Slater, 'Gender Violence or Violence against Women? The Treatment of Forced Marriage in the Special Court for Sierra Leone' (2012) 13(2) *Melbourne Journal of International Law* 732; Allain, *The Law and Slavery* (n 41) 468; Adams (n 81) 315-316, 318.

and will, fight a violation of their rights, ignoring that they might also freeze or flop under highly coercive circumstances.¹¹³ However, in neither situation does a lack of resistance amount to consent, nor does a relative gain excuse or justify the violation. As is indicated here, the courts maintained a clear and gendered victim-perpetrator dichotomy. In doing so, they neglected ideas of relational autonomy and personhood and wider coercive contexts that are shaped by deep and intersecting inequalities, complicating victim and perpetrator constructs. Drawing on the same gendered notions, the courts built on and perpetuated understandings of marriage as an exclusive, lifelong sacrosanct union between a man and a woman and took a traditional view on their respective conjugal duties. This incorporates patriarchal gender stereotypes into 'jurisprudence that (...) seeks to make gains for women'¹¹⁴ and disregards alternative forms of marriage and conjugal duties.

These biases and misconceptions highlight elements that have to be taken into consideration when developing a definition of forced marriage for the purpose of International Criminal Law. A definition must recognise that forced marriage is a process rather than an act. As such, forced marriage includes both, coercing a person into a conjugal association without their consent as well as various acts of gendered physical, sexual and psychological violence that are perpetrated within that relationship. The element of consent has to be understood broadly to allow for a context sensitive interpretation and application. Similarly, the element of coercion must be interpreted to cover the wider coercive circumstances that continuously surround a forced marriage in addition to pre-existing and purposively created physical and non-physical coercion. In this context, women and men have to be recognised as subjects and objects of forced marriage, as both victims and perpetrators. Following on from this and taking into account the different forms of forced marriage in different contexts, the acts of gendered physical, sexual and psychological violence perpetrated within a forced marriage have to be interpreted flexibly.

¹¹³ Andrias (n 1); Estrich (n 1); Dowds (n 2).

¹¹⁴ B Nowrojee, 'Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims' (2005) *Harvard Human Rights Journal* 85, 102.

Improving Prosecutions of Human Trafficking for Labour Exploitation: Lessons Learned from Two European Jurisdictions (England and Wales and Belgium)

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Abstract

The increasing number of identified victims of human trafficking for labour exploitation and the low number of associated prosecutions calls into question the effective implementation of anti-trafficking measures in European countries.

This paper will focus on two European jurisdictions (England and Wales and Belgium) and consider the low prosecution rates for human trafficking for labour exploitation. In brief, the number of referrals of potential victims of human trafficking for labour exploitation to the National Referral Mechanism has, in England and Wales, increased exponentially from 393 to 2,840 between 2012 and 2017, whereas in Belgium it has remained stable. Overall, prosecutions remain low, as the complexity of the human trafficking phenomenon creates challenges for the investigatory and judicial process, namely, the operationalisation of the principle of irrelevance of consent, where the victim demonstrates apparent consent to exploitative working conditions, the participation of victims in criminal proceedings, and the complexity of the factual circumstances.

In addition to relevant literature, this paper will draw on the findings of a comparative analysis of criminal cases from 2010 to 2017 in the two domestic jurisdictions. This paper will identify the main obstacles for the identification, investigation and prosecution of these cases, and provide some insight into what is needed to secure more effective access to justice for victims of human trafficking.

I. Introduction

The increasing number of identified victims of human trafficking for labour exploitation and the low number of associated prosecutions

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in European countries calls into question the effective implementation of anti-trafficking measures.¹ In this paper, the focus will be on two European jurisdictions (England and Wales and Belgium), and consider the low prosecution rates in the context of human trafficking for the purposes of labour exploitation.² In brief, the number of referrals of potential victims of human trafficking for labour exploitation to the National Referral Mechanism (NRM) has, in England and Wales, increased exponentially from 393 to 2,840 between 2012 and 2017,³ whereas in Belgium the number of NRM referrals has remained stable.⁴ In England and Wales, the prosecution of human trafficking for labour exploitation has gradually increased, but not at the same rate as the number of NRM referrals. In Belgium, however, the number of prosecutions is also stable. Overall, prosecutions remain low, as the complexity of the human trafficking phenomenon creates challenges for the judicial process (section 2).

Section 3 will outline how human trafficking has been criminalised, emphasising divergences from the international and regional definitions. This will be followed by consideration of the implementation of national criminal law by drawing on findings from comparative research of criminal cases of human trafficking for labour exploitation from 2010 to 2017 in the two domestic jurisdictions (section 4).⁵ From this insight into the implementation of the law, three challenges to the judicial process when identifying, investigating and prosecuting human trafficking for labour exploitation will be highlighted and discussed (section 5).

Section 5.1 will first consider the role of workers and their apparent consent to exploitative working conditions.⁶ The legal definition of human trafficking clearly provides for the irrelevance of consent where means such as deception, coercion, or abuse of a position of vulnerability are used to achieve the action

¹ European Commission, 'Report on the Progress Made in the Fight against Trafficking in Human Beings as required under Article 20 of Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims' COM (2016) 267 final; Council of Europe, '7th General Report on GRETA's Activities Covering the Period from 1 January to 31 December 2017' (2018) 197.

² N Ollus, Anniina Jokinen and Matti Joutsen, 'Exploitation of Migrant Workers in Finland, Sweden, Estonia and Lithuania: Uncovering the Links between Recruitment, Irregular Employment Practices and Labour Trafficking' (ADSTRINGO 2016) 9.

³ National Crime Agency, 'National Referral Mechanism Statistics 2012-2017' <<https://national-crimeagency.gov.uk/who-we-are/publications>> accessed 31 March 2020.

⁴ Myria, 'Federal Migration Centre Annual Reports 2011-2017' <<https://www.myria.be/fr/publications>> accessed 31 March 2020.

⁵ A Weatherburn, 'Clarifying the Scope of Labour Exploitation in Human Trafficking Law: Towards a Legal Conceptualisation of Exploitation' (DLaw thesis, Vrije Universiteit Brussel & University of Tilburg 2019).

⁶ Circulaire du 23 Décembre 2016 relative à la Mise en Œuvre d'une Coopération Multidisciplinaire Concernant les Victimes de la Traite des Êtres Humains et/ou Certaines Formes Aggravées de Trafic des Êtres Humains (Belgian Official Gazette, 10 March 2017); House of Lords, 'House of Lords Committee: Modern Slavery Bill 1st Sitting' (2014) cols 1132-1133.

(recruitment, transfer, harbour etc). However, as will be explained in section 3, the domestic definitions of human trafficking exclude the means as a constituent element but do include the principle of irrelevance of consent. As such, the principle's practical application is in need of further scrutiny.

Section 5.2 will then turn to the participation of victims in criminal proceedings. Whilst the participation of victims in criminal proceedings is a condition of victim support and assistance in Belgium,⁷ in England and Wales, prosecutors are turning to victimless prosecutions (or evidence-based prosecutions), making the investigatory process more complex. Given the often transnational nature of human trafficking and the lengthy judicial process, it is imperative that law enforcement agencies maintain good connections with victims and witnesses (regardless of their participation) – who, in the meantime, may have returned to their country of origin – to keep them informed of the status of proceedings and to ensure access to a remedy.

Section 5.3 will discuss a third and final challenge to securing successful prosecutions of human trafficking for labour exploitation. The complexity of the factual circumstances means that the indictment pursued will be extremely lengthy, consisting of multiple victims, defendants and offences, including offences against the person, sexual offences, fraud offences, immigration offences and (in Belgium only) social criminal offences (including violations of labour and social security law such as non-payment of wages, employment of undocumented foreigners, non-payment of social security contributions, etc).⁸ This can be challenging when it comes to the judicial process and, in particular, where there is a trial by jury that requires a simple and clear presentation of the factual circumstances by prosecution and defence counsel and judge's directions on the law.

2. Low Number of Prosecutions of Human Trafficking for Labour Exploitation

A discrepancy between the number of potential human trafficking victims referred to the NRM and the prosecution rates is encountered by many European countries who are seeking to ensure effective implementation of anti-trafficking measures.⁹ Despite increased and, in certain cases, improved efforts to accurately identify potential victims of human trafficking, the number

⁷ Circulaire du 23 Décembre 2016 (n 6).

⁸ Since 2010, with the introduction of the Social Criminal Code, all violations of employment law, industrial relations law and social security law were consolidated. The Social Criminal Code provides for administrative fines and/or criminal sanctions (including imprisonment for the most severe violations).

⁹ European Commission, 'Report on the Progress made in the Fight against THB' (n 1).

of prosecutions does not correspond.¹⁰ A significant challenge to prosecution has been the wide-ranging differences in the understanding of what constitutes trafficking for labour exploitation. Indeed, the scope of the meaning of forced labour, slavery and servitude and, in some instances, restrictive interpretations by courts, lead to acquittals or cases being prosecuted under alternative criminal offence provisions.¹¹ Of course, it is also important to remember that a decision to prosecute and, what is more, a successful prosecution, is the end of a long line of a complex process. In this process, many factors can act as a barrier to pursuing a prosecution including, *inter alia*, difficulty collecting sufficient evidence, the availability of resources, and the lack of training of key actors.¹²

The limited number of prosecutions and convictions also has significant implications from the perspective of the victims. In particular, acquittals or cases being prosecuted under alternative criminal offence provisions impact on the victims' rights to support and assistance, as well as access to justice and the right to a remedy. The right to effective compensation – including unpaid wages and statutory contributions for social security benefits¹³ – for those victims where the perpetrators are successfully convicted, is problematic, as they are often awarded compensation but are unable to recuperate the compensation in practice.¹⁴ Thus, for those who do not have the opportunity to pursue a human trafficking prosecution or where criminal proceedings end in an acquittal, the chances of restitution of pecuniary and non-pecuniary damage are even slimmer. A lack of access to remedy and protection can prolong the position of precarity of victims and increase the risk of re-exploitation/victimisation.

The implications of low prosecution levels will be discussed when comparing Belgium and England and Wales. Between 2012 and 2017, the number of NRM referrals for potential victims of human trafficking have, in England and Wales, increased exponentially – from 393 in 2012 to 2,840 in 2017¹⁵ – due to law and policy changes that increased the emphasis on detecting and identifying modern slavery victims. However, despite a gradual increase of prosecutions, there is still more to be done to secure access to justice for all victims of human traffick-

¹⁰ European Commission, 'Study on Case-Law relating to Trafficking in Human Beings for Labour Exploitation: Final Report' (2015) 45.

¹¹ Council of Europe (n 1) 66-67; European Commission, 'Study on Case-Law relating to THB' (n 10) 101.

¹² European Commission, 'Study on Case-Law relating to THB' (n 10) 88-97.

¹³ R203 - Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), para 12; Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168, art 6(1).

¹⁴ J Cusveller and E Kleemans, 'Fair Compensation for Victims of Human Trafficking? A Case Study of the Dutch Injured Party Claim' (2018) 24(3) *International Review of Victimology* 297; COMP.ACT, 'Findings and Results of the European Action for Compensation for Trafficked Persons' (2012).

¹⁵ National Crime Agency (n 3).

ing.¹⁶ Efforts are being made to determine the reasons why cases referred to the Crown Prosecution Service are not meeting the evidential threshold for charge and prosecution.¹⁷ The difference in prosecutions of criminal offences related to labour exploitation in the two case study jurisdictions is stark as outlined in Table 1. In Belgium, the difference in prosecution of criminal offences during the same time period and the number of victims referred to the NRM has remained stable.¹⁸

Year	England and Wales		Belgium	
	No. of NRM referrals ¹⁹	No. of prosecutions ²⁰	No. of NRM referrals ²¹	No. of prosecutions ²²
2010	Not available	21	Not available	Not available
2011	Not available	52	Not available	165
2012	393	32	89	164
2013	820	46	79	184
2014	1093	49	86	115
2015	1605	79	61	124
2016	2034	69	62	112
2017	2840	143	65	116

Table 1: Number of NRM Referrals and Prosecutions for Labour Exploitation Offences in England and Wales and Belgium (2010-2017)

In addition to the discrepancies between the number of NRM referrals and the prosecution rate, the way in which human trafficking for labour exploitation

¹⁶ The Anti-Trafficking Monitoring Group, 'Before the Harm is Done Examining the UK's Response to the Prevention of Trafficking' (September 2018) 42.

¹⁷ National Audit Office, 'Report by the Controller and Auditor General Home Office Reducing Modern Slavery' (HC 630, 2017) 44-45.

¹⁸ Myria (n 4).

²² For 2011 see Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains (n 21) 128-131; for 2012-2017 see Myria, 'Rapport annuel traite et trafic des êtres humains 2018' (2019) 137 and 139.

²¹ For 2011 see Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains, 'Rapport annuel traite et trafic des êtres humains' 2011: l'argent qui compte (2012) 136; for 2012-2016 see Myria, 'Rapport annuel 2017 en ligne' (2017) 136; for 2018 see Myria, 'Rapport annuel traite et trafic des êtres humains 2018: Mineurs en danger majeur' (2019) 142.

²⁰ For 2010-2011, see HM Government, 'First Annual Report of the Inter-Departmental Ministerial Group on Human Trafficking' (2012) 32; for 2012-2013, see HM Government, 'Second Report of the Inter-Departmental Ministerial Group on Human Trafficking' (2014) 26; for 2014-2016, see HM Government, '2017 UK Annual Report on Modern Slavery' (2017) 19; for 2017, see HM Government, '2018 UK Annual Report on Modern Slavery' (2018) 19.

¹⁹ National Referral Mechanism Statistics are only available as of 2012 and refer to the total number of adults and minors referred to NRM for labour exploitation and domestic servitude. National Crime Agency (n 3).

has been criminalised in both domestic legal frameworks reveals divergences with the international and regional definitions that can impact upon the implementation of the law on the books in practice.

3. Criminalisation of Human Trafficking for Labour Exploitation in Domestic Law

In England and Wales, human trafficking is prohibited under Section 2 of the Modern Slavery Act 2015:

1. A person commits an offence if the person arranges or facilitates the travel of another person ("V") with a view to V being exploited.
2. It is irrelevant whether V consents to the travel (whether V is an adult or a child).
3. A person may in particular arrange or facilitate V's travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.
4. A person arranges or facilitates V's travel with a view to V being exploited only if—
 - (a) the person intends to exploit V (in any part of the world) during or after the travel, or
 - (b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel.

It is important to note that the action is limited to the facilitation or arrangement of travel (Section 2(1)). The remaining actions that are included in the international and regional definitions are then intrinsically connected to the facilitation or arrangement of the travel (Section 2(3)) implying that trafficking requires the movement of a person – a factor that has been disregarded in the international and regional interpretation of human trafficking.²³

The meaning of exploitation is provided in Section 3 of the Modern Slavery Act 2015 and, for the purpose of this paper, will be limited to slavery, servitude and forced or compulsory labour. These forms of exploitation are also criminalised as standalone offences under Section 1 of the Modern Slavery Act 2015 and are to be construed in accordance with Article 4 of the Human Rights Convention (Section 1(2)).

In Belgium, there are no standalone offences of slavery, servitude and forced or compulsory labour, since the human trafficking definition is, according to

²³ Office of the United Nations High Commissioner for Human Rights, 'Human Rights and Human Trafficking, Fact Sheet No. 36' (2014) 3.

the legislative, sufficiently broad to encompass the standalone offences.²⁴ Human trafficking for labour exploitation is criminalised in Article 433quinquies of the Criminal Code:²⁵

The offence of human trafficking constitutes the recruitment, transport, transfer, housing, harbouring, taking control or transferring of the control over a person for the purposes of:

1. the exploitation of prostitution or other forms of sexual exploitation;
2. the exploitation of begging;
3. *carrying out work or providing services in conditions contrary to human dignity*; [emphasis added]
4. removal of organs in violation of the law of 13 June 1986 on the removal and transplantation of organs, or human tissue in violation of the law of 19 December 2008 on the acquisition and use of human tissue for the purposes of medical applications in humans or scientific research;
5. or having this person commit a crime or a misdemeanour against his or her will.

Except in the case referred to in 5, the consent of the person referred to in paragraph 1 to the proposed or actual exploitation shall be irrelevant.

The meaning of ‘conditions contrary to human dignity’ is to be interpreted by the judges. However, some preliminary guidance was offered by the *travaux préparatoires* whereby indicators of conditions contrary to human dignity can be derived from the number of hours worked, the level of pay and the health and safety conditions of the working environment.²⁶

Both case study jurisdictions have adopted slightly different approaches to criminalising human trafficking as compared to the international and regional definitions of human trafficking.²⁷ For instance, both have exhaustive lists of

²⁴ C Clesse, *La traite des êtres humains. Législation belge éclairée des législations française, luxembourgeoise et suisse* (Larcier 2013) 268; C Huberts and J Minet, ‘La Loi du 29 avril 2013 visant à modifier l’Article 433quinquies du Code Pénal en vue de clarifier et d’étendre la définition de la traite des êtres humains: Analyse et mise en perspective’ (2014) *Revue de Droit Pénal et de Criminologie* 34.

²⁵ Loi du 29 avril 2013 visant à modifier l’Article 433quinquies du Code Pénal en vue de clarifier et d’étendre la définition de la traite des êtres humains (Belgian Official Gazette, 23 July 2017).

²⁶ Belgian Senate, ‘Projet de loi modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil, Rapport fait au nom de la Commission de la Justice’ (2005, no 3-1138/4) 3.

²⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol) art 3(a); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L101, art 2; Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS No. 197, art 4.

form of exploitation and there are only two constituent elements of the offence, namely, the action (eg recruitment, transport, transfer, housing, harbouring, taking control or transferring of the control) and the purpose (for the purpose of exploitation). In both domestic provisions, the means – the third constituent element of the international and regional definitions – are absent altogether. In Belgium, the means are instead listed as aggravating factors (Article 433^{septies}). These differences impact on the principle of irrelevance of consent which, in the international and regional definitions, applies where any of the means are used to secure the action. In Belgium, the principle of irrelevance of consent applies to consent to the exploitation and in England and Wales, despite efforts to broaden the scope of the application of the principle during the legislative drafting process,²⁸ the irrelevance of consent is restrictively applied to the travel only.²⁹ The implications of these definitional divergences will be further discussed below in section 4.

4. Methodology

The analysis of criminal cases of human trafficking for labour exploitation consisted of two comparison groups: Belgium and England and Wales. The comparative research used empirical data to consider the information recorded by the courts.³⁰ The sample included cases where the judgment was handed down between January 2010 and December 2017. The choice of this timeframe is representative, in both jurisdictions, of relevant reforms to the law that deals with labour exploitation in both criminal and civil matters. In England and Wales, two reforms occurred, the first on 6 April 2010,³¹ when standalone offences were criminalised, and again in 30 March 2015, when the labour exploitation offences were consolidated into one Act of parliament. In Belgium, the criminal code was updated in 2013 providing clarification to the meaning and scope of trafficking for economic exploitation.³² A total of 72 cases were analysed as outlined in Table 2: 25 in England and Wales and 47 in Belgium.

²⁸ House of Lords (n 6) cols 1132–1133.

²⁹ NB the irrelevance of consent in Northern Ireland and Scotland is not restricted to the travel, but encompasses all acts Section 1(5) The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, Section 1(3) Human Trafficking and Exploitation Act (Scotland) 2015.

³⁰ R Lawless, J Robbenolt and T Ulen, *Empirical Methods in Law* (2nd edn, Aspen Select Series 2016) 56.

³¹ The Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010.

³² Huberts and Minet (n 24) 6.

Year	2010	2011	2012	2013	2014	2015	2016	2017	TOTAL
England and Wales	0	1	4	4	2	4	4	6	25
Belgium	6	3	3	10	7	11	5	2	47

Table 2: Overview of Cases Analysed in England and Wales and Belgium from 2010 to 2017

5. Challenges to the Judicial Process

As it has been seen in section 2, prosecution rates remain low, as the complexity of the phenomenon creates challenges for the judicial process. This section will consider the implications of such challenges in the case studies, including the operationalisation of the principle of irrelevance of consent, where the victim demonstrates apparent consent to exploitative working conditions, the participation of victims in criminal proceedings, and, finally, the complexity of the factual circumstances.

5.1. The Operationalisation of the Principle of Irrelevance of Consent

A challenge to the prosecution of human trafficking for labour exploitation is the role of the worker themselves, and their apparent consent to exploitative working conditions.³³ The irrelevance of consent is made explicit in both jurisdictions; in practice, the application of the irrelevance of consent requires further consideration.

In Belgium, the absolute nature of the irrelevance of consent has been reiterated in law, policy and the judicial handling of human trafficking, emphasising that even where a person gains an economic advantage from conditions that are contrary to human dignity,³⁴ it is important for the criminal prosecution to focus upon the mens rea of the offender and not on the victim's assessment of the position they are in.³⁵ Any analysis of the situation should be on the objective elements that constitute human trafficking, and not on the subjective experience of the individual's understanding of their treatment and acceptance of working

³³ Circulaire du 23 Décembre 2016 (n 6); House of Lords (n 6) cols 1132-1133.

³⁴ Belgian Senate, 'Rapport fait au nom du groupe de travail traite des êtres humains par Mme DÉSIR' (2012 Doc 5-1073/1 23). Original: *'une personne qu'on aurait recrutée dans le but de l'exploiter économiquement et alors même que cette personne aurait consenti aux conditions de travail parce qu'elle en tire effectivement un avantage économique, pourrait donc être considérée comme une victime de la traite.'*

³⁵ Huberts and Minet (n 24) 15; Myria, 'Rapport annuel 2017 en ligne' (n 21) 77.

in inhumane conditions.³⁶ Accordingly, in order to avoid social dumping and tolerance of unacceptable working conditions,³⁷ the judicial assessment should be made on the basis of standards in Belgium.³⁸ Indeed, a subsequent analysis of the case law demonstrates that consent to exploitative working conditions is deemed to be irrelevant.³⁹

The notion of human dignity should not be assessed on the basis of the perception of the facts, which was possibly that of [the individual] at the beginning of the employment relationship.⁴⁰

In England and Wales, such instances of apparent consent have subsequently been characterised by the exercise of control and manipulation by the exploiters, which has meant that, due to an imbalance of power, the individuals were conditioned to the extent that their free will was overborne. For instance, the manipulation and the subsequent imbalance of power between the exploiter and the victim meant that the ‘imbalance [was used] as a tool in his coercion of [victim] and his overbearing of [victim’s] will.’⁴¹ The absence of a complaint does not mean that there was no exploitation, as this could be an indicator of the conditioned status of the individual.

In Belgium, whilst the consent of the individual to the exploitation is categorically irrelevant to the determination of the constituent elements of the offence, there has nevertheless been an emphasis on the agency of the individual when discussing their vulnerability, and their so-called contribution to creating such a precarious position as a mitigating factor. Namely, the judiciary refers to the creation of vulnerability in the context of an illegal administrative status when ruling on the admissibility of pecuniary damage for back pay of wages.⁴² The principal reason for enforcing such a mitigating factor was the need to secure the public interest, with the illegal employment deemed to be the pursuit of an illegitimate interest. Consequently, compensation was initially denied since the wages from illegal employment were identified as an unlawful advantage. Further, when determining the award of non-pecuniary compensation,

³⁶ Centre fédéral pour l’analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains (n 21) 25.

³⁷ C Clesse and others, *Traite des êtres humains / Mensenhandel Mensensmokkel* (Die Keure 2010) 44 and 56.

³⁸ Circulaire du 23 Décembre 2016 (n 6).

³⁹ Bruges Court of First Instance, Corr. Bruges (17th ch.), 21 January 2015.

⁴⁰ Nivelles Court of First Instance, Corr. Nivelles (6th ch.), 26 June 2013. Original: ‘*La notion de dignité humaine ne doit pas s’apprécier sur base de la perception des faits qui était éventuellement celle de [individu] au début de la relation de travail.*’

⁴¹ *R v WC, JJC, JC, MC, JC* (unreported, 12 July 2012) Luton Crown Court.

⁴² Such a ruling is in contradiction with Directive 2009/52/EC (n 13) art 6(1) that has been transposed in Belgium by the Law of 11 February 2013 and provides for a presumption of three months employment relationship.

judges have, in some cases, withheld access to redress, based on an assessment of the judge who considers that the victim contributed to the precarious situation by knowingly working and residing illegally in Belgium:

The precarious situation in which they found themselves and which was exploited by some defendants is the result of a *situation created by the civil parties themselves: they knowingly left Brazil to come to work in Europe in conditions that they must have known to be painful*.⁴³ [emphasis added]

The complainant must therefore have known about the conditions that she would need to endure to survive in Belgium (...) there is, on her part a tacit but aware acceptance of the risk she would run of finding herself in such a situation.⁴⁴ [emphasis added]

In 2016 the Liège Court of Appeal⁴⁵ overruled these previous rulings and reinforced the absolute nature of the principle of irrelevance of consent, ruling that the fact of knowingly working illegally and contributing to the creation of a situation of precarity is not relevant to the determination of remedy: 'the Court thus emphasises that it is irrelevant that the workers were recruited by the defendants after they arrived in Belgium of their own free will'.⁴⁶

The courts, in their interpretation of the offences overall, have reinforced the principle of irrelevance of consent. The comparative analysis reveals that the principle applies to those who have solicited the work in the first instance, consented at the point of recruitment, facilitated the exploitation of others by having an active role in the recruitment of another and 'appear' to consent to the working conditions even if they are exploitative. The irrelevance of consent is of great importance to the successful prosecution of trafficking cases because the lack of recognition and acceptance by victims that they are being exploited leads to a lack of evidence and complainants in the first instance, and whilst

⁴³ Brussels Court of First Instance, Corr. Bruxelles (69th ch.), 30 October 2014. Original: '*La situation précaire dans laquelle ils se trouvaient et qui a été exploitée par certains prévenus est issue d'une situation créée par les parties civiles elles-mêmes: celles-ci ont quitté le Brésil en connaissance de cause pour venir travailler en Europe dans des conditions qu'elles devaient savoir être pénibles.*'

⁴⁴ Brussels Court of First Instance, Corr. Bruxelles (69th ch.), 1 April 2015. Original: '*La partie civile devait donc se douter des conditions dans lesquelles elle allait être amenée à survivre en Belgique...il y a, dans son chef une acceptation tacite mais consciente du risque qu'elle courrait d'attirer dans une telle situation.*'

⁴⁵ Liège Court of Appeal, 8 December 2016.

⁴⁶ Myria 'Rapport annuel 2017 en ligne' (n 21) 121. Original: '*la Cour souligne ainsi qu'il est indifférent que les travailleurs aient été recrutés par les prévenus après qu'ils aient rejoint la Belgique de leur propre gré.*'

prosecutions are possible, they are often for lesser offences, such as assault and offences against the person.⁴⁷

5.2. The Participation of Victims in Criminal Proceedings

A report of the European Commission revealed that in the labour exploitation case law in European Union Member States the participation of the victim in criminal proceedings was a key component, with victims testifying in court in the majority of the cases.⁴⁸ However, there was also a reported lack of willingness on the part of victims to cooperate and participate, requiring a focus on the protection measures for victims to ensure that their wellbeing was safeguarded throughout the criminal justice process.⁴⁹ The same issue has been noted in the findings from the comparative research.

In Belgium, the participation of victims in criminal proceedings is a condition of victim support and assistance.⁵⁰ In order for victim status to be conferred on an individual, the prosecutor will base their assessment on whether the victim has: 1) cut ties with the traffickers; 2) agreed to receive support and assistance from one of the three recognised specialised human trafficking centres (including psychosocial assistance) and 3) is willing to cooperate with the authorities.⁵¹ The analysis of Belgian criminal cases revealed that the involvement of the victim in the proceedings is of great importance in the evidentiary process, with a significant emphasis accorded to the victims' testimony showing a reliance on the role of the victims in the criminal proceedings. Nevertheless, where the subjective testimony of the victim is relied upon, for it to be credible, it must be corroborated with other objective evidential elements. This requires significant cooperation between different actors involved in the investigation and prosecution. From the perspective of the victim's participation, it must be assured that they are adequately supported and given sufficient information about the process so that any risk of secondary victimisation is minimised.

In England and Wales, whilst the provision of victim support and assistance is not conditional on the participation of victims in criminal proceedings, prosecuting authorities are increasingly encountering situations where victims do not always recognise their victimhood and self-identify as victims. Such a situation leads to a lack of evidence and ultimately prosecutions for lesser offences

⁴⁷ HM Parliament, *Parliamentary Debates House of Commons Official Report General Committees Public Bill Committee Modern Slavery Bill First Sitting* (2014) 8.

⁴⁸ European Commission, 'Study on Case-Law relating to THB' (n 10) 10-11.

⁴⁹ *ibid* 88-89.

⁵⁰ Circulaire du 23 Décembre 2016 (n 6).

⁵¹ *ibid*.

such as assault and offences against the person.⁵² Similarly, victims who have an irregular migration status are hesitant to receive victim support and assistance,⁵³ and thus participation in criminal proceedings is superseded by concerns over their migration status. As a result, we now see the emergence of victimless prosecutions (or evidence-based prosecutions)⁵⁴ that do not require reliance on the victim's evidence but can instead prioritise the use of other investigatory techniques to gather forensic evidence, financial records and evidence retrieved from suspects' residence, workplace or vehicles.⁵⁵ However, it is important to note that evidence-based prosecutions will require more resources, in an already resource intensive area of law enforcement.

Victims must be informed of the status of proceedings. Given the often transnational nature of human trafficking and the lengthy judicial process, this can be problematic where victims return to their country of origin. This is particularly the case for EU nationals who are more likely to return to their country of origin or move to a different EU Member State to seek employment than third country nationals. Therefore, it is imperative that law enforcement agencies maintain good connections with victims and witnesses where they have returned to their country of origin, requiring additional resources for safeguarding and welfare checks.

The participation of victims (or not) in proceedings should not affect their access to remedy and protection. For instance, it is important to ensure that those victims who do not engage with proceedings nevertheless receive compensation.⁵⁶ In addition, it is imperative that access to victim support and assistance be unconditional.

5.3. The Complexity of Factual Circumstances

The complexity of the factual circumstances in human trafficking cases means that the indictment is often extremely lengthy, consisting of

⁵² HM Parliament (n 47) 8.

⁵³ The inability to work during reflection and recovery needed does not reflect the economic imperative of workers who are supporting their family. See K Roberts, 'Human Trafficking: Addressing the Symptom, Not the Cause' in G Craig and others (eds), *The Modern Slavery Agenda: Policy, Politics and Practice in the UK* (Policy Press 2019) 147. EU nationals who are referred to the NRM are more likely to receive a positive decision than non-EU nationals. See H Lewis and L Waite, 'Migrant Illegality, Slavery and Exploitative Work' in the same work of Gary Craig and others (eds).

⁵⁴ A 'victimless prosecution' is one where no evidence is directly adduced from the complainant. This is only likely to take place where a victim is a) unwilling to give evidence, and b) it is in the public interest to continue with the prosecution without the victim.

⁵⁵ HM Prosecution and Inspectorate, 'The CPS Response to the Modern Slavery Act 2015' (December 2017) 40.

⁵⁶ HM Parliament, 'Independent Review of the Modern Slavery Act 2015: Final Report' (May 2019) 65.

multiple victims, defendants and offences. Multi-count indictments consist of a high number of wide ranging offences, including offences against the person, sexual offences, fraud offences, immigration offences and (in Belgium only) social criminal offences. This can be challenging when it comes to the judicial process and, in particular, where there is a trial by jury that requires a simple and clear presentation of both the factual circumstances by prosecution and defence counsel and legal directions from the judge.

In Belgium, the multi-count indictments appeared to be well accepted in the criminal proceedings, where proceedings are often overseen by specialised prosecutors and judges that frequently deal with human trafficking cases. In addition, significant guidance on the interpretation of the offence of human trafficking for economic exploitation has been provided as to the meaning of 'conditions contrary to human dignity'. Namely, level of remuneration in comparison to the number of hours worked, number of rest days, average monthly minimum income of less than the national minimum wage, working conditions, living conditions, restriction of freedom of movement, violation of physical integrity, confiscation of identity and travel documents. Such indicators are to be used to facilitate the assessment of a situation, in order to determine whether or not it amounts to exploitation.⁵⁷

Conversely, in England and Wales, despite one of the principal aims of the legal reform being the facilitation of the operational aspects of prosecuting modern slavery offences, in practice the reality is that the cases before the courts are extremely complex. Consolidation of the offences was supposed to make the prosecution of trafficking and exploitation offences easier, by ensuring that they are flagged up, making it much clearer and easier for prosecutors, investigators and the courts to understand.⁵⁸ In reality, the complexity of exploitation cases has led to an increased number of multi-count indictments. In some extremely complicated cases involving multiple defendants and victims, the indictments have been severed leading to separate trials. In order to improve the implementation of the newly consolidated legislation, there should be a systematic review of all existing guidance for all anti-trafficking legislation with a view to ensuring that all prosecuting advocates and judges share knowledge and information on the application of offences.⁵⁹ Identifying the acts which support the charged offence is also of use for the defence counsel as it permits the defence advocate and defendant to know the material scope of the alleged criminal

⁵⁷ Belgian Senate (n 26) 3; Annexe Circulaire no. COL 10/2004 du Collège des procureurs généraux près les cours d'appel, politique de recherches et poursuites en matière de traite des êtres humains – Adaptation de la Directive du Ministre de la Justice (30 April 2004) 35-38; Annexe 2 Circulaire no. COL 1/2007 du Collège des procureurs généraux près les cours d'appel, Traite des êtres humains – Directive ministérielle relative à la politique de recherches et poursuites en matière de traite des êtres humains (17 January 2007) 4-8.

⁵⁸ HM Parliament (n 47) 8.

⁵⁹ The Anti Trafficking Monitoring Group (n 16) 81.

acts. Updated guidance for judges that include legal directions on Modern Slavery Act offences would facilitate the judge's legal directions to the jury of a complex matter of law that suffers from a lack of certainty and a limited availability of case law.⁶⁰ This improvement would also ensure the jury's understanding of a complicated offence.⁶¹

6. Conclusion

The challenges to the judicial process reveal some differences between the victims who are nationals and EU nationals as opposed to third country nationals. When seeking to apply the principle of irrelevance of consent, the agency of the victim – particularly undocumented victims – before, during and after the exploitation should not be taken into account. Similarly, any prosecutorial decision should not adversely impact on the rights of victims to access to support and assistance and their right to an effective remedy. Access to support and assistance should be unconditional, regardless of their participation in proceedings. This is especially important for undocumented third country nationals who – when granted human trafficking victim status – will be entitled to a temporary residence permit. EU nationals, who are more likely to decide to return to their country of origin or another EU Member State, should also be assured access to effective compensation.

Furthermore, in light of the complexity of exploitative situations, legal professionals should receive clear guidance on how to deal with human trafficking cases. Clarity on how to objectively assess the existence of exploitation will also ease the difficulties encountered where a victim does not necessarily self-identify as a victim or appears to have consented to exploitation. Such guidance and clarity will also be particularly important where the role of the perpetrator is not always clear, for example where complex factual circumstances lead to multiple defendants on the indictment.

The focus on a criminal justice approach in combating human trafficking has generated criticism, and the low prosecution rates provide an evidence-base from which such proponents can further reinforce their position. This paper has not addressed all challenges and criticisms of a criminal justice approach, but has nevertheless highlighted a number of recurring issues that have emerged from the comparative analysis of the judicial approach to handling labour exploitation cases in criminal proceedings in England and Wales and Belgium.

⁶⁰ C Haughey, 'Independent Report, Modern Slavery Act 2015 Review: One Year On' (2016) 23-24. See Recommendation 19 to update the Crown Court Bench Book.

⁶¹ *ibid.* See Recommendation 14 and Recommendation 16: During the summing up, the trial judge should direct the jury in terms similar to those articulated in the Crown Court Compendium Part 1 May 2016 Chapter 20-1 the danger of assumptions.

In particular, the implications for victims' effective access to justice and remedy should be at the forefront of efforts that seek to improve prosecution rates.

A Dual-Model of Posttraumatic Stress and Posttraumatic Growth in a Community Sample of Female Conflict-Related Sexual Violence Survivors from Bosnia and Herzegovina

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Abstract

Background: Posttraumatic stress disorder (PTSD) and posttraumatic growth (PTG) are known psychological outcomes that can co-occur in the aftermath of a traumatic event. However, it is less clear how these outcomes interact – particularly for female survivors of conflict-related sexual violence (CRSV) – and to what extent intermediary factors play a role in this relationship.

Methods: In a sample of 192 war survivors from Bosnia & Herzegovina (n = 104 experienced CRSV, n = 88 did not), a structural equation model (LISREL 8.8) tested CRSV as a traumatic event, ‘positive reinterpretation’ (as a strategy of approach coping) and ‘behavioural disengagement’ (as a strategy of avoidance coping), and PTSD and PTG as psychosocial outcomes. A difference in the mechanisms by which

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PTG and PTSD interact in the two subgroups was hypothesised, given the differences in the nature of the trauma they experienced.

Results: Through multiple indirect relationships, results showed that CRSV survivors respond to their trauma with both PTSD and PTG, suggesting a dual PTSD-PTG mechanism. As for coping strategies, positive reinterpretation predicted greater PTG, and behavioural disengagement predicted greater PTSD. In the sample of non-sexual violence survivors, positive reinterpretation also remained a significant predictor of PTG.

Conclusions: Positive reinterpretation as a coping strategy appears to be a stable characteristic that independently predicts PTG, irrespective of trauma type. Mental health professionals should take into account this mechanism when addressing the needs of CRSV survivors, but also war survivors more generally. Reframing traumatic events and post-trauma sequelae during treatment could lead to PTG and enhance recovery.

I. Background

The development of posttraumatic growth (PTG) in the aftermath of a traumatic event is a salutary association.¹ It is increasingly investigated across mental health literature, with much debate as to how this association is impacted by other factors and how it differs across different types of events.² PTG is understood as a 'significant beneficial change in cognitive and emotional life that goes beyond previous levels of adaptation or psychological functioning and is a way of living optimally in the wake of trauma'.³ Some suggest that PTG can be viewed as a defence against the development of pathology following a traumatic event,⁴ but it is likely to be more complex. There is moderate support for a curvilinear relationship between posttraumatic stress disorder (PTSD) symptomatology and PTG, whereby fewer PTSD symptoms may not be enough stimulation for a person to experience PTG, and a greater number of symptoms may result in mental health consequences that prevent the opportunity for PTG.⁵ Other evidence suggests that adjustment to trauma is a process influenced

¹ M Mittelmark and G Bauer, 'The Meanings of Salutogenesis' in M Mittelmark and G Bauer (eds), *The Handbook of Salutogenesis* (Springer 2017).

² E Ulloa, M Guzman, M Salazar, and C Cala, 'Posttraumatic Growth and Sexual Violence: A Literature Review' (2016) 25 *J Aggress Maltreat Trauma* 286.

³ RG Tedeschi, C Park and LG Calhoun, 'Posttraumatic Growth: Future Directions' in RG Tedeschi and others (eds), *Posttraumatic Growth: Positive Changes in the Aftermath of Crisis* (Mahwah, New Jersey 1998) 1.

⁴ S Dekel, T Ein-Dor and Z Solomon, 'Posttraumatic Growth and Posttraumatic Distress: A longitudinal Study' (2012) 4 *Psychol Trauma* 94.

⁵ B Kleim and A Ehlers, 'Evidence for a Curvilinear Relationship Between Posttraumatic Growth and Posttrauma Depression and PTSD in Assault Survivors' (2009) 22 *J Trauma Stress* 45; Z Solomon and R Dekel, 'Posttraumatic Stress Disorder and Posttraumatic Growth Among Israeli Ex-POWs' (2007) 20 *J Trauma Stress* 303.

by factors that pre-date the trauma (eg socioeconomic status, family stability, a history of trauma) or psychosocial factors (eg personality, coping strategies, social support), as well as event characteristics (eg type, intensity, duration of exposure or perceived threat).⁶

Taking the type of event as an important factor in the possible development of psychological sequelae following trauma, differences begin to emerge. Events experienced by groups of people (eg natural disasters) tend to result in a strengthened common identity, manifestations of solidarity and improved self-esteem.⁷ Events experienced personally by an individual, such as that of interpersonal violence of a sexual nature, can trigger a more complex reaction, including high rates of depression, anxiety and PTSD.⁸ In some contexts, additional factors can contribute to subsequent outcomes. For example, how controllable the event was to the victim; whether they attribute the occurrence of the event to a personal characteristic; or whether it was under the control of another person or entity. Moreover, if a survivor of sexual violence negatively appraises their emotions and symptoms, or indeed if they perceive negative responses from others, there is a greater risk of developing PTSD.⁹ This often stems from the shame and stigma that is associated with this type of violence, particularly in conflict settings,¹⁰ that may be perceived differently to other non-interpersonal, war-related trauma, such as the death of a loved one. Findings among adolescent girls in the Democratic Republic of the Congo (DRC) showed that stigmatisation related to conflict-related sexual violence (CRSV) has a greater mediating impact on mental health outcomes, than the act itself.¹¹ Furthermore, CRSV often takes place among other forms of violence (eg looting and destruction of property), and comprises multiple forms of victimisation,¹² which may compound psychological outcomes and societal reactions.

With regard to psychosocial factors, it is understood that coping is the process by which people manage their stress following a traumatic event; either by doing something to alter the source of the stress, or by managing the emotional reac-

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- ⁶ J Lawrence and J Fauerbach, 'Personality, Coping, Chronic Stress, Social Support and PTSD Symptoms among Adult Burn Survivors: A Path Analysis' (2003) 24 *J Burn Care Rehabil* 63.
 - ⁷ D Garcia and B Rimé, 'Collective Emotions and Social Resilience in the Digital Traces After a Terrorist Attack' (1993) *Psychol Sci* 30.
 - ⁸ A Verelst, M De Schryver, E Broekaert and I Derluyn, 'Mental Health of Victims of Sexual Violence in Eastern Congo: Associations with Daily Stressors, Stigma, and Labeling' (2014) 14 *BMC Women's Health* 106.
 - ⁹ K Chivers-Wilson, 'Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments' (2006) 9 *MJM* 111.
 - ¹⁰ D Mukwege and C Nangini, 'Rape with Extreme Violence: The New Pathology in South Kivu, Democratic Republic of Congo' (2009) 6 *PLoS Med* 1.
 - ¹¹ A Verelst and others, 'The Mediating Role of Stigmatization in the Mental Health of Adolescent Victims of Sexual Violence in Eastern Congo' (2014) 38 *Child Abuse and Negl* 1139.
 - ¹² D Haynes, 'Lessons from Bosnia's Arizona Market: Harm to Reconstruction Process' (2002) 158 *Univ PA Law Rev* 1779.

tions associated with it.¹³ Several scholars have found approach coping styles (where a person seeks to resolve the stressor) to be positively correlated with PTG in people with experiences of interpersonal violence, and the opposite (actively avoiding the stressor) negatively associated with PTG.¹⁴ Furthermore, it has been found that male and female survivors of sexual violence who disclosed their assault (as form of approach coping) were more likely to experience PTG.¹⁵ This is a particularly important aspect of recovery for survivors, given that withdrawal from social networks often takes place in the aftermath of interpersonal trauma of a sexual nature.¹⁶ In other research, however, positive relationships between avoidance strategies and psychological outcomes have been identified. Verelst and colleagues found that while certain symptoms may stem from direct emotional and psychophysiological responses to reliving traumatic sexual events, symptoms of avoidance may constitute a marker of a stigmatised social position within the individual's family and community.¹⁷ Another explanation for this is that the use of avoidance strategies among women may be more commonly associated with greater distress in the aftermath of sexual violence, because the tendency to suppress thoughts about the stressor or denying its existence, may paradoxically lead to over-attention to the event.¹⁸ This may initially serve as a protective mechanism to mitigate emotional distress following trauma.¹⁹ However, among other populations, research has shown that avoidance coping strategies can lead to more positive adaptations in the short term, but have no, or even negative, effects in the long term.²⁰

In a previous study based on the dataset presented in this article, findings from women in Bosnia and Herzegovina who experienced CRSV during the war from 1992-1995 showed that higher levels of positive reinterpretation (as

¹³ C Carver, MF Scheier and J Weintraub, 'Assessing Coping Strategies: A Theoretically Based Approach' (1989) 56 *J Pers Soc Psychol* 267.

¹⁴ A Elderton, A Berry and C Chan, 'A Systematic Review of Posttraumatic Growth in Survivors of Interpersonal Violence in Adulthood' (2017) 18 *Trauma Violence Abus* 223; S Ullman, 'Correlates of Posttraumatic Growth in Adult Sexual Assault Victims' (2014) 25 *Trauma Violence Abus* 219; M Brooks and others, 'Trauma Characteristics and Posttraumatic Growth: The Mediating Role of Avoidance Coping, Intrusive Thoughts, and Social Support' (2019) 11 *Psychol Trauma* 232.

¹⁵ A Cole, 'Differential Adjustment among Sexual Assault Survivors: Predicting Positive Outcome' (State University of New York at Binghamton 2008).

¹⁶ C Kılıç, K Magruder and M Koryürek, 'Does Trauma Type Relate to Posttraumatic Growth after War? A Pilot Study of Young Iraqi War Survivors Living in Turkey' (2016) 53 *Transcult Psychiatry* 110.

¹⁷ A Verelst and others (n 11).

¹⁸ H Littleton, 'The Coping Process of the Unacknowledged Rape Victim' (Virginia Polytechnic Institute 2003).

¹⁹ M London, M Mercer and M Lilly, 'Considering the Impact of Early Trauma on Coping and Pathology to Predict Posttraumatic Growth Among 9-11 Telecommunicators' (2017) 1 *Interpers Violence* 1.

²⁰ T van Elderen, S Maes, J Madalinska, and I Komprom, 'Coping, angst en vitale uitputting na een coronair incident'. Een longitudinaal onderzoek' (1996) *Gedrag Gezond* 207.

a form of approach coping, ie reframing the event and subsequent sequelae and lower levels of behavioural disengagement (as a form of avoidance coping, ie withdrawing effort from achieving the goal with which the stressor interferes) were associated with a greater degree of PTG.²¹ These domains of coping likely represent mediators for pathogenic and salutary outcomes: positive reinterpretation as a buffer against, and behavioural disengagement as a risk factor for, lower measured PTG. Regression analyses indicated that the severity of posttraumatic symptomatology was not significantly associated with PTG, which may be attributable to the fact that PTSD was identified in more than ninety percent of the sample.

Nonetheless, such findings can only tell us so much. We know that coping provides a person with the emotional and behavioural tools to appraise and assess a situation for threat, which can be a protective factor in times of distress and buffer against psychological suffering. However, whether this occurs directly (where an increase in coping skills will result in an increase in PTG irrespective of the existing level of PTSD) or indirectly (protecting persons from the potentially pathogenic influence of stressful events) remains unclear. Prior analyses have potentially been too simplistic. This occurs particularly as a result of the difficulty in obtaining retrospective data in certain populations and a reliance on cross-sectional studies, and therefore an inability to make causal inferences.²² Given the evidence, the most likely interaction is that events themselves do not result directly in PTSD/PTG,²³ but individuals will respond to stress with a mixture of resilience-promoting resources and vulnerability to mental illness²⁴ – a dual mechanism – rather than PTG falling on the ‘adaptive’ end of a single spectrum of post-trauma adjustment.²⁵ This results in multiple indirect relationships between trauma, PTG and PTSD that may be influenced by psychosocial factors such as coping. The purpose of this paper is to delve deeper into the possibility of a dual mechanism by which PTG and PTSD interact in the aftermath of trauma, and to explore the extent to which they are impacted by certain coping strategies. Findings from this study are expected to have important clinical implications regarding the support of CRSV survivors. As Bosnia goes through a long-overdue investigation of war crimes that took place during the

²¹ K Anderson and others, ‘Predictors of Posttraumatic Growth among Conflict-Related Sexual Violence Survivors from Bosnia and Herzegovina’ (2019) 13 *Confl and Health* 23.

²² A Cole and S Lynn, ‘Adjustment of Sexual Assault Survivors: Hardiness and Acceptance Coping in Posttraumatic Growth’ (2010) 30 *Imagin Cogn Pers* 111.

²³ Brooks and others (n 14).

²⁴ J Shakespeare-Finch and J Lurie-Beck, ‘A Meta-Analytic Clarification of the Relationship between Posttraumatic Growth and Symptoms of Posttraumatic Distress Disorder’ (2014) 28 *J Anxiety Disord* 223; P Kuwert and others, ‘Long-Term Effects of Conflict-Related Sexual Violence Compared with Non-Sexual War Trauma in Female World War II Survivors: A Matched Pairs Study’ (2014) 43 *Arch Sex Behav* 1059.

²⁵ R Tedeschi and L Calhoun, ‘The Post-Traumatic Growth Inventory: Measuring the Positive Legacy of Trauma’ (1996) 9 *J Trauma Stress* 455.

conflict, the acts of CRSV, trafficking and enslavement are likely to come to the fore once again. This is particularly poignant for the stigmatisation felt by CRSV survivors, and the role it plays in recovery and long-term outcomes. It can help clinicians and mental health workers understand what to address in interventions based on a holistic view of the women, their experiences and their reactions to it. Focusing on recovery does not mean that a traumatic event did not occur, or symptoms necessarily disappear,²⁶ but understanding a PTSD-PTG mechanism and associated coping strategies may serve to prepare and buffer survivors against further mental deterioration. As such, we have conceptualised a model to explore this process.

1.1. The Hypothesised Model

On the basis of earlier analyses and existing literature on the subject, our hypothesised model explored a possible PTSD-PTG mechanism specified by: five pathways between experiencing CRSV; positive reinterpretation and behavioural disengagement as strategies of coping; and PTSD severity and PTG as psychosocial outcomes. At the core of this model, several indirect relationships were specified between the experience of sexual violence and PTG. On one hand, 1) experiencing CRSV can lead to higher PTSD scores which may result in lower measured PTG; 2) CRSV can lead to the use of behavioural disengagement (as an avoidance coping strategy), which could lead to lower measured PTG; and 3) this second pathway could be further mediated by PTSD. On the other hand, 4) the experience of CRSV could lead to positive reinterpretation of the event (as an approach coping strategy) which could result in higher measured PTG; and 5) this relationship could be further mediated by behavioural disengagement and has a negative impact on PTG. Given the difference in trauma types between the subsamples and the mechanisms by which coping influences psychosocial outcomes, the final model for the non-sexual violence survivors is expected to fit differently. The hypothesised model is presented in figure 1.

²⁶ W Anthony, 'Recovery from Mental Illness: The Guiding Vision of the Mental Health Service System in the 1990's' (1993) 16 *Psychosoc Rehabilitation* 11.

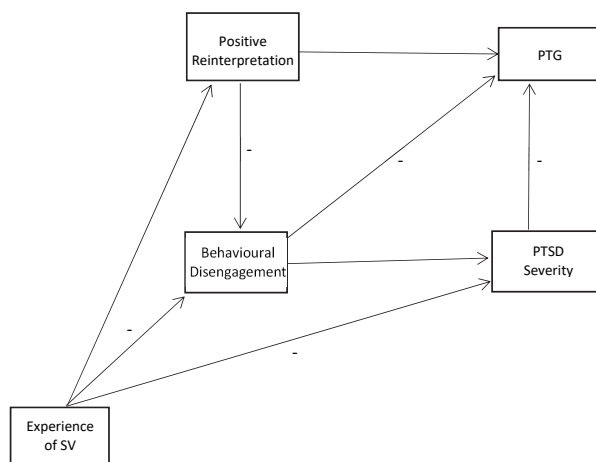


Figure 1. *Hypothesised Model of Relationships between the Experience of Sexual Violence and Outcomes PTSD Severity and PTG*

The core assumption when testing this model is that the relationship between CRSV and PTG is mediated by psychosocial factors such as coping. Multiple indirect relationships are presented, that specify strategies of coping that buffer against PTSD and promote PTG and contribute to explaining this dual mechanism. These assumptions are tested using a structural equation modelling approach within a sample of CRSV survivors from Bosnia and Herzegovina and compared to a group of war survivors who did not experience CRSV. The research has three main hypotheses: 1) PTG and PTSD will both be possible psychosocial outcomes among this war-affected population; 2) the explanatory mechanisms for PTG among CRSV survivors will be different from participants who did not experience CRSV, and 3) higher measured PTG among CRSV survivors will be associated with greater positive reinterpretation as an approach coping strategy, and lower behavioural disengagement as an avoidance coping strategy. A more detailed understanding of these mechanisms – the interrelationships and the differences between those who experienced CRSV and those who did not – will shed light onto the dual PTSD-PTG mechanism and might have important implications for how to support survivors of CRSV towards PTG and recovery.

2. Methodology

2.1. Design and setting

The data presented here are part of a cross-sectional study on the quality of life and long-term psychological consequences among women

with experiences of CRSV during the conflict in Bosnia and Herzegovina. During this conflict, women are believed to have been subjected to CRSV by civilians, locally stationed and foreign military forces²⁷ and even peacekeepers.²⁸ The present study refers to the United Nations (UN) definition of CRSV, as: 'rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict',²⁹ and specifically to rape. Data used in this study were collected by the research team from December 2012 to December 2014, twenty years after the start of the war. Results elsewhere have shown that more than half of female CRSV survivors still suffered from PTSD more than two decades after the start of the war.³⁰ Ethical approval was given by the Human Research Ethics Board of the Medical Faculty of the University of Tuzla, Bosnia and Herzegovina.

2.2. Participants

Female survivors of CRSV in this study were recruited by author AD, with the assistance of the Bosnian non-governmental, non-profit organisation Association for Women Victims of War, who campaign for the rights of women and girls who experienced sexual violence during the conflict, and possess a database of more than 700 CRSV survivors. Participants were eligible for inclusion in this study if they had been residents of Bosnia and Herzegovina during and after the war and were between 30-65 years old at the time of study. On the basis of a study screening measure of cognitive functioning (Mini

²⁷ A Delić, P Kuwert and H Glaesmer, 'Should the Definition of the Term "Children Born of War" and vulnerabilities of children from recent conflict and post-conflict settings be broadened?' (2017) 46 *Act Med Acad* 67; I Skjelsbæk, 'Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape during the War in Bosnia-Herzegovina' (2006) 16 *Fem Psychol* 373; T Salzman, 'Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia' (1998) 20 *HRQ Quarterly* 348; C Benard, 'Rape as Terror: The Case of Bosnia' (1994) 6 *Terror Polit Violenc* 29.

²⁸ K Jennings and V Nikolić-Ristanović, 'UN Peacekeeping Economies and Local Sex Industries: Connections and Implications' (2009) MICROCON Research Working Paper 17 <DOI: 10.2139/ssrn.1488842> accessed 3 April 2019.

²⁹ UNSC, 'Report of the Secretary-General on Conflict-Related Sexual Violence' (S/2017/249) 15 April 2017.

³⁰ Medica Zenica and Medica Mondiale, "We Are Still Alive. We Have Been Harmed but We Are Brave and Strong", A Research on the Long-Term Consequences of War Rape and Coping Strategies of Survivors in Bosnia and Herzegovina' (2014). <https://www.medicamondiale.org/fileadmin/redaktion/5_Service/Mediathek/Dokumente/English/Documentations_studies/141205_Summary_Research_We-Are-Still-Alive_CR-Medica-Zenica_medica-mondiale.pdf> accessed 1 May 2018.

Mental Status Examination, MMSE³¹) women were excluded with scores < 23 (out of a possible score of 30, with 24 indicating normal cognition) or those with a psychiatric history prior to the war. Participants for the CRSV group were eligible if they had experienced sexual violence during the years 1992-1995 and had disclosed this to the association. A control group of women who did not experience sexual violence during the war (non-CRSV), but met other study criteria, was selected from the general population using a method of snowball sampling. This subsample served as way to isolate the impact of CRSV from other wartime events experienced by the entire sample (eg separation from family members, loss of loved ones, displacement).

2.3. Procedures

A multistage sampling method was employed to reach the civilian population who experienced sexual violence during the war. Seven localities across Bosnia and Herzegovina were identified as having the greatest density of registered CRSV survivors and using the list of registered female members of the association, the President of the Association for Women Victims of War telephoned survivors from selected localities to provide them with information about the research project and invite them to voluntarily participate in the study. For those who consented, the initial interview was then conducted in person by AD in two or more sessions, with breaks upon request. Psychiatric history was discussed with participants and corroborated by medical notes if available. Given the sensitive nature of the research, referral information for psychological counselling and support was provided.

Interviews were carried out with a total of 110 CRSV survivors, of which three later withdrew their consent, two were excluded due to MMSE < 23, and one participant was excluded due to missing data. Contact persons from the local NGOs, mental health facilities or psychiatric clinics that provided space for interviews for CRSV survivors were asked to recommend other women who may be willing to participate. Those who were interviewed were asked to identify other potential participants, who were then contacted and followed-up. This gave a total sample of $n = 192$ for analysis, see table 1 later on for demographic information.

2.4. Measures

In this study, the following measures have been used:

³¹ M Folstein, S Folstein and P McHugh, "Mini-Mental State". A Practical Method for Grading the Cognitive State of Patients for the Clinician' (1975) 12 J Psychiatr Res 189.

- *Socio-demographic questionnaire*: a self-developed questionnaire was developed by author AD to gather sociodemographic data. Items were predominantly categorical, including ethnic affiliation, age, marital status, education, employment status, data on the context of CRSV, and any involvement in psychosocial support programmes.
- *Harvard Trauma Questionnaire (HTQ)*:³² a version for Bosnia and Herzegovina was used to explore experiences of traumatic events and assess the presence of PTSD symptomatology.³³ Only the first and fourth parts were used in this study. The first part is a list of possible traumatic events that civilians could potentially have been exposed to during the war, for which there is a yes/no response format. Events include material deprivation, conditions relating to war, bodily injury, forced confinement and coercion, being forced to harm others, disappearance, death or injury to loved ones, and witnessing violence to others. The fourth part contains forty statements about possible psychosocial difficulties caused by trauma. The first sixteen statements are derived from DSM-IV criteria for PTSD and inquire about the symptoms of the PTSD domains: re-experiencing the traumatic event, avoidance, and hyperarousal. The scale for each response in these sections are rated from one ('not at all') to four ('very strongly'), whereby a mean item score of two-and-a-half or above is considered an indicator for symptoms of PTSD. Symptoms are grouped into three phenomena: re-experiencing traumatic experiences, avoiding and numbing, and psychological arousal, of which there are four, seven and five items respectively. This measure has been used reliably in a study of Bosnian women affected by war³⁴ with reportedly high internal consistency for traumatic symptoms (Cronbach's $\alpha = 0.95$). In this study, the HTQ demonstrated very high reliability and internal consistency with Cronbach's $\alpha = 0.96$ for the PTSD symptom scale.
- *Adapted validated Croatian scale*: the Bosnian version of the Coping Orientations to Problems Experienced Scale (COPE) used in this study is an adaption of the validated Croatian scale.³⁵ It is a 71-item scale to assess how people respond when they are confronted with difficult or stressful situations, whereby respondents rate each statement on a scale from 0 ('never') to 4 ('I always do this'). It produces 15 subscales that mirror the original

³² R Mollica, Y Caspi-Yavin, P Bollini and T Truong, 'The Harvard Trauma Questionnaire: Validating a Cross-Cultural Instrument for Measuring Torture, Trauma, and Posttraumatic Stress Disorder in Indochinese Refugees' (1998) 180 J Nerv Ment Dis 11.

³³ K Allden and others, 'Harvard Trauma Manual: Bosnia-Herzegovina Version' (Cambridge, Harvard Program in Refugee Trauma 1998).

³⁴ M Klaric and others, 'Social Support and PTSD Symptoms in War-Traumatized Women in Bosnia and Herzegovina' (2008) 20 Psychiatr Danub 466.

³⁵ J Hudek-Knežević, I Kardum and Ž Vukmirović, 'The Structure of Coping Styles: A Comparative Study of Croatian Sample' (1999) 13 Europ J Pers 149.

COPE-60,³⁶ which include problem-focused, emotion-focused and disengagement dimensions, and reflect the activities from a particular coping domain. Subscales are calculated using the mean score of items. Based on results from prior research³⁷ two subscales were used in this study: ‘positive reinterpretation’ is comprised of 4 items (eg ‘I try to make it seem more positive’), and behavioural disengagement is comprised of 5 (eg ‘I admit to myself I can’t deal with and quit trying’). In the validated Croatian version, ‘substance use’ referred exclusively to alcohol, in the Bosnian translation, this referred only to the use of sedatives. This scale has been used successfully in existing research.³⁸ In this study, positive reinterpretation – reframing negative experiences – had an alpha of .57 and behavioural disengagement – withdrawing effort from addressing the source of stress – of α .72.

- *Posttraumatic Growth Inventory (PTGI)*:³⁹ the PTGI is a 21-item self-report scale for assessing psychological growth following a traumatic event, in this case framed in the context of participants’ experiences of CRSV. The PTGI includes five subscales: new possibilities (eg ‘I established a new path for my life’), relating to others (eg ‘I feel a sense of closeness with others’), personal strength (eg ‘knowing I can handle difficulties’), spiritual change (eg ‘I have a stronger religious faith’), and appreciation for life (‘I appreciate each day’). Total scores on the PTGI range from 1 to 126, with higher scores reflecting greater perceived growth, and items uses a response format that ranges from 1 (‘I did not experience this change as a result of my crisis’) to 6 (‘I experienced this change to a very great degree as a result of my crisis’). The PTGI has been successfully implemented in a study of Israeli war veterans,⁴⁰ who report high reliability for total scores (Cronbach’s $\alpha = 0.94$). In the present study, Cronbach’s α for the PTGI total score was 0.96 and ranged from 0.66 to 0.90 for subscale scores.

2.5. Data analyses

The samples of CRSV survivors and non-CRSV survivors were tested on differences in sociodemographic characteristics using t-tests and chi-

³⁶ C Carver, M Scheier and J Weintraub, ‘Assessing Coping Strategies: A Theoretically Based Approach’ (1989) 56 *J Pers Soc Psychol* 267.

³⁷ Anderson and others (n 21).

³⁸ V Antičević, G Kardum and D Britvić, ‘War Veterans’ Quality of Life: The Impact of Lifetime Traumatic Experiences, Psychological and Physical Health-Related Characteristics’ (2011) 20 *Drus Istraz* 1101.

³⁹ Tedeschi and Calhoun (n 25).

⁴⁰ Dekel, Ein-Dor and Soloman (n 4).

square tests. T-tests were also used to compare means of study outcome variables.

First, the hypothesised model was tested to assess the extent to which it fit the data within the total sample, and separately for the groups CRSV survivors and non-CRSV survivors. The hypothesised model was evaluated with structural equation modelling using LISREL 8.8. Five goodness-of-fit measures were used in this study. Firstly, the chi-square (χ^2) was included as a measure of the discrepancy between variance–covariance matrices of the variables used in the model; and the (constructed) variance–covariance matrix derived from the specified relationships in the model. A non-significant χ^2 refers to the resemblance between the specified relationships in the hypothesised model and interpretations of the variances-covariances in the data matrix (ie validity of the structural equation model (SEM) explaining the (co)variances of the data matrix). Secondly, the root-mean-square error of approximation (RMSEA) was used which refers to the difference between the data variance-covariance matrix and the model-based matrix fit to the data, per degree of freedom. This estimate should be less than .05 to indicate close fit. Confidence intervals (90%) of RMSEA are provided. Thirdly, the comparative fit index (CFI) was included which assumes that all latent variables are uncorrelated and compares the sample covariance matrix with this null model. Values for this statistic range between 0.0 and 1.0 with values closer to 1.0 indicating good fit; Fourthly, the standardised root mean square residual (SRMR) was used which assess the difference between the residuals of the sample covariance matrix and the hypothesised covariance model. Values for the SRMR range from 0 to 1.0 with well-fitting models obtaining values less than .05. Fifthly, the non-normed fit index (NNFI) was included, which assesses the model by comparing the χ^2 value of the model to the χ^2 of the null model. Values for this statistic range between 0 and 1 with values greater than 0.90 indicating a good fit.

Statistical modelling was done by inclusion and exclusion of relationships between variables, that, underpinned by theory and supported by modification indices provided by the LISREL software, gave alternative models. These alternative models are evaluated by means of the five goodness-of-fit measures. Only standardised estimated paths with *t* values > 1.98, thus only paths with a significance of $p < .05$, are included in the modelling process. Relative effect sizes are defined using standardised path coefficients, as seen in figures 2-4. The ‘most likely best-fitting’ (MLBF) model and its specified relationships obtained from the CRSV survivors group was then tested on the non-CRSV group. This type of statistical modelling has been used successfully elsewhere in mental

health research to predict healthcare consumption,⁴¹ community social capital,⁴² and postpartum posttraumatic stress.⁴³

Finally, post hoc multi-group analyses were conducted to determine whether the model performed differently as a function of subgroup, by estimating the model freely for CRSV survivors and non-CRSV survivors. This unconstrained model was then compared to models in which the parameters were constrained to be equal across groups. In doing so, it is possible to test specific hypotheses about group differences by constraining individual parameters and then comparing model fit.⁴⁴

3. Results

The total study sample comprised 192 female participants ($n = 104$ CRSV survivors and $n = 88$ non-CRSV survivors). The largest proportion of women in both groups were of Bosniak ethnicity, but CRSV survivors were significantly older than non-CRSV survivors. Fewer CRSV survivors were married, educated above primary school level or currently employed. Regarding the circumstances of sexual violence, 45.2% ($n = 47$) of women indicated that they were raped three or more times during the conflict, with almost a third (29.8%, $n = 30$) having been raped by three or more perpetrators. The majority of women (76%, $n = 79$) did not know their perpetrators. Women were on average 29.6 (SD 8.9) years old (range 12-48) when their first experience of sexual violence took place. Fourteen women (13.5%) indicated that they became pregnant as a result of being raped, of whom 10 (9.6%) had this pregnancy terminated. Scores on study variables fell in the expected directions: survivors of CRSV scored higher in terms of PTSD severity (current PTSD symptomatology above a threshold of >2.5 was detected in 92.3% ($n = 96$) of CRSV survivors, and in 27.3% ($n = 24$) of non-CRSV survivors), traumatic load and behavioural disengagement; and lower on PTG and positive reinterpretation (table 1).

⁴¹ A Kamperman, I Komproe and J de Jong, 'Migrant Mental Health: A Model for Indicators of Mental Health and Health Care Consumption' (2007) 26 *Health Psychol* 96.

⁴² T Wind and I Komproe, 'The Mechanisms that Associate Community Social Capital with Post-Disaster Mental Health: A Multilevel Model' (2012) 75 *Soc Sci Med* 1715.

⁴³ M van Son and others, 'Prenatal Depression, Mode of Delivery and Perinatal Dissociation as Predictors of Postpartum Posttraumatic Stress: An Empirical Study' (2005) 12 *Clin Psychol Psychother* 297.

⁴⁴ M Bosmans and others, 'Assessing Perceived Ability to Cope With Trauma: A Multigroup Validity Study of a 7-Item Coping Self-Efficacy Scale' (2015) 33 *Eur J Psychol Assess* 55; M Jordans and others, 'Screening for Psychosocial Distress amongst War-Affected Children: Cross-Cultural Construct Validity of the CPDS' (2009) 50 *J Child Psychol Psychiatry* 514; Kamperman, Komproe and De Jong ($n = 41$).

	CRSVs (<i>n</i> = 104)		Non-CRSVs (<i>n</i> = 88)		
	Mean	SD	Mean	SD	Statistical test
Age	48.85	8.72	44.78	7.39	<i>t</i> = 3.44*
	<i>n</i>	(%)	<i>n</i>	(%)	
Ethnicity					
Bosnian	94	90.4	80	90.9	$\chi^2(2) = 1.178$
Croatian	5	4.8	6	6.8	
Serbian	5	4.8	2	2.3	
Marital status					
Married	59	56.7	71	80.7	$\chi^2(3) = 11.440^*$
Single	12	11.5	2	2.3	
Widowed	22	21.1	8	9.1	
Divorced	11	10.6	7	7.9	
Education					
No schooling	14	13.5	1	1.1	$\chi^2(3) = 26.375^*$
Primary education	32	30.8	10	11.4	
Secondary education	52	50.0	62	70.5	
Higher education	6	5.8	15	17.0	
Work					
Employed	16	15.4	57	64.8	$\chi^2(2) = 50.522^*$
Unemployed	71	68.3	28	31.8	
Retired	17	16.3	3	3.4	
	Mean	SD	Mean	SD	
HTQ (No. events)	25.52	5.78	6.01	5.40	<i>t</i> (190) = 24.03*
HTQ (PTSD severity)	3.19	.45	1.92	.70	<i>t</i> (190) = 14.59*
PTGI (total score)	58.94	23.01	68.79	24.19	<i>t</i> (190) = -2.85*
COPE Positive reinterpretation	9.09	2.87	10.25	2.96	<i>t</i> (190) = -2.76*
COPE Behavioural disengagement	8.65	3.74	4.81	3.51	<i>t</i> (190) = 7.30*

* *p* < .01
HTQ: No. events, PTSD severity (mean score items 1-16)
PTGI: Posttraumatic growth inventory total score
COPE: Coping Orientations to Problems Experienced Scale (Bosnian)

Table 1. Demographic Characteristics of the Study Samples

3.1. The hypothesised model

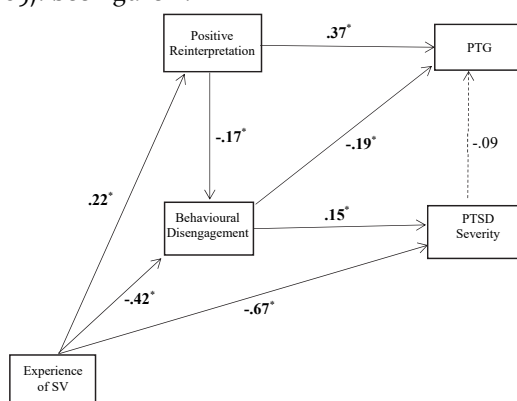
Structural equation modelling was performed on data from 185 participants, 7 cases of non-CRSV survivors were removed from the analysis because of multiple missing values. The correlations between the variables specified in the hypothetical model are given in Table 2.

	PTGI Total	COPE Positive Reinterpretation	COPE Behavioural Disengagement	PTSD Total	CRSV vs non- CRSV
PTGI Total	1.00				
COPE Positive Reinterpretation	0.41	1.00			
COPE Behavioural Disengagement	-0.25	-0.26	1.00		
PTSD Total	-0.06	-0.19	0.46	1.00	
CRSV vs non-CRSV*	0.10	0.22	-0.46	-0.74	1.00

n = 185
PTGI: Posttraumatic growth inventory total score
PTSD: HTQ (Bosnian) Mean score items 1-16
COPE: Coping Orientations to Problems Experienced Scale (Bosnian)
* point-biserial correlation

Table 2. Correlations between the Variables specified in the Hypothesised Model

The hypothesised model showed no acceptable fit with the variance-covariance matrix of the data for the total sample ($\chi^2(2) = 8.54$, CFI = .97, RMSEA = .13, SRMR = .034, NNFI = .86, $p < 0.5$). In this model, seven pathways were significant. As expected, the experience of CRSV was significantly related to both types of coping strategies (positive reinterpretation and behavioural disengagement in positive and negative directions, respectively). Positive reinterpretation was associated with higher measured PTG, and behavioural disengagement was associated with lower measured PTG, as well as greater PTSD symptom severity. The path from PTSD to PTG produced a non-significant effect ($p > 0.05$). See figure 2.



Model fit indices: $\chi^2(3) = 10.09$, $p = .05$; 90% RMSEA = 0.11, CI = 0.038 – 0.19

* Standardised estimated paths with a significance of $p < .05$

Figure 2. Tested Structural Model of Relationships between the Experience of Sexual Violence and Outcomes PTSD Severity and PTG

With a theoretical underpinning and guided by modification indices provided by LISREL, the model was optimised by removing the pathway between PTSD and PTG. Remaining pathways continued to be statistically significant, but overall the model still showed no acceptable fit with the data ($\chi^2(3) = 10.09$, CFI = .97, RMSEA = .052, SRMR = .035, NNFI = .90, $p = .05$). The optimised model (MLBF) is shown in Figure 2b. Based on the rationale that the experience of CRSV generates different PTSD-PTG mechanisms, the hypothesised model was proceeded to be tested in each individual subgroup.

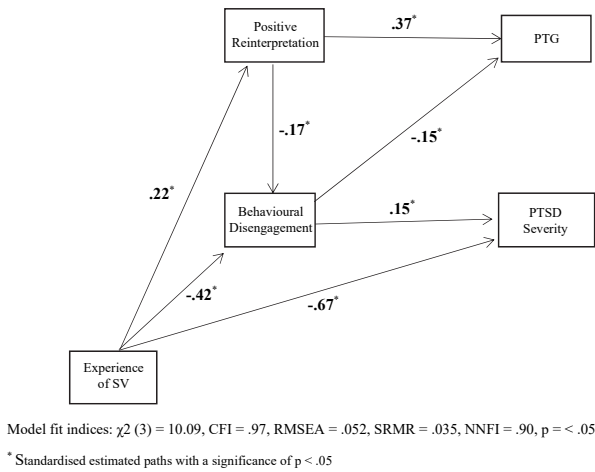


Figure 2b. Optimised Structural Model of Relationships between the Experience of Sexual Violence and Outcomes PTSD Severity and PTG

3.2. Adequateness of the model in the CRSV survivors sample

The hypothesised model showed an acceptable fit with the CRSV survivors data ($\chi^2(1) = 1.29$, CFI = .99, RMSEA = 0.11, SRMR = .036, NNFI = .93, $p = > .05$). The relationship between coping strategies positive reinterpretation and behavioural disengagement was non-significant, though positive reinterpretation was still directly related to PTG. In addition, the negative relationship between behavioural disengagement and PTG remained significant, as well as when mediated by PTSD severity. See figure 3.

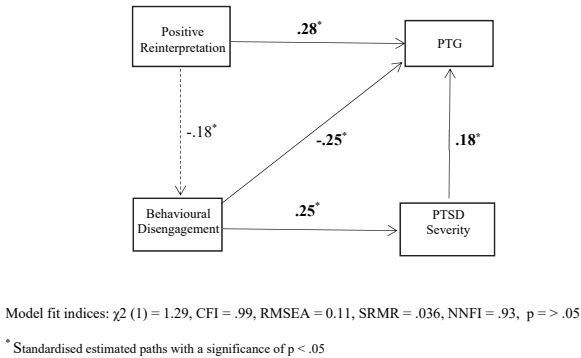
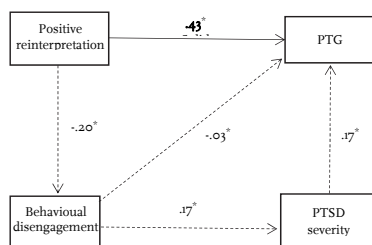


Figure 3. Tested Structural Model of Relationships between PTSD Severity and PTG – SSVs ($n = 104$)

3.3. Adequateness of the model in the non-CRSV sample

The hypothesised model also fit the non-CRSV data, although it was a less close fit between the data variance-covariance matrix and the model-based matrix to the data, $\chi^2(1) = 1.30$, CFI = .98, RMSEA = 0.061, SRMR = .043, NNFI = .91, $p = > 0.05$). In this sample, PTG was still directly impacted by positive reinterpretation, but all other associations were spurious. See figure 4.



Model fit indices: $\chi^2(1) = 1.30$, CFI = .98, RMSEA = 0.061, SRMR = .043, NNFI = .91, $p = > 0.05$

* Standardized estimated paths with a significance of $p < .05$

Figure 4. Tested Structural Model of Relationships between PTSD Severity and PTG – non-SSVs ($n = 81$)

3.4. Post hoc multi-group analyses

Finally, we used SEM to test the presented model found in the total sample on its adequacy for both sub samples, by using a multi-group analysis. The χ^2 for the total model with two subgroups was 8.41 (7), NNFI = 0.94, $p = 0.30$. The χ^2 for the earlier found model (see above) tested in the CRSV group data was 3.10 (36.87% of total); the χ^2 for the earlier found model (see above) tested in the non-CRSV group data was 5.31 (63.13%). None of the unspecified relationships between the four variables had modification indices above 3, thus contributing significantly to the tested model in both subsamples.

4. Discussion

The aim of this study was to examine the role of two coping strategies (positive reinterpretation and behavioural disengagement) in two psychosocial outcomes following CRSV (PTSD and PTG). These variables have been documented as playing important roles in the aftermath of trauma in existing literature and earlier findings from the research team, but this is the first study to explore the interrelationships between them. Participants were part of a community-based sample from Bosnia and Herzegovina that included both

CRSV survivors and war survivors who did not experience sexual violence during the 1990s conflict. The possibility of PTSD and PTG being separate outcomes – as opposed to opposite ends of a single spectrum – was explored, which would substantiate a dual mechanism of distress and growth. In order to investigate this mechanism in a cross-sectional dataset, SEM was used to test relationships between variables.

Since we hypothesised a difference between the two subsamples (based on whether they did or did not experience CRSV), to ensure the validity of the model it was tested first overall, and then, removing the exposure variable of CRSV, we tested the model's adequacy for both subgroups. This difference was specified based on literature that distinguishes between outcomes for war-related trauma and CRSV: the difference being that uncontrollable, interpersonal events such as CRSV have the potential to challenge personal resources and characteristics,⁴⁵ and come with connotations of shame⁴⁶ and stigma,⁴⁷ and may therefore impact the development of PTG.

Our findings offer support for our first hypothesis, that PTSD and PTG are both possible co-occurring psychosocial outcomes, substantiating the presence of a dual PTSD-PTG mechanism. Thus, it is possible for women to respond to war-related traumatic events with both distress and growth, corresponding to existing research.⁴⁸ In our model for the total sample, a lower PTSD symptom severity did not predict greater PTG. By way of multiple indirect relationships, participants were more likely to experience PTG if they were able to employ a personal resource enabling them to positively reinterpret the event and subsequent psychological sequelae, by reframing the impact of their experiences.

With regards to our second and third hypotheses, our results confirmed a difference in the explanatory mechanisms when the model was tested in each subsample. The difference being that positive reinterpretation significantly predicted PTG in the subsample of CRSV survivors, as well as in the non-CRSV group. But an additional relationship was found between higher behavioural disengagement and greater PTSD, which reduced the amount of PTG overall, for CRSV survivors. Thus, this type of avoidance coping after experiencing sexual trauma is likely a risk factor for lower measured PTG, which supports existing findings in similar vulnerable groups.⁴⁹ Additionally, in this subsample of CRSV survivors, a positive relationship between PTSD and PTG was detected, which supports earlier findings that suggest maladaptive personal resources (such as avoidant coping that is a risk factor for psychopathology including

⁴⁵ Chivers-Wilson (n 9).

⁴⁶ Mukwege and Nangini (n 10).

⁴⁷ Verelst and others (n 11).

⁴⁸ Kuwert and others (n 24); Shakespeare-Finch and Lurie-Beck (n 24); Tedeschi and Calhoun (n 25).

⁴⁹ Brooks and others (n 14).

PTSD) may influence the development of PTG.⁵⁰ This finding may reflect the extent to which women report higher levels of PTG to offset their emotional distress, on the premise that PTG can have a constructive side, as well as an illusory side; certain aspects of self-deception or denial that positively distort beliefs, still allow for PTG to prosper.⁵¹ For women who survived the war but did not experience CRSV no other relationships remained significant.

The findings of this study have important implications for supporting survivors of CRSV towards recovery, particularly given that sexual trauma continues to have far-reaching and long-lasting consequences that still often go unresolved.⁵² Trauma-focused psychotherapeutic techniques that are provided to individuals experiencing PTSD have cognitive elements that allow a person to process traumatic experiences, by altering the relationship between the original emotional response and current distress.⁵³ In principle, such techniques guide individual behaviour toward a more adaptive response to trauma. A stronger salutary component, and further harnessing strategies that permit these altered relationships – such as reframing the psychological sequelae following sexual trauma – could be highly beneficial to survivors. This is particularly important when addressing the minutiae of the types of (additional) CRSV experienced. Survivors are likely to have a complex narrative of CRSV, depending on the frequency with which it took place, whether survivors knew their perpetrators and whether they experienced enslavement or human trafficking.

Nonetheless, individual treatment is unlikely to capture the shared experience of CRSV that brings survivors together as part of the Association for Women Victims of War. Such group support may be of particular importance as BiH goes through a long-overdue process of investigation of the war crimes that took place, which bring up feelings of stigma and/or shame and cause psychological deterioration.

By considering the stability of this dimension of coping as personal resource, strengthening its capacity through psychoeducation, guidance or coaching nourishes the opportunity to promote PTG. Equally, a reduction in avoidance

⁵⁰ London, Mercer and Lilly (n 19).

⁵¹ A Maercker and T Zoellner, 'The Janus Face of Self-Perceived Growth: Toward a Two-Component Model of Posttraumatic Growth' (2004) 15 *Psychol Inquiry* 41.

⁵² P Kuwert and others, 'Trauma and Current Posttraumatic Stress Symptoms in Elderly German Women who Experienced Wartime Rapes in 1945' (2010) 198 *J Nerv Ment Dis* 450; Medica Zenica and Medica Mondiale (n 30).

⁵³ NICE, 'Posttraumatic Stress Disorder: Management. Clinical Guideline' (2018) <<https://www.nice.org.uk/guidance/cg26/resources/posttraumatic-stress-disorder-management-pdf-975329451205>> accessed 11 September 2018.

coping strategies has been shown to enhance PTG following different types of trauma,⁵⁴ which may prevent maladaptive strategies prolonging distress.⁵⁵

However, given the result that positive reinterpretation was a predictor of PTG across both subsamples of this study, it appears to be a key protective factor in the aftermath of trauma; acting as a buffer against lower measured PTG for war-affected persons more generally. This highlights its importance as a personal resource following different types of trauma and could mean that this 'reframing' mechanism is a characteristic that acts as a buffer against the negative consequences of war-related trauma.

Yet, cultural and societal factors influence how trauma is managed and processed in post-conflict settings and could explain the differences between trauma types in terms of their relationship to PTG.⁵⁶ This is particularly relevant given that stigmatisation towards CRSV survivors in some places is known to still play an important mediating role in mental health outcomes, and often has a greater impact than the act itself.⁵⁷ When discussing with survivors their experiences of CRSV, whether in treatment or research, it is important to address the needs of CRSV survivors, perceived by themselves, as this remains key in their recovery trajectory given the specific way in which these women have experienced violence or loss, and the impact of living through war.

4.1. Limitations

Despite the strength of these findings, this study is not without limitations. Primarily, there are some methodological concerns regarding the type of measures, as well as the sampling techniques used in this study that should be considered when interpreting the findings. First, the measures implemented to acquire information on PTSD, PTG and coping were self-report questionnaires, and are therefore interpreted as subjective indicators and not objective measurements. Underreporting or misinterpretation of events or symptomatology may occur within such measures. This is particularly the case for PTSD, for which we used a screener of symptoms, but requires a subsequent clinical interview for a confirmation of diagnosis. Moreover, the low internal consistency of the COPE subscales may reflect possible discrepancies in the translation/adaption or interpretation of the scale, or a lack of rigorous cross-cultural validity of the different defined coping domains. For instance, the specific activities clustered as a subscale in the original instrument might not be contextually valid among this specific population of Bosnian women. That

⁵⁴ Brooks and others (n 14).

⁵⁵ T Zoellner and A Maercker, 'Posttraumatic Growth in Clinical Psychology – A Critical Review and Introduction of a Two Component Model' (2006) 26 *Clin Psychol Rev* 626.

⁵⁶ Kılıç, Magruder and Koryürek (n 16).

⁵⁷ Verelst and others (n 11).

is to say, the coping strategies of one individual is by no means a guarantee that these are beneficial to another. Thus, we consider scores on the COPE subscales as indicators of application: a low score reflects little use of the specific collection of coping strategies, and a high score refers to a greater use of the specific coping strategies.

With regards to our sampling technique, limitations include a possible selection bias and not age matched participants. Equally, due to the small sample size, demographic associations were not corrected for in the SEM analyses and the power of the model is insufficient, which could have led to unstable goodness-of-fit estimates of the PTSD-PTG mechanism. However, we believe that this type of sampling in a post-war context such as that of Bosnia and Herzegovina – where stigma is still ever-present; where the effects of war are still daily realities for many people; where research in general is not part of the mainstream agenda (let alone that type which considers women survivors of CRSV); and where there is no information to access the entire population of survivors of CRSV – was currently our best option. Hopefully, the more that CRSV is discussed in mainstream society, and the more people feel comfortable to share their experiences, the greater options we will have to implement more sophisticated sampling techniques.

When reporting limitations, reference should also be made to how the results should be interpreted. Despite efforts to frame the study in relation to CRSV, a cross-sectional design in this context is not able to discount traumatic experiences that have taken place since the conflict and the impact these may have on the development of PTG or PTSD. In addition, the development of PTG requires a period of time, and thus, a cross-sectional study cannot rigorously demonstrate the dynamic process by which it is developed. Although the temporality of personal resources such as coping suggest a certain stability, we cannot know whether the development of PTG or PTSD would have changed over time. A longitudinal design can ultimately add weight to these findings and examine the dynamic development of relationships between coping and PTG in women who have experienced sexual violence in conflict.

Lastly, the concept of CRSV encompasses multiple types of abuse and victimisation, the minutiae of which were not addressed in this study. Women were asked about experiences of enslavement, but as one of only a few studies to consider this population, our focus remained on the wider common experience of rape and thus this was not controlled for in the analyses. Equally, it is known that human trafficking was rife during the conflict in BiH⁵⁸ but this was not specifically explored in this study. There is much room to address these aspects of CRSV in future research and whether the PTSD-PTG mechanism can be refined further with these in mind. Nonetheless, the results correspond

⁵⁸ Haynes (n 12).

to existing literature, and begin to further explain some of the discrepancies in the understanding of PTG.

5. Conclusion and implications

This study has shown that PTG among CRSV survivors of Bosnia and Herzegovina's conflict during the 1990s is possible, particularly when utilising personal coping mechanisms to process the psychological sequelae. This finding has important implications for supporting women who experience CRSV, as the traditional bio-medical model of psychological treatment is inherently designed to identify and improve mental illness. Shifting toward a salutary perspective – one that is recovery-focused – opens up possibilities to utilise personal strengths and harness growth that may be applied in different settings. PTG in this study was not affected by severity of PTSD, which adds weight to the notion of a dual distress-growth mechanism. This is in line with Tedeschi and Calhoun, who state that 'PTG and distress are essentially separate dimensions, and growth experiences do not put an end to distress in trauma survivors'.⁵⁹ As such, an indirect association is identified that links high levels of disengagement to an increase in distress, which becomes a risk factor for lower measured PTG. Positive reinterpretation of events appears to be an important characteristic that independently predicts PTG across both sexual violence survivors and non-sexual violence war survivors. Harnessing this process during treatment could support the effectiveness of current interventions and promote recovery by accepting the various aspects of it. Specifically targeting the consequences of pathogenic and salutogenic outcomes following sexual trauma has the potential to leave a survivor not with less, but with more, more meaning, more purpose, more success and satisfaction with life.⁶⁰

⁵⁹ RG Tedeschi and LG Calhoun, 'Posttraumatic Growth: Conceptual Foundations and Empirical Evidence' (2004) 15 *Psychol Inquiry* 1, 13.

⁶⁰ Anthony (n 26).

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 *Krajišnik*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 *Todorović* 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 Krajišnik* (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 Todorović* (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* (Judgement) IT-95-17/1-T (10 December 1998) paras 127, 129, 267.

⁶⁶ *Prosecutor v Mićo Stanišić and Stojan Župljanin* (Judgement) 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.