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Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals

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Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals

VALERIE OOSTERVELD*

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I. Introduction

Men and boys are targeted for sexual violence during armed conflict or other forms of mass atrocity, but this fact has received relatively little attention within the international community.¹ The recent conflicts taking place in Syria and Libya provide stark illustrations of sexual violence directed against males. For example, the February 2013 report of the United Nations (UN)-appointed Independent International Commission of Inquiry on Syria examined numerous reports of sexual violence taking place during

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¹ Sandesh Sivakumaran, "Prosecuting Sexual Violence Against Men and Boys" in Anne-Marie de Brouwer et al, eds, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Antwerp: Intersentia, 2013) 79 at 79, 93 [Sivakumaran, "Prosecuting"].

during the Syrian conflict in two distinct contexts: against women by government forces and affiliated militia during house searches and at checkpoints; and against men, boys, women and girls in detention centres as a means to extract information, humiliate and punish.³ Men and boys in detention have been raped, and had their genitals electrocuted with live wires or burned by cigarettes, lighters or melted plastic.⁴ As well, government forces used sexual violence as a method of coercion, by detaining and raping (or threatening to rape) male and female family members to force male relatives fighting with opposition armed groups to surrender themselves.⁵ The UN-appointed International Commission of Inquiry on Libya highlighted similar stories.⁶ Male and female victims were subjected to sexual violence by Qadhafi forces in detention centres to extract information about the opposition, humiliate and punish.⁷ As in Syria, the forms of male sexual violence included anal rape, rape with an instrument, electrocution of genitals and burning of genitals.⁸ These examples highlight the need for more focus within international criminal law on male-targeted sexual violence.⁹

This article explores the current state of understanding within international criminal law of sexual violence directed at men and boys, particularly as a crime against humanity or a war crime. It begins by examining how international criminal tribunals have approached male-targeted sexual violence to date, concluding that the tribunals have been uneven in their approach; even so, these cases have been helpful in creating the beginnings of a typology of male sexual violence. The article then turns to identifying three main gaps that must be addressed in order to improve the ability of international criminal tribunals – and, similarly, domestic courts prosecuting international crimes – to address this form of sexual violence.¹⁰ The first gap is an information gap: there is a dearth of systematic data on sexual violence directed against men and boys in armed conflict or atrocity. The result is that relatively little is known about the prevalence, patterns and effects of male sexual violence, and less attention is paid to the issue than should be the case, including in the field of international criminal law. The second gap can be referred to as a social gap. Men and boys may not feel able to speak about their experiences or, if they do, they may not describe themselves as victims of sexual violence. In addition, international

³ *Ibid.*, at paras 106, 108, Annex IX paras 5, 10, 15, Annex X para 13.

⁴ *Ibid.*, at para 107 and Annex IX paras 5, 10-13.

⁵ *Ibid.*, at para 107 and Annex IX paras 5, 11.

⁶ UN Human Rights Council, *Report of the International Commission of Inquiry on Libya*, UNHRCOR, 19th Sess, UN Doc A/HRC/19/68, (2012) at paras 65-70 [Libya Commission of Inquiry Report].

⁷ *Ibid.*, at para 67.

⁸ *Ibid.*

⁹ This focus should not occur at the expense of attention to female-targeted sexual violence. Rather, it should occur in addition to an examination of sexual violence against women and girls, especially given the interrelationship between male- and female-targeted sexual violence: see Parts 2 and 4, below.

¹⁰ While this article focuses on international criminal courts and tribunals, it is important to recognize that the same concerns and recommendations may also arise in domestic prosecutions of international crimes.

investigators, prosecutors, counsel (whether for victims or defence) and judges may have difficulty in recognizing sexual violence directed against men, whether due to certain, perhaps unconscious, assumptions that only women and girls are the victims of sexual violence; lack of training (of themselves or of the individuals they speak to or who serve as witnesses); or assumptions that certain violence, like forced circumcision, castration, penile amputation or sexual mutilation, is best categorized more generically as torture, inhumane acts or cruel treatment. The third gap is a legal gap, which is twofold: a gap in overt recognition and a gap in classification. While rape has been defined in international criminal law in a gender-neutral way,¹¹ there are other acts of sexual violence visited upon men and boys that are not explicitly named. This lack of overt recognition can be problematic because these acts must be prosecuted under other (broader, less descriptive) headings. When combined with the social gap, the result can be miscategorization. Sexual violence crimes directed at men and boys have been legally (re)classified as torture, cruel treatment or inhumane acts, thereby obscuring the sexual aspects of the harm done to the victims.

A solid understanding of sexual violence directed against men and boys is crucial for international criminal law. Under the principle of legality,¹² it is important to clarify the contours of this type of sexual violence so that it can be clearly labeled as a crime.¹³ As well, a deeper understanding of this form of sexual violence will help international criminal law's understanding of *all* forms of sexual violence, including sexual violence directed against women and girls. Sexual violence directed at men and boys is often intertwined with sexual violence committed against women and girls and is intimately linked to socially-constructed gender norms. In the context of international criminal law, increased attention to sexual violence targeted at men and boys will lead to more accurate explanations by prosecutors of the depth of victimization of individuals and communities. Therefore, this article ends by

¹¹ See, e.g. the definition in the International Criminal Court's Elements of Crimes document: International Criminal Court, *Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at arts 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1 [ICC "Elements of Crimes"].

¹² Under the principle of legality (*nullum crimen, nulla poena sine lege*), criminal conduct must have been laid down as clearly as possible in a written or unwritten form before the crime was committed: Gerhard Werle, "General Principles of International Criminal Law" in Antonio Cassese, ed, *The Oxford Companion to International Criminal Justice* (New York: Oxford University Press, 2009) 54 at 55.

¹³ This is exactly what has been happening over the past two decades with sexual and gender-based violence directed against women and girls. Like sexual violence targeted at males, sexual violence directed at females was largely overlooked or ignored for centuries: Radhika Coomaraswamy, "Sexual Violence During Wartime" in Helen Durham and Tracey Gurd, eds, *Listening to the Silences: Women and War* (Leiden: Martinus Nijhoff Publishers, 2005) 53 at 53. Labeling something as a violation of the law is an important expressive tool for revealing otherwise hidden harm: Rebecca J Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010) at 39. Note that international criminal law does not yet have a standardized definition of rape, which may pose a challenge to clearly labeling rape (whether of men, boys, women or girls) as a crime in certain circumstances as different definitions are more, or less, inclusive: see, e.g. Valerie Oosterveld, "Gender and the *Charles Taylor* Case at the Special Court for Sierra Leone" (2012) 19:1 *William & Mary Journal of Women and the Law*, 7 at 12-13.

discussing what needs to be done in order to translate what is known about sexual violence targeted against men and boys into successful international prosecutions.

II. Recognition by International Criminal Tribunals of Male-Targeted Sexual Violence

Sexual violence directed against men and boys in armed conflict and other forms of mass atrocity has rarely been prosecuted in international courts and tribunals, but there is some case law providing a helpful basis for future prosecutions. Much of this case law stems from the International Criminal Tribunal for the Former Yugoslavia (ICTY), namely from cases dealing with events at detention facilities.¹⁴ The ICTY recorded in evidence various types of male sexual violence such as anal rape with objects,¹⁵ forced fellatio between detainees (including in front of other detainees),¹⁶ forced fellatio of a detainee on an accused,¹⁷ beatings on genitals,¹⁸ and placing a lit fuse around the genitals of a detainee.¹⁹ The International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC) and the Special Court for Sierra Leone also contributed some – albeit less than the ICTY – supportive jurisprudence. The usefulness of the legal discussion varies, however, because these tribunals have been very inconsistent in their consideration of male sexual violence.²⁰ This lack of consistency suggests there has been, or there is currently, no overarching or coherent prosecutorial policy, or consistent judicial analysis, on how to approach this form of sexual violence.

The first inconsistency occurs in the charging – or failure to charge – rape and other forms of sexual violence against men and boys as such. Rape is the only form of sexual violence explicitly listed in each of the Statutes of the

¹⁴ For a discussion on the ICTY's statistics on the prosecution of male sexual violence, see Kirsten Campbell, "The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia" (2007) 1 Int'l J Transitional Justice 411 at 422-427.

¹⁵ *Prosecutor v Blagoje Simić*, IT-95-9-T, Judgment (17 October 2003) at para 728 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) [*Simić* Trial Judgment].

¹⁶ *Ibid*; *Prosecutor v Momčilo Krajišnik*, IT-00-39-T, Trial Judgment (27 September 2006) at para 304 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I) [*Krajišnik* Trial Judgment].

¹⁷ *Simić* Trial Judgment, *supra* note 15 at para 728.

¹⁸ *Ibid*, at paras 695, 697, 698, 771; *Prosecutor v Radoslav Brđanin*, IT-99-36-T, Trial Judgment (1 September 2004) para 498 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III) [*Brđanin* Trial Judgment].

¹⁹ *Prosecutor v. Zdravko Mucić et al*, IT-96-21-T, Trial Judgment (16 November 1998) paras 1035-1040 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Mucić et al* Trial Judgment].

²⁰ Sivakumaran describes how the cases of the international criminal courts and tribunals tend to fall into three categories: (a) where sexual violence against men and boys is mentioned but not characterized as sexual violence; (b) where the sexual violence is mentioned and properly categorized as such but without any consequences attached to the violence; and (c) where the sexual violence is recognized as such and consequences (i.e. convictions) are attached to this violence: Sandesh Sivakumaran, "Lost in Translation: UN responses to sexual violence against men and boys in situations of armed conflict" (2010) 92:877 *International Review of the Red Cross* 259 at 272 [Sivakumaran, "Lost in Translation"].

ICTY, ICTR, ICC and Special Court for Sierra Leone.²¹ It is defined by these tribunals in a gender-neutral manner, and therefore captures male and female rape.²² The ICC has charged rape of men. In the *Bemba* case, involving acts committed in the Central African Republic, the confirmation of charges decision describes a man raped in succession by three soldiers in his house in the presence of his three wives and children.²³ His two daughters were also raped in his presence.²⁴ These incidents were charged as rape.²⁵ Rape of men was also prosecuted as such at the ICTY.²⁶ In *Češić*, the accused was convicted of rape for forcing two Muslim brothers to perform fellatio in front of the other prisoners.²⁷ Conversely, in *Mucić* the ICTY prosecutor charged forced fellatio between two detained brothers as the grave breach of inhuman treatment and cruel treatment as a violation of the laws and customs of war.²⁸ The Trial Chamber responded that this “act could constitute rape for which liability could have been found if pleaded in the appropriate manner”.²⁹ Similarly, in the ICTY’s *Simić* case, anal rape of a male victim with a police truncheon, and forced oral sex between two male prisoners (as well as between a male prisoner and a perpetrator) was not considered specifically as rape, but more generally as “sexual assaults”

²¹ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UNSC Res 827, UNSCOR, 48th Sess, UN Doc S/Res/827, (1993), art 5(g); *Statute of the International Criminal Tribunal for Rwanda*, UNSC Res 955, UNSCOR, 49th Sess, UN Doc S/Res/955, (1994), arts 3(g) and 4(e); *Rome Statute of the International Criminal Court*, UN Doc A/CONF 183/9, (1998), arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi) [Rome Statute]; *Statute of the Special Court for Sierra Leone*, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 138 (entered into force 12 April 2002), arts 2(g) and 3(e) [Special Court for Sierra Leone Statute].

²² See e.g. ICC “Elements of Crimes”, *supra* note 11 at arts 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1; *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judgment (2 September 1998) at para 598 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Akayesu* Trial Judgment]; *Prosecutor v Dragoljub Kunarac et al*, IT-96-23-T & IT-96-23/1-T, Judgment (22 February 2001) at para 460 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) [*Kunarac et al* Trial Judgment], followed in *Prosecutor v Alex Tamba Brima et al*, SCSL-04-16-T, Judgment (20 June 2007) at para 963 (Special Court for Sierra Leone, Trial Chamber II) [AFRC Trial Judgment].

²³ *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009) at para 171 (International Criminal Court, Pre-Trial Chamber II) [*Bemba* Confirmation of Charges].

²⁴ *Ibid*, at para 172.

²⁵ *Ibid*, at para 159. See also *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Public Redacted Version of Amended Document Containing the Charges Filed on 30 March 2009 (30 March 2009) at para 39 (International Criminal Court, Pre-Trial Chamber II).

²⁶ Campbell notes that the four counts of male rape charged as rape at the ICTY involve fellatio rather than anal penetration: Campbell, *supra* note 14 at 427.

²⁷ *Prosecutor v Ranko Češić*, IT-95-10/1-S, Sentencing Judgment (11 March 2004) at paras 13-14, 33 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I) [*Češić* Trial Judgment]. See also *Prosecutor v Stevan Todorović*, IT-95-9/1-S, Sentencing Judgment (31 July 2001) paras 39-40 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Todorović* Sentencing Judgment]. See also Sivakumaran, “Lost in Translation”, *supra* note 20 at 275.

²⁸ *Mucić et al* Trial Judgment, *supra* note 19 at para 1060. See also *Todorović* Sentencing Judgment, *supra* note 27 at paras 17, 39-40, 66 (sexual assault as persecution). See also Sivakumaran, “Lost in Translation”, *supra* note 20 at 275.

²⁹ *Mucić et al* Trial Judgment, *supra* note 19 at para 1066.

amounting to torture and persecution.³⁰ As well, in *Krajisnik*, the ICTY Trial Chamber found that Muslim and Croat male detainees were repeatedly “forced to engage in degrading sexual acts with each other in the presence of other detainees”.³¹ This was classified as inhumane treatment under the crime against humanity of persecution.³² The better approach is to charge rape as rape, in addition to other forms of harm (if the rape also fulfills the elements of crime for those other forms). When rape is categorized solely under non-rape categories, the sexual nature of the harm is obscured and therefore potentially lost when determining liability. As Eriksson convincingly notes, it is important to understand rape as a sexual manifestation of aggression because this leads to greater acknowledgement of the modes used to subjugate an enemy group in armed conflict or other forms of atrocity.³³

Prosecutors within international criminal courts and tribunals sometimes fail to charge male sexual violence (other than rape) at all. For example, in *Brđanin*, the ICTY Trial Chamber considered evidence of an elderly man being forced under threat to rape a female detainee at Omarska camp, but only considered that this was a violation against the female detainee.³⁴ This can be contrasted with the Special Court for Sierra Leone, which considered such acts as violations against both of the victims.³⁵ Another example comes from the Special Court for Sierra Leone, where the Prosecutor restricted the indictments against the Armed Forces Revolutionary Council (AFRC) and Revolutionary United Front (RUF) leaders, and Charles Taylor (former President of Liberia), to sexual violence directed against “civilian women and girls”.³⁶ Evidence of sexual violence directed against men and boys arose during the trials in all three cases, but the Trial Chamber in the AFRC and *Taylor* cases felt constrained by the indictment to attach no consequences to the evidence.³⁷ In contrast, the Trial Chamber in the RUF case felt that the defect in the indictment had been cured and considered evidence of forced rape between male and female civilian captives, slicing of the sexual organs of male and female captives, forced male nudity, and the harm inherent in

³⁰ *Simić* Trial Judgment, *supra* note 15 at paras 728, 772.

³¹ *Krajisnik* Trial Judgment, *supra* note 16 at paras 304, 800.

³² *Ibid.*, at paras 745, 1126.

³³ Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (Boston: Martinus Nijhoff Publishers, 2011) at 58.

³⁴ *Brđanin* Trial Judgment, *supra* note 18 at para 516.

³⁵ *Prosecutor v Issa Hassan Sesay et al*, SCSL-04-15-T, Judgment (2 March 2009) at paras 1205, 1207-8 (Special Court for Sierra Leone, Trial Chamber I) [RUF Trial Judgment].

³⁶ *Prosecutor v Alex Tamba Brima et al*, SCSL-04-16-PT, Further Amended Consolidated Indictment (18 February 2005) at paras 51-57 (Special Court for Sierra Leone); *Prosecutor v Issa Hassan Sesay et al*, SCSL-04-15-PT, Corrected Amended Consolidated Indictment (2 August 2006) at paras 54-60 (Special Court for Sierra Leone); *Prosecutor v Charles Taylor*, SCSL-03-01-PT, Prosecution’s Second Amended Indictment (29 May 2007) at paras 14-17 (Special Court for Sierra Leone).

³⁷ AFRC Trial Judgment, *supra* note 22 at paras 968-969; *Prosecutor v Charles Taylor*, SCSL-03-01-T, Judgment (18 May 2012) at paras 124-134 (Special Court for Sierra Leone, Trial Chamber II) [*Taylor* Trial Judgment]. Similarly, in *Bagosora*, the court heard evidence that amputated genitals of men were seen at roadblocks, but this was only considered as background information as the indictment contained no charges related to this: *Prosecutor v Théoneste Bagosora*, ICTR-98-41-T, Judgment and Sentence (18 December 2008) at para 1908 (International Criminal Tribunal for Rwanda, Trial Chamber I). See also Sivakumaran, “Lost in Translation”, *supra* note 20 at 274.

forcing a husband to watch the rape and subsequent death of his wife.³⁸ In a somewhat different iteration, sometimes judges do not seize the opportunity presented to highlight particular acts as sexual violence. For example, the ICTR heard evidence in *Muhimana* that a particular victim's genitals were amputated and hung on a pole, but the Trial Chamber ignored this aspect of the victim's death and concentrated on his shooting and subsequent beheading in the context of his murder.³⁹

Related to this issue, prosecutors within international criminal courts and tribunals sometimes fail to charge male sexual violence (other than rape) as such. There are a number of explanations,⁴⁰ but the fact that only the Statutes of the Special Court for Sierra Leone and the ICC contain explicit reference to forms of sexual violence other than rape, such as sexual slavery, enforced prostitution, and "any other form of sexual violence" as a residual category,⁴¹ is a significant legal issue. Thus, the ICTY and ICTR Prosecutors were required to slot this evidence under other categories – usually the crime against humanity or war crime of torture, the crime against humanity of inhumane treatment or the war crime of cruel treatment.⁴² While recognizing that this has undoubtedly constrained the ICTY and ICTR, the prosecution and judges still had room to manoeuvre, in that they could describe how these seemingly non-sexual prohibited acts were committed in a sexual manner. However, the tribunals have been unpredictable in terms of whether and how they explain the sexual nature of the acts. For example, in the ICTY's *Simić* case, a victim was beaten in the crotch and told "Muslims should not propagate".⁴³ Another was kicked in the genital area.⁴⁴ This was referred to under the heading of "beatings, torture, forced labour and confinement under inhumane conditions" and was not referred to as sexual violence.⁴⁵ Rather, it was categorized as cruel and inhumane treatment as an underlying act of persecution.⁴⁶ In *Mucić*, the ICTY Trial Chamber characterized the placing of a lit fuse around the genitals of a male detainee as "physical mistreatment"⁴⁷ and as causing "serious pain and injury"⁴⁸ qualifying as cruel treatment and wilfully causing great suffering and injury, but not as sexual violence.⁴⁹ In a recent example, the ICTY Trial Chamber, in *Stanišić and Župljanin*, considered sexual violence directed against Muslim men, including sexual humiliation; the stomping of genitals; forced nudity;

³⁸ RUF Trial Judgment, *supra* note 35 at paras 1304, 1308, 1194, 1207, 1208, 1210, 1307, 1067, 1347.

³⁹ *Prosecutor v Mikaeli Muhimana*, ICTR-95-1B-T, Judgment and Sentence (28 April 2005) paras 442-444, 448 (International Criminal Tribunal for Rwanda, Trial Chamber III); Sivakumaran, "Lost in Translation", *supra* note 20 at 274.

⁴⁰ Social assumptions will be examined in Part 3, below.

⁴¹ Special Court for Sierra Leone Statute, *supra* note 21 at art 2(g). The Rome Statute also includes mention of enforced sterilization: Rome Statute, *supra* note 21 at arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

⁴² Sandesh Sivakumaran, "Sexual Violence Against Men in Armed Conflict" (2007) 18:2 *European Journal of International Law* 253 at 256 [Sivakumaran, "Sexual Violence"].

⁴³ *Simić* Trial Judgment, *supra* note 15 at para 697.

⁴⁴ *Ibid*, at para 698.

⁴⁵ *Ibid*, at 198.

⁴⁶ *Ibid*, at para 771.

⁴⁷ *Mucić et al* Trial Judgment, *supra* note 19 at para 1037.

⁴⁸ *Ibid*, at 1039.

⁴⁹ *Ibid*, at paras. 1035, 1037, 1038, 1039.

forced rape (including forced penetration by a broom handle) and other sexual acts between two pairs of fathers and sons and one pair of cousins; and penile amputation (then forcing other prisoners to ingest the penis).⁵⁰ Some of these acts were referred to directly as “sexual violence”⁵¹ while others were not. All were considered under charges of torture (as a crime against humanity and a war crime), cruel treatment (as a war crime) and inhumane treatment (as a crime against humanity) and as constituent aspects of persecution.⁵² In the ICTR’s case of *Niyitegeka*, the accused was convicted of aiding and abetting an incident in which a man’s genitals were amputated and displayed in the context of his murder, and this was characterized as an inhumane act of sexual violence.⁵³ In the ICTY case of *Stakić*, the accused was found guilty of the crime against humanity of persecution based on – and characterized as – sexual assault on male detainees.⁵⁴ Similarly, in *Todorovic*, genital beatings and ordering a detainee to bite another detainee’s penis were considered by the ICTY to be sexual assaults and therefore underlying acts of persecution.⁵⁵

Finally, international criminal courts and tribunals appear unsure how to address secondary victimization as a result of sexual violence: is it a form of sexual violence in and of itself, or is it mainly something else, such as a form of psychological torture?⁵⁶ For example, in the ICTY’s *Furundžija* case, a woman was raped and sexually assaulted and her male friend was forced to watch “in order to force him to admit allegations made against her”.⁵⁷ The Tribunal concluded that both witnesses were “subjected to severe physical and mental suffering”, and therefore torture.⁵⁸ The Trial Chamber in *Stanišić and Župljanin* also considered the harm inherent in forcing a man to watch a female relative being raped, similarly considering this as evidence of torture, inhumane acts and persecution.⁵⁹ The Special Court for Sierra Leone recognized the harm caused by RUF fighters forcing a man to watch the rape and death of his wife, and considered this an aspect of fomenting terror by sexual means.⁶⁰ To arrive at a consistent international criminal legal approach, deeper consideration of this form of victimization is needed.

⁵⁰ *Prosecutor v Mićo Stanišić and Stojan Župljanin*, IT-08-91-T (Vol I) (27 March 2013) at paras 1221, 1235, 1599, 1663 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) [*Stanišić and Župljanin* Trial Judgment].

⁵¹ *Ibid*, at para 1560.

⁵² *Ibid*, at paras 1221, 1235, 1246, 1248-1250, 1560, 1685, 1687-1690.

⁵³ *Prosecutor v Eliezer Niyitegeka*, ICTR-96-14-T, Judgment and Sentence (16 May 2003) paras 462-467, 303, 312, 462 (International Criminal Tribunal for Rwanda, Trial Chamber I) [*Niyitegeka* Trial Judgment].

⁵⁴ *Prosecutor v Milomir Stakić*, IT-97-24-T, Judgment (31 July 2003) paras. 228, 236, 241, 617 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II). See also Sivakumaran, “Lost in Translation”, *supra* note 20 at 275.

⁵⁵ *Todorovic* Sentencing Judgment, *supra* note 27 at para 38.

⁵⁶ For a discussion of this, see R Charli Carpenter, “Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations” (2006) 37:1 Security Dialogue, 83 at 96-97.

⁵⁷ *Prosecutor v Anto Furundžija*, IT-95-17/1-T, Judgment (10 December 1998) para 127 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber). See also para 267 for a description of the effect of forced viewing of sexual violence.

⁵⁸ *Ibid*, at 129, 267.

⁵⁹ *Stanišić and Župljanin* Trial Judgment, *supra* note 50 at para 1214.

⁶⁰ RUF Trial Judgment, *supra* note 35 at para 1347.

The recognition by international courts and tribunals of various forms of sexual violence directed against men and boys is important and helps shed light on generally overlooked forms of sexual violence, including similar violence directed against women and girls. Yet, the incoherent approach taken by and within various tribunals raises serious concerns. Male sexual violence is not consistently and accurately being labeled as such. This obscures the sexual nature of the prohibited acts.⁶¹ It also perpetuates the inaccurate stereotype that sexual violence is a crime that only affects women and girls and overlooks male sexual violence.⁶² In comparison, violence directed against women and girls is more likely to be directly categorized as sexual - sometimes there is an intense focus on the sexual aspects, to the detriment of including or recognizing other forms of female victimization.⁶³ Campbell notes that the ICTY's Prosecutor has been more likely to charge rape of female victims than of male victims; as a result, there is a pattern where "men appear to testify to conflict and women testify to rape".⁶⁴ The treatment of male sexual violence sometimes as sexual violence, and sometimes simply as violence, creates ambiguity and undermines the potential for positive expressivism in international criminal law.⁶⁵ Clear prosecutorial policy on how to address male sexual violence is needed. This policy needs to not only address how to bring consistency to the prosecutorial approach, but also how to address the factual, social and legal gaps outlined in the following sections.

III. International Criminal Law and the Factual Gap on Sexual Violence Directed Against Men and Boys

As awareness slowly builds that men and boys are also victims of sexual violence in armed conflicts and other forms of mass atrocity, more reports are recording incidents of this type of violence.⁶⁶ These reports are helpful,

⁶¹ Jarvis and Salgado note that "sexual violence" is the best term, as it highlights that these crimes are less about sex and more about violence and control: Michelle Jarvis and Elena Martin Salgado, "Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice" in Anne-Marie de Brouwer et al, eds, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Antwerp: Intersentia, 2013) 103.

⁶² Sivakumaran, "Lost in Translation", *supra* note 20 at 273. See also Sivakumaran, "Prosecuting", *supra* note 1 at 93. It is important to note that sexual violence directed against women and girls is also not attended to with regularity, and thus the comparison is between instances when female sexual violence is, in fact, identified in comparison with instances when male sexual violence is identified.

⁶³ Franke describes this as the reduction of gendered harms to the sexual: Katherine M Franke, "Gendered Subjects of Transitional Justice" (2006) 15 *Columbia Journal of Gender and Law* 813 at 822-823. See also Fionnuala Ní Aoláin et al, *On the Frontlines: Gender, War, and the Post-Conflict Process* (New York: Oxford University Press, 2011) at 45-46; and Dara Kay Cohen et al, *Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward* (Washington DC, United States Institute of Peace, February 2013) at 7-8, online: USIP <<http://www.usip.org/sites/default/files/resources/SR323.pdf>>.

⁶⁴ Campbell, *supra* note 14 at 425.

⁶⁵ On expressivism in international criminal law, see Margaret M. deGuzman, "An Expressive Rationale for the Thematic Prosecution of Sex Crimes" in Morten Bergsmo, *Thematic Prosecution of International Sex Crimes* (Beijing: Torkel Opsahl Academic EPublisher, 2012) 11-44.

⁶⁶ E.g. Syria Commission of Inquiry Report, *supra* note 2 above; Libya Commission of Inquiry Report, *supra* note 6 above; Sivakumaran, "Sexual Violence", *supra* note 42 above at 257-260 and

but they tend to be anecdotal. Where there happen to be multiple reports, “male sexual violence has been recognized as regular and unexceptional, pervasive and widespread”.⁶⁷ That said, it is relatively rare for the incidence of male sexual violence during conflict or other situations of mass atrocity to be studied in particular conflicts, let alone across conflicts.⁶⁸ For example, Sivakumaran outlines only two prevalence studies, from Bosnia-Herzegovina and Liberia,⁶⁹ and Cohen et al. point to only two studies on wartime sexual violence against men in which the surveyors asked about the sex of the perpetrator *and* the sex of the victim – one from Sierra Leone and one from the Democratic Republic of the Congo.⁷⁰ This dearth of systematic data on male victimization is problematic: it “demonstrates that pervasive gendered expectations about women’s and men’s roles [with women as the only victims and men solely as perpetrators] during wartime prevent researchers and policymakers alike from robustly analyzing questions of wartime sexual violence.”⁷¹ More specific to the theme of this article, lack of survey data on particular armed conflicts also hampers international prosecutors and victims’ counsel from presenting non-victim/witness-provided evidence of male sexual violence – evidence that could be helpful in explaining the occurrence, the context and the pattern of the crimes to the judges.⁷² Thus, more study is certainly needed,⁷³ and may help to explain not only the forms and patterns of male sexual violence in specific conflicts, but also shed light on “the causes of sexual violence against men, and why men may be targeted in some contexts but not others.”⁷⁴ That said, under-reporting by victims due to fear, shame, stigma, confusion, guilt and loss of masculinity is likely to remain an issue, and this must be taken into account.⁷⁵

associated footnotes [noting at 259 that most studies come from medical literature and reports of nongovernmental and intergovernmental organizations with presence in the field]; Sivakumaran, “Lost in Translation”, *supra* note 20 at 263-265 and associated footnotes; Sivakumaran, “Prosecuting”, *supra* note 1 at 80-82 and associated footnotes; Save the Children, *Unspeakable Crimes Against Children: Sexual Violence in Conflict* (2013) at 4, 8, online: Save the Children <<http://www.savethechildren.ca/document.doc?id=332>>; Sarah Solangon and Preeti Patel, “Sexual Violence Against Men in Countries Affected by Armed Conflict” (2012) 12:4 *Conflict, Security & Development* 417-442, and reports cited in the references.; and Cohen et al, *supra* note 63 at 7-8.

⁶⁷ Sivakumaran, “Sexual Violence”, *supra* note 42 at 259.

⁶⁸ Sivakumaran notes that this may be because male sexual violence remains “a cause without a voice”, with “no natural constituency to advocate on their behalf”: Sivakumaran, “Prosecuting”, *supra* note 1 at 81-82.

⁶⁹ Sivakumaran, “Lost in Translation”, *supra* note 20 at 263.

⁷⁰ Cohen et al, *supra* note 63 at 7.

⁷¹ *Ibid.*

⁷² On how data can assist in establishing patterns and context, see Xabier Agirre Aranburu, “Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases” (2010) 23:3 *Leiden Journal of International Law*, 609 at 618-627.

⁷³ Sivakumaran, “Sexual Violence”, *supra* note 42 at 260; Sivakumaran, “Lost in Translation”, *supra* note 20 at 276.

⁷⁴ Cohen et al, *supra* note 63 at 7. For preliminary analysis on causes, see, e.g., Solangon and Patel, *supra* note 66 at 425-430.

⁷⁵ Solangon and Patel, *supra* note 66 at 422-423; Sivakumaran, “Sexual Violence”, *supra* note 42 at 255; Sivakumaran, “Lost in Translation”, *supra* note 20 at 264; Sivakumaran, “Prosecuting”, *supra* note 1 at 81.

Despite this factual gap and the need for further and deeper analysis, two important lessons emerge. First, the reports available help set out a preliminary explanation of reasons and a typology of sexual violence against men and boys. They also show how the types of violence used vary from situation to situation. The reports seem to illustrate that sexual violence directed against men and boys is meant to achieve similar ends as sexual violence directed against women and girls:⁷⁶ to assert domination, to terrorize,⁷⁷ to coerce,⁷⁸ to humiliate and degrade, to prevent procreation by the victims (of their ethnicity or culture), and to disempower.⁷⁹ Indeed, sexual violence directed against men and boys is similarly rooted in the hegemonic masculinity of war.⁸⁰ In addition, male sexual violence may be committed for different reasons than female sexual violence: specifically, “to cast aspersions of homosexuality” and to emasculate.⁸¹ Sivakumaran helpfully grouped accounts of male sexual violence under different headings: rape (by body parts or objects), including forced fellatio and forced rape between two victims (both male or male and female), and threat of rape;⁸² enforced sterilization and sexual mutilation, such as castration or penile amputation;⁸³ genital violence, such as beatings or electrocution;⁸⁴ forced nudity, either as a prelude to rape or other forms of sexual violence or to sexually humiliate;⁸⁵ forced masturbation;⁸⁶ and sexual slavery.⁸⁷ This typology assists in demonstrating that male sexual abuse is not only about rape: indeed, “insofar as men and boys are concerned, [rape] may not be the predominant form of sexual violence committed against them.”⁸⁸ Investigators, prosecutors, counsel (victims’ and defence) and judges need to be alert to potential differences between, and within, conflicts of types of sexual violence, as well as potential differences in the location of male and female sexual violence. Men and boys are most likely to experience sexual violence during conflict or atrocity while in detention, or as prisoners of war or members of armed forces or armed groups (including as boy soldiers).⁸⁹

⁷⁶ Sivakumaran, “Prosecuting”, *supra* note 1 at 81.

⁷⁷ RUF Trial Judgment, *supra* note 35 at paras 1125, 1347-1351; Taylor Trial Judgment, *supra* note 37 at paras 2035-2038, 2053.

⁷⁸ See e.g. Syria Commission of Inquiry Report, *supra* note 2 at para 107 and Annex IX paras 5, 11.

⁷⁹ Sivakumaran, “Prosecuting”, *supra* note 1 at 81; Sivakumaran, “Sexual Violence”, *supra* note 42 at 267-275.

⁸⁰ On hegemonic masculinity, gender and conflict, see Carol Cohn, “Women and Wars: Toward a Conceptual Framework” in Carol Cohn, *Women & Wars* (Cambridge, UK: Polity Press, 2013) 1, 10-11.

⁸¹ Sivakumaran, “Prosecuting”, *supra* note 1 at 81; Sivakumaran, “Sexual Violence”, *supra* note 42 at 270-273.

⁸² Sivakumaran, “Sexual Violence”, *supra* note 42 at 263-264. He also mentions “rape plus”, which is rape done specifically to transmit HIV/AIDS or which has a consequence of doing so: 264.

⁸³ *Ibid*, at 265. See also description of the ICC’s *Kenyatta* case in Part 4, below.

⁸⁴ Sivakumaran, “Sexual Violence”, *supra* note 42 at 266. See also Syria Commission of Inquiry Report, *supra* note 2 at para 107 and Annex IX paras 5, 10-13.

⁸⁵ Sivakumaran, “Sexual Violence”, *supra* note 42 at 266.

⁸⁶ *Ibid*, at 266-267.

⁸⁷ Sivakumaran, “Prosecuting”, *supra* note 1 at 80.

⁸⁸ *Ibid*, at 94.

⁸⁹ Sivakumaran, “Lost in Translation”, *supra* note 20 at 271. Investigators and prosecutors need

The available information suggests a variation in extent and form of both female and male sexual violence, and therefore, not all types of sexual violence are applicable in all conflicts or situations of atrocity. It is not clear, however, why some forms of sexual violence occur more in some contexts than in others.⁹⁰

The second lesson that emerges from available reports is that male and female sexual violence are clearly interlinked.⁹¹ For example, in Syria, sexual violence is used as a tool against both male and female detainees to coerce male opposition fighters to turn themselves in.⁹² This conclusion is also reflected in international cases – the ICC's *Bemba* example above showed how rape of a male head of household was interconnected with the rape of his two daughters, likely to enhance the expression of domination by the perpetrators over the entire household.⁹³ In Sierra Leone, the jurisprudence demonstrated that the rebels intentionally used sexual violence against both males and females – simultaneously or in combination – to terrorize civilians.⁹⁴ Sivakumaran argues that the connections between the two forms of sexual violence require that both types should be subjected to similar analytical rubrics because “the dynamics, the constructions of masculinity and femininity and the stereotypes involved are similar.”⁹⁵ Thus, consideration of them together by international investigators, prosecutors and victims’ counsel may lead to a more nuanced consideration in the jurisprudence of the roles of men and women in armed conflict and “ignoring it may mean missing out on a vital component of the issue”⁹⁶

In sum, the lack of in-depth and prevalence reporting on male sexual violence in atrocity and conflict encumbers international criminal law’s understanding of this form of sexual violence: lack of reporting may lead international investigators to incorrectly overlook male sexual violence as a possible crime in the situation at hand. Therefore, more consistent reporting on the occurrence, forms, patterns and prevalence of male sexual violence could assist international investigators, prosecutors, victims’ and defence counsel, and judges, leading to increased legal recognition of these violations. The reports presently available for some conflicts assist

to be aware that the types of witnesses chosen can influence the likelihood of demonstrating male sexual violence, especially in detention: Campbell notes the ICTY’s relatively positive record in prosecuting sexual violence directed against male victims is “in clear contrast to the general lack of visibility of male sexual assault in the Yugoslavian conflict; both in terms of media coverage and in comparison to the institutional and legal focus upon sexual violence against women”: Campbell, *supra* note 14 at 423. She says the disproportionate number of male witnesses appearing before the Tribunal might explain this: *ibid*, at 424.

⁹⁰ Sivakumaran, “Lost in Translation”, *supra* note 20 at 263; Elisabeth Wood, “Variation in Sexual Violence During War” (2006) 34:3 *Politics & Society* 307-341.

⁹¹ E.g. Maria Eriksson Baaz and Maria Stern, *The Complexity of Violence: A Critical Analysis of Sexual Violence in the Democratic Republic of Congo* (Sweden: Nordiska Afrikainstitutet and Sida, 2010) 7-14, 41-50, online: NAI <<http://nai.diva-portal.org/smash/record.jsf?pid=diva2:319527>>.

⁹² Syria Commission of Inquiry Report, *supra* note 2 at para 107 and Annex IX paras 5, 11.

⁹³ Bemba Confirmation of Charges, *supra* note 23 above, paras 171-172.

⁹⁴ RUF Trial Judgment, *supra* note 35 at paras 1125, 1347-1351; Taylor Trial Judgment, *supra* note 37 at paras 2035-2038, 2053.

⁹⁵ Sivakumaran, “Sexual Violence”, *supra* note 42 at 260. Not all agree: see Carpenter, *supra* note 56 at 94.

⁹⁶ Sivakumaran, “Sexual Violence”, *supra* note 42 at 260.

international investigators and lawyers in understanding the typology of male sexual violence, and the linkages between male and female sexual violence, but the understanding of these is still rudimentary.

IV. International Criminal Law and the Social Gap on Sexual Violence Directed Against Men and Boys

The gap in reporting on, and therefore deep analysis of, male sexual violence is compounded by what may be referred to as a 'social' gap. There are two aspects to that gap: the difficulties that exist for men and boys to understand and report their sexual victimization, and the challenges others (including investigators, prosecutors, victims' and defence counsel, and judges) may have in recognizing male sexual violence.

It is suspected that male victims of sexual violence significantly under-report their victimization "due to a combination of shame, confusion, guilt, fear and stigma".⁹⁷ They may feel unable to reveal their mistreatment because they feel overwhelmed by the other aspects of their life due to displacement, insecurity and chaotic state systems, or because there is simply no place or institution (whether medical, legal or otherwise) to which to report.⁹⁸ Masculine gender norms of aggression and protection tend to be exaggerated or heightened during times of conflict or atrocity.⁹⁹ Thus, male victims of sexual violence may feel even more reluctant to report sexual violence than they do during peacetime, as they may feel like they have failed to accord with those cultural norms of manhood (both in being attacked and in being able to cope 'like a man').¹⁰⁰ As well, men and boys may feel unable to reveal their emotions due to these same cultural gender norms.¹⁰¹ Even if they do feel able to reveal their victimization, they may not be able to express themselves adequately if their culture lacks phrases to describe male sexual violence.¹⁰² They may not view their victimization as sexual in nature, either because they have adopted a societal assumption that males cannot be raped (or be the victim of sexual abuse),¹⁰³ or because the sexual violence was accompanied by many other kinds of violence and thus may be considered as one of a number of forms of beating or torture.¹⁰⁴ All of these difficulties deserve consideration in formulating overarching prosecutorial policy toward male sexual violence, and in approaching investigation and prosecution of male sexual violence in particular cases.

The second aspect of the social gap is that investigators, prosecutors, victims' and defence counsel, and judges may face challenges in recognizing male sexual violence. First, those on the ground — such as investigators and

⁹⁷ Sandesh Sivakumaran, "Male/Male Rape and the "Taint" of Homosexuality" (2005) 27 *Human Rights Quarterly* 1274 at 1288; Sivakumaran, "Sexual Violence", *supra* note 42 at 255.

⁹⁸ Solangon and Patel, *supra* note 66 at 424.

⁹⁹ Ní Aoláin et al, *supra* note 63 at 49-55.

¹⁰⁰ Sivakumaran, "Sexual Violence", *supra* note 42 at 255.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, at 255-256. Indeed, we have seen this with female sexual violence, where many cultures use euphemisms to describe rape: e.g. *Akayesu* Trial Judgment, *supra* note 22 at paras 152-154.

¹⁰³ This may be because the domestic law does not recognize male sexual abuse, especially rape, as such: see examples in Sivakumaran, "Prosecuting", *supra* note 1 at 82-83.

¹⁰⁴ Sivakumaran, "Sexual Violence", *supra* note 42 at 256.

those individuals the investigators speak to, like medical and humanitarian personnel — may assume men are not as susceptible to sexual violence, and therefore may pay less attention to detecting signs of this violence than they would when speaking with women and girls.¹⁰⁵ Second, these individuals may not be trained to recognize signs of male sexual violence, or may incorrectly assume that only rape qualifies as sexual violence.¹⁰⁶ Third, if the violence is recognized (for example, castration), then it may not be seen as sexual in nature, but rather simply as mutilation or torture, thereby reinforcing the view that only women and girls may be the victims of sexual violence.¹⁰⁷ This gap is seen in an example related to the Special Court for Sierra Leone. As mentioned earlier, when the Prosecutor drafted the indictments containing sexual violence charges, all of these charges were cast as occurring only to women and girls: an assumption disproven by evidence arising during the AFRC, RUF and *Taylor* trials.¹⁰⁸ Finally, female sexual violence (especially rape) is sometimes incorrectly understood as acts that are personal in nature and separate from the main activity of war.¹⁰⁹ It may be that this same assumption is being applied to male sexual violence, depending on the scenario. Therefore, there is a risk that investigators, prosecutors, victims' and defence counsel, and judges may be more likely to (incorrectly) conclude that sexual violence crimes are 'opportunistic' and disconnected from the prevailing context than they are to reach the same conclusions for other violent crimes.¹¹⁰

International criminal tribunals alone cannot fix the factual gap or the social gap. However, international investigators, prosecutors and counsel need to be aware of these gaps and adopt strategies such as: encouraging and supporting the reporting and study of male sexual violence; training staff to overcome ingrained social and cultural assumptions about male sexual violence and to gain knowledge of, and experience in, detecting such violence;¹¹¹ working to reduce retraumatization of male sexual violence victims in interviews;¹¹² and ensuring that male sexual violence survivors are able to access psycho-social and other supports.¹¹³ These changes would undoubtedly serve to fill the legal gaps outlined in the next section.

V. International Criminal Law and Legal Gaps on Sexual Violence Directed Against Men and Boys

There are two types of legal gaps within international criminal law that hamper a clearer understanding of sexual violence directed against men and boys during conflict and times of other atrocity. The first gap is one of overt legal recognition for certain forms of sexual violence commonly directed

¹⁰⁵ Sivakumaran, "Sexual Violence", *supra* note 42 at 256.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* See also the *Kenyatta* case on forced circumcision, described in Part 4, below.

¹⁰⁸ See notes 36-38 and accompanying text, *supra*.

¹⁰⁹ Jarvis and Salgado, *supra* note 61 at 102.

¹¹⁰ *Ibid.*, at 122.

¹¹¹ Sivakumaran, "Prosecuting", *supra* note 1 at 92.

¹¹² *Ibid.*, at 90.

¹¹³ *Ibid.*, at 87, 91.

against men and boys. On the one hand, there is recognition within international criminal law that anyone may be raped. The act of rape, whether as a crime against humanity or a war crime, has been defined in a neutral manner to capture rape committed against women, girls, men and boys. For example, one of the most widely-used definitions of rape in the ICTY and ICTR is: “the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.”¹¹⁴ Other definitions are similarly inclusive.¹¹⁵ On the other hand, other modes of sexual violence commonly directed against men and boys – such as forced circumcision, penile amputation, castration, sexual mutilation (for example, burning of the genitals) and genital electrocution – are not explicitly listed in any international criminal statute or treaty.¹¹⁶ It is understandable that every specific form of sexual violence cannot be listed, which is why the residual category of other forms of sexual violence was included in the Rome Statute. However, this lack of overt recognition has meant that prosecutors and judges have sometimes entirely overlooked these forms of violence (as illustrated in the Special Court for Sierra Leone’s RUF and *Taylor* cases, discussed above),¹¹⁷ have classified the acts as something other than sexual violence,¹¹⁸ or where they have recognized the violence as sexual, their attempts at classification as sexual violence have been rebuffed.¹¹⁹

The second gap in international criminal law is related: while the term ‘sexual violence’ has been defined by international criminal tribunals, the word ‘sexual’ – obviously integral to the definition – is not well understood, resulting in misunderstandings. The term ‘sexual violence’ was first defined by the ICTR and later confirmed by the ICTY 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.¹²⁰

However, the term ‘sexual’ was not defined, and this is also the case in the ICC’s Elements of Crimes document.¹²¹ In order to articulate what type of

¹¹⁴ *Kunarac et al* Trial Judgment, *supra* note 22 at para 460.

¹¹⁵ See *supra* note 22.

¹¹⁶ The Rome Statute of the ICC contains the most comprehensive listing of sexual violence crimes, and it includes as crimes against humanity and war crimes: “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence” comparable in nature: Rome Statute, *supra* note 21 at arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

¹¹⁷ See notes 36-38 and accompanying text, *supra*.

¹¹⁸ Sivakumaran, “Prosecuting”, *supra* note 1 at 92-95; Sivakumaran, “Lost in Translation”, *supra* note 20 at 273.

¹¹⁹ This happened in the ICC’s *Kenyatta* case, which is explored in detail in Part 4, below.

¹²⁰ *Akayesu* Trial Judgment, *supra* note 22 at para 688; upheld in *Prosecutor v Miroslav Kvočka et al*, IT-98-30/1-T, Judgment (2 November 2001) at para 180 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Kvočka et al* Trial Judgment].

¹²¹ ICC “Elements of Crimes”, *supra* note 11 at art 7(1)(g)-6.

violence qualifies as sexual, the ICTY and ICTR have provided examples, such as forced public nudity,¹²² sexual mutilation,¹²³ and forced abortion.¹²⁴

Perhaps the most detailed definition of sexual violence in the international criminal legal sphere – and therefore the definition closest to indicating the meaning(s) of ‘sexual’ – is that of the UN Special Rapporteur on systematic rape, sexual slavery and slavery-like practices: “any violence, physical or psychological, carried out through sexual means or by targeting sexuality”.¹²⁵ This includes “both physical and psychological attacks directed against a person’s sexual characteristics, such as forcing a person to strip naked in public, mutilating a person’s genitals, or slicing off a woman’s breasts” and “situations in which two victims are forced to perform sexual acts on one another or to harm each other in a sexual manner”.¹²⁶ While the Special Rapporteur’s definition does not directly define ‘sexual’, it is helpful in capturing the meaning(s) of ‘sexual’.¹²⁷ She identifies three ways in which physical or psychological violence may be deemed to be sexual: first, by targeting a victim’s sexual characteristics such as body parts¹²⁸ (like breasts, vaginas, testicles or penises); second, when the perpetrator uses sexual means to carry out the violence¹²⁹ (such as humiliating an individual by placing the perpetrator’s penis in the victim’s mouth, or forcing two victims to perform sexual acts); or third, by targeting sexuality¹³⁰ (a victim’s virginity, or virility, for example). This nuanced explanation of sexual violence indicates that what is ‘sexual’ must also be similarly nuanced. In other words, sexual violence is not about sex *per se*, but it is about body parts and socially-constructed norms of what is ‘sexual’ (for example, social norms that link the virginity of unmarried girls and women with a family’s honour).¹³¹ It would be helpful for international courts and tribunals to consider more comprehensively what makes certain kinds of violence sexual, in order to capture the relevant physical, sociological and psychological aspects.

An example of how both gaps – in overt recognition and in

¹²² *Akayesu* Trial Judgment, *supra* note 22 at para 697; *Kvočka et al* Trial Judgment, *supra* note 120 at para 180.

¹²³ *Niyitegeka* Trial Judgment, *supra* note 53 at paras 456-467; *Kvočka et al* Trial Judgment, *supra* note 120 at para 180 and note 343. See also, for an example of sexual mutilation not overtly identified as such: *Prosecutor v Duško Tadić*, IT-94-1-T, Opinion and Judgment (7 May 1997) at paras 729-730 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

¹²⁴ *Kvočka et al* Trial Judgment, *supra* note 120 at para 180 and note 343.

¹²⁵ UN 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*, 22 June 1998, UN Doc E/CN.4/Sub.2/1998/13 (1998) at para 21 [*Report of the Special Rapporteur on Systematic Rape*].

¹²⁶ *Ibid.*, at paras 21-22.

¹²⁷ There is more than one meaning to the word. E.g., Oxford Dictionaries defines the term as “relating to the instincts, physiological processes, and activities connected with physical attraction or intimate physical contact between individuals” or “relating to the two sexes or to gender”: Oxford University Press, *Oxford Dictionaries*, online: Oxford Dictionaries <<http://oxforddictionaries.com/definition/english/sexual?q=sexual>>.

¹²⁸ *Report of the Special Rapporteur on Systematic Rape*, *supra* note 125 at para 21.

¹²⁹ *Ibid.*, at paras 21-22.

¹³⁰ *Ibid.*, at para 21.

¹³¹ On sexual stereotypes, see Cook and Cusack, *supra* note 13 at 27-28.

understanding the sexual aspect of sexual violence – can unfortunately reinforce each other, thereby leading to the non-recognition of the sexual aspect of male-targeted sexual violence, occurred in an ICC case related to the post-election violence in Kenya in late 2007 and early 2008. In the *Kenyatta* case, the Prosecutor sought to charge the crime against humanity of ‘other forms of sexual violence’¹³² in relation to the forced circumcision of Luo men.¹³³ Pre-Trial Chamber II, in considering which charges would be included in the Summons to Appear, rejected the Prosecutor’s categorization. It found “the acts of forcible circumcision cannot be considered acts of a “sexual nature” as required by the Elements of Crimes” and are “more properly” listed under the crime against humanity of ‘other inhumane acts’.¹³⁴ The Pre-Trial Chamber reached this conclusion “in light of the serious injury to body that the forcible circumcision causes and in view of its character, similar to other underlying acts constituting crimes against humanity.”¹³⁵ While this explanation is somewhat unclear, it appears the Pre-Trial Chamber felt that forcible circumcision was not ‘sexual’ enough to qualify as a form of sexual violence, and that the violence done to the men was more analogous to a physical injury on any other part of the body.

The Prosecutor disagreed with this recategorization and, at the next stage confirming the charges, tried to explain why ‘other forms of sexual violence’ was a more appropriate category than ‘other inhumane acts’. First, the prosecution tried to broaden the Pre-Trial Chamber’s understanding of how men and boys¹³⁶ were targeted for various forms of sexual violence, pointing out that they not only suffered forced circumcision and penile amputation, they also suffered rape,¹³⁷ forced nudity and/or sexual mutilation.¹³⁸ In other words, the overarching context of the forced circumcision and penile amputation was one where other forms of sexual violence also occurred. The Prosecutor also explained that other forms of violence, such as murder, accompanied these forms of sexual violence.¹³⁹ Unfortunately, this wider understanding of the context of male sexual violence may have been lost, as the Pre-Trial Chamber seemed to focus its

¹³² The Rome Statute contains this list of prohibited acts within the crimes against humanity provision: “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”: Rome Statute, *supra* note 21 at art 7(1)(g).

¹³³ *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, Decision on Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (8 March 2011) at para 27 (International Criminal Court, Pre-Trial Chamber II) [*Kenyatta* Summons to Appear].

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ There was direct evidence on the targeting of boys: On 21 January 2008, eight Luo men had their genitals chopped off and even young boys, some of them as young as 11 and 5 years old had their genitalia cut with blunt objects such as broken glass. *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-T-5-Red-ENG CT WT 22-09-2011 1/108 NB PT, Transcript (22 September 2011) at 89, lines 21-23 (International Criminal Court, Pre-Trial Chamber II) [September 2011 Transcript].

¹³⁷ *Ibid.*, at 87, lines 5-12.

¹³⁸ *Ibid.*, at 88, lines 9-12; 89, line 3; 91, lines 15-20.

¹³⁹ *Ibid.*, at 90, lines 7-9.

Confirmation of Charges analysis of rape on female victims,¹⁴⁰ and its analysis of male victims on forced circumcision and penile amputation (but not sexual mutilation or forced nudity).¹⁴¹ Second, the prosecution tried to explain why these acts should be viewed as a form of sexual violence, rather than obscured under the heading of inhumane acts.¹⁴² The prosecution explained how the sexuality of the Luo men was targeted by attempting to target their virility: “these weren’t just attacks on men’s sexual organs as such but were intended as attacks on men’s identities as men within their society and were designed to destroy their masculinity”.¹⁴³ In other words, the prosecution attempted to engage the third prong of the Special Rapporteur’s definition. That said, the prosecution’s explanation was not as fulsome as it could have been, jumping from sexual organs to gender without stopping in the middle to make the link to sexual norms. The acts were sexual in nature not only because a sexual organ was targeted, but also because of the sexualized cultural norms attached to circumcision or non-circumcision of the organ. Luo men and boys were targeted for forced circumcision and other acts for complex reasons, including to humiliate their sexual status within their own society.

The response of the Pre-Trial Chamber indicated that it understood the Prosecutor’s argument to be that an act of violence is ‘sexual’ if it targets a ‘sexual’ body part and it rejected this approach: “not every act of violence which targets parts of the body associated with sexuality should be considered an act of sexual violence.”¹⁴⁴ The Pre-Trial Chamber ascribed a different meaning to the attacks than that proposed by the Prosecutor – “it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other”¹⁴⁵ – but without considering whether multiple motivations, including a motivation relating to humiliation of sexual status, can be considered. Both the explanations of the Prosecutor and the Pre-Trial Chamber are likely correct¹⁴⁶ because both describe the purpose of the acts. However, the Pre-Trial Chamber’s approach overlooked the specific role norms around circumcision (as a trigger for sexual and cultural manhood) played within

¹⁴⁰ This is not altogether clear, but the two detailed descriptions provided in the Confirmation of Charges decision relate to women: *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012) at paras 258-259 (International Criminal Court, Pre-Trial Chamber II) [*Kenyatta Confirmation of Charges Decision*].

¹⁴¹ *Ibid.*, at paras 260-266. Para 261 mentions forced removal of clothes, but the PTC does not classify this evidence as a form of sexual violence, seemingly seeing it as part of the forcible circumcision act.

¹⁴² September 2011 Transcript, *supra* note 136 at 88, lines 1-3: “The Prosecution submits that other forms of sexual violence are different from other inhumane acts due to the sexual nature of the specific acts.”

¹⁴³ *Ibid.*, at 88, lines 12-15.

¹⁴⁴ *Kenyatta Confirmation of Charges Decision*, *supra* note 140 at para 265.

¹⁴⁵ *Ibid.*, at para 266.

¹⁴⁶ See, e.g. September 2011 Transcript, *supra* note 136 at 91, 1-2: “witness assessed that the act of forcible circumcision was viewed as a punishment for having supported the Orange Democratic Movement, ODM.” See also: *ibid.*, at 93, lines 3-6: “Weeks before the election, there were rumours that if election violence broke out, Kikuyus will circumcise Luo men. The suspects used this ethnic hatred, some already coloured in sexually violent terms, to carry out their common plan.”

the political and ethnic context of the acts.¹⁴⁷ The Pre-Trial Chamber also offered no explanation as to when the Special Rapporteur's first category of sexual violence – targeting a victim's sexual characteristics such as body parts – would not apply. The Pre-Trial Chamber thus recategorized forced circumcision and penile amputation under the crime against humanity of 'other inhumane acts', thereby prioritizing evidence of physical injury and motives related to ethnic prejudice while ignoring the evidence relating the perpetrators' use of cultural norms of sexuality to dominate Luo males.¹⁴⁸ The lack of signalling in the Rome Statute that forced circumcision and penile amputations may be considered as sexual violence, combined with an under-articulated argument by the Prosecutor as to why exactly the acts qualified as 'sexual', led to a poor result: an under-reasoned decision by the judges on why exactly the acts did not qualify as 'sexual' (essentially leaving the categorization to 'I know it when I see it').¹⁴⁹

These gaps in overt codification and in categorization are heightened when international prosecutors and criminal tribunals fail to understand the interconnected nature of sexual violence. As discussed in Part 2 above, sexual violence directed against men and boys is often closely related to sexual violence directed against women and girls, regardless of whether it is committed by an 'enemy' or one's own 'side'. However, male-directed sexual violence has sometimes been perceived as different, and therefore separate, from sexual violence directed against women and girls. In the ICC's *Kenyatta* case, the prosecution attempted to demonstrate that these forms of violence were intertwined:

In committing rape and mutilation of genital organs, individuals are assaulted and wounded in ways that are socially gendered, in their identities as women and men as such, and in the social roles that they occupy, identify with, and anticipate filling as gendered members of their communities. Women who were gang raped were violated, humiliated, desecrated so as to lower their status and deprive them of their dignity and equality as human beings and, for some of them, to reduce their value as wives or potential wives. Men who were castrated were deprived of their manhood and debased in front of their families.¹⁵⁰

However, the Pre-Trial Chamber separated its consideration of forced circumcision and penile amputation from that of rape, exclusively focused on rape of females, and did not address forced nudity and sexual mutilation.¹⁵¹ Therefore, the Pre-Trial Chamber missed the opportunity to

¹⁴⁷ This point was made by Brigid Inder, Executive Director of the nongovernmental organization Women's Initiatives for Gender Justice in: 'Kenya: Plea to ICC over Forced Male Circumcision', IRIN News, 25 April 2011, online: IRIN <<http://www.irinnews.org/Report/92564/KENYA-Plea-to-ICC-over-forced-male-circumcision>>. See also Inder's comments in: Robbie Corey-Boulet, "In Kenya, Forced Male Circumcision and a Struggle for Justice" (The Atlantic, 1 August 2011), online: Atlantic <<http://www.theatlantic.com/international/archive/2011/08/in-kenya-forced-male-circumcision-and-a-struggle-for-justice/242757/>>.

¹⁴⁸ *Kenyatta* Confirmation of Charges Decision, *supra* note 140 at paras 266, 270.

¹⁴⁹ The Pre-Trial Chamber indicated that "the determination of whether an act is of a sexual nature is inherently a question of fact" - *ibid*, at para. 265 - but did not discuss what that factual consideration would cover.

¹⁵⁰ September 2011 Transcript, *supra* note 136 at 84, lines 4-13.

¹⁵¹ *Kenyatta* Confirmation of Charges Decision, *supra* note 140 at paras 257-266. The prosecution

examine how the integration of these forms of violence advanced the overarching crimes against humanity requirements.¹⁵²

The legal gaps can be filled. The gap in overt recognition can be rectified in two ways: first, the statutes of any future tribunal or court applying international criminal law should include examples of sexual violence typically targeted at men and boys in the list of sexual violence crimes, such as forced circumcision, penile amputation or forced castration.¹⁵³ Second, prosecutors, investigators, and victims' and defence counsel need to become more knowledgeable about what 'sexual' means and how this applies to acts done to men and boys. If implemented, the legal recognition and categorization of male sexual violence is likely to become more consistent, which should, in turn, positively influence the manner in which judges understand the cases. This will help international criminal law move beyond the current 'I know it when I see it' approach to identifying violence against men and boys as sexual.

VI. Conclusion

International criminal law is still at a very early stage in its understanding of sexual violence directed against men and boys during conflict and other forms of atrocity. This explains the inconsistent approaches to the issue between, and within, international criminal courts and tribunals that tend to obscure the sexual nature of the violence. However, the preliminary nature of international analysis of the issue also presents an ideal opportunity for the creation of informed prosecutorial policy to positively influence future prosecutions. While the mandates of the ICTY, ICTR and Special Court for Sierra Leone will soon be ending,¹⁵⁴ the International Criminal Court is a permanent institution. The Prosecutor of the ICC, Fatou Bensouda, has announced that her office is preparing a 'gender justice' policy paper.¹⁵⁵ Once it is prepared, she intends to circulate

characterized sexual violence against males and females as a "powerful form of destruction": September 2011 Transcript, *supra* note 136 at 92, lines 23-24.

¹⁵² The crimes against humanity threshold is "a widespread or systematic attack directed against any civilian population, with knowledge of the attack": Rome Statute, *supra* note 21 at art 7(1).

¹⁵³ It would be ideal for the Rome Statute to be amended in this way, but this is unlikely to happen unless there is strong political will among States Parties.

¹⁵⁴ United Nations Security Council, UNSC Res 1966 (2010) requested the ICTY and ICTR to "take all possible measures to expeditiously complete all their remaining work ... no later than 31 December 2014": United Nations Security Council, 'International Criminal Tribunal for the Former Yugoslavia', UNSC Res 1966, UNSCOR 6463rd mtg, UN Doc S/Res/1966 (2010) at para 3. The mandate of the Special Court for Sierra Leone will end after the completion of the 2013 appeal in the *Charles Taylor* case: Special Court for Sierra Leone, *Ninth Annual Report of the President of the Special Court for Sierra Leone June 2011 - May 2012* (2012) at 27, online: SCSL <<http://www.sc-sl.org/LinkClick.aspx?fileticket=ZEDnSBp6ahc%3d&tabid=176>>.

¹⁵⁵ Fatou Bensouda, Prosecutor-elect of the International Criminal Court, "Gender Justice and the ICC: Progress and Reflections", at *Justice for All? The International Criminal Court: 10 Year Review of the ICC* (14 February 2012, Sydney, Australia) at 6, online: ICC <<http://www.icc-cpi.int/NR/rdonlyres/FED13DAF-3916-4E94-9028-123C4D9BB0C9/0/StatementgenderSydeny140212.pdf>>. This article was written in January 2013, and the discussion below reflects this timing. The Prosecutor issued her office's 'Policy Paper on Sexual and Gender-Based Crimes' in June 2014. This article therefore does not examine the impact of that policy paper on sexual violence directed against men and boys.

the draft paper to the international community for comment.¹⁵⁶ This presents an excellent opportunity to ensure the ICC's Office of the Prosecutor embraces an educated approach to the scourge of male sexual violence. Such a policy could help create consistency in how the ICC's Office of the Prosecutor understands, investigates, classifies, explains and charges male sexual violence. This consistency would, hopefully, lead to regular, thoughtful and more precise judicial analysis.¹⁵⁷

The ICC Prosecutor's gender justice policy paper needs to grapple with the three gaps identified in this article. First, there are significant challenges in securing data explaining the forms, patterns and levels of incidence of male sexual violence in conflict or atrocity. This means prosecutors do not have information that would help to demonstrate that, for example, male sexual violence was part of a widespread or systematic attack directed against a civilian population.¹⁵⁸ Thus, the ICC may wish to encourage academic, nongovernmental or intergovernmental organizations with experience in surveying to undertake such data collection in ICC situation countries. That said, reports that do exist are helpful in policy formation in that they demonstrate types of, and motivations behind, male sexual violence that may be helpful in training investigators and prosecutions, and in explaining male sexual violence to judges. In addition, these reports and tribunal jurisprudence to date demonstrate the interlinked nature of male and female sexual violence, which can again be used in training within the Office of the Prosecutor and in explaining the context of sexual violence in judicial briefs.

The second gap – termed a social gap – must also inform the ICC Prosecutor's gender justice policy paper. The policy must be aware of the barriers faced by men and boys that are disincentives to revealing their victimization. These barriers are similar to those faced by female victims of sexual violence – stigma, fear, shame, guilt, confusion and the need to focus on immediate survival priorities. However, there may be additional barriers that must be taken into account: the perceived need to live up to masculine gender norms heightened as a result of war, a lack of cultural expressions or terms to describe male sexual violence, or a perception that men and boys simply cannot be victims of sexual violence. Thus, sensitive investigation and prosecution practices are needed: these may mirror practices already in place at the ICC, or additions may be required to address male-specific needs.

The second gap also requires sensitivity on the part of ICC staff and officials. Investigators and prosecutors need to be aware of any incorrect assumptions they, or individuals from whom they seek information (such as medical or humanitarian personnel), hold about male sexual violence. Such assumptions could include that rape is the only form of sexual violence, that men cannot be victims of sexual violence, or that sexual violence is 'personal'

¹⁵⁶ *Ibid.*

¹⁵⁷ There is a need for more precision in the judgments. For example, in the findings in *Stanišić and Župljanin*, the ICTY Trial Chamber found that male "[d]etainees were subjected to sexual humiliation" and sexual assault but provided no further details (and no footnote to witness evidence): *Stanišić and Župljanin* Trial Judgment, *supra* note 50 at paras 1221, 1235.

¹⁵⁸ This is the crimes against humanity threshold: Rome Statute, *supra* note 21 at art 7(1).

and not really connected to the main activity of war. The Office of the Prosecutor will need to ensure adequate training of all staff in recognizing and countering incorrect assumptions.

The ICC's Prosecutor is best equipped to fill the third gap. While the policy paper cannot change the crimes listed in the Rome Statute, and so cannot directly address the gap in overt recognition, the policy can promote consistent charging of male rape as such, and other forms of sexual violence directed against men and boys as 'sexual violence' or 'enforced sterilization', for example. It can also promote consistent explanation to the judges of how and why particular acts are sexual, and why it is important for those acts to be correctly labeled to capture the full nature of victimization. It can also tackle the issue of whether secondary victimization (such as forcing an individual to watch another individual being raped) is a form of sexual violence.

The ICC Prosecutor's policy paper can have a positive impact on domestic prosecutions of international crimes. As at the international level, there is also silence on male sexual violence at the domestic level.¹⁵⁹ Thus, the ICC Prosecutor's policy paper could help inform domestic investigators and prosecutors on best practices in this respect.¹⁶⁰

This article ends where it began, on the theme of the volume: sexual violence against men and boys, especially in detention, was recorded in recent conflicts in Libya and Syria. The ICC has the opportunity to prosecute this sexual violence (due to the referral of the situation in Libya to the ICC by the Security Council),¹⁶¹ thereby setting international precedent in drawing attention to this form of violence. In addition, it is important that evidence of male sexual violence continue to be gathered in the Syria situation, so that future prosecutions – whether by the ICC¹⁶² or domestic courts – are possible. Sexual violence against men and boys must no longer be “overlooked, downplayed, or re-characterized” within international criminal law.¹⁶³

In the meantime, social scientists, policy makers and advocates must increase their understanding of each other and how each approaches the collection and analysis of information. Mutual understanding can help strengthen efforts to stop, prevent or redress the violence, either through international prosecution or some other means.

¹⁵⁹ On limitations posed by domestic law, see Sivakumaran, “Prosecuting”, *supra* note 1 at 82-83.

¹⁶⁰ This is especially so because the Rome Statute is based on the principle of complementarity, under which, states have the primary responsibility to investigate and prosecute the crimes listed in the Rome Statute: Rome Statute, *supra* note 21 at art 17.

¹⁶¹ United Nations Security Council, ‘Peace and Security in Africa’, UNSC Res 1970, UNSCOR 6491st mtg, UN Doc S/Res/1970 (2011) at para 4.

¹⁶² At the time of writing, the Security Council had not referred the situation in Syria to the ICC. Led by Switzerland, more than 50 countries wrote a letter to the Member States of the Security Council to call on the Council to refer the Syrian situation to the ICC. See letter of 14 January 2013, available on the website of the Permanent Mission of Switzerland to the United Nations in New York, online: <<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/un/missny/other.Par.0142.File.tmp/ICC-Brief%20def.pdf>>.

¹⁶³ Sivakumaran, “Prosecuting”, *supra* note 1 at 79.