

LL.M. Thesis

***A Tale of Triumphs and Taboos:***  
**Assessing Accountability for Perpetrators of Sexual and  
Gender-Based Violence Against Men in  
International Criminal Law**

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# 1. Introduction

*There are strong perceptions about who can be a victim/survivor of SGBV as dictated by norms surrounding masculinity or heterosexuality and binarity, which limit the health seeking behaviour of victims/survivors [...].<sup>1</sup>*

This quote wholly summarises the issue which lies at the core of this thesis – that is, the circumstances surrounding the lack of prosecution regarding sexual and gender-based violence (SGBV) against men. The fact is that conflict related sexual violence (CRSV) committed against men is a more common phenomenon than most presume.<sup>2</sup> However, due to stigmatisation and ostracization, such violence is severely underreported and underrepresented.<sup>3</sup> In 2002, Del Zotto and Jones estimated that out of over 4,000 NGOs operating in the field of CRSV, only 3% of their publications made reference to male victims.<sup>4</sup> This has consequences for the victims, including lack of necessary assistance or achieving justice.<sup>5</sup> Moreover, so called ‘rape myths’ depreciate the experiences of male victims of sexual violence by focusing on men as perpetrators and women as victims.<sup>6</sup>

These are a few reasons why the topic of SGBV towards men is a crucial one to be held, especially within the context of international criminal law (ICL). Criminal prosecution is one of the avenues in which justice for victims around the world is achieved and should be effective to provide for all victims without discrimination. As ICL is a continuously developing area of international law, understanding SGBV in this context from its inception until present day is imperative for its future and ensuring that such impunity is quashed. The establishment of a permanent International Criminal Court (ICC) gave hope that ‘the history of impunity for

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<sup>1</sup> Norwegian Red Cross and International Committee of the Red Cross, ‘“That never happens here”: Sexual and gender-based violence against men, boys and including LGBTIQ+ persons in humanitarian settings’ (2022) <[https://www.rodekors.no/globalassets/\\_rapporter/thatneverhappenshere\\_uu.pdf?mc\\_phishing\\_protection\\_id=28048-c7t8vm70s0vafoouhkkq](https://www.rodekors.no/globalassets/_rapporter/thatneverhappenshere_uu.pdf?mc_phishing_protection_id=28048-c7t8vm70s0vafoouhkkq)> accessed 19 April 2022, p 47.

<sup>2</sup> Philipp Schulz, *Male Survivors of Wartime Sexual Violence: Perspectives from Northern Uganda* (University of California Press 2020) 26.

<sup>3</sup> Irene Garofalo, ‘Prosecuting Male Sexual Violence at the ICC: Idealism Or Realism?’ (*Centre for African Justice, Peace and Human Rights*) <<https://centreforafricanjustice.org/prosecuting-male-sexual-violence-at-the-icc-idealism-or-realism/>> accessed 13 June 2023.

<sup>4</sup> Augusta Del Zotto and Adam Jones, ‘Male-on-Male Sexual Violence in Wartime: Human Rights’ Last Taboo?’ (2002) <<http://adamjones.freeservers.com/malerape.htm>> accessed 26 June 2023.

<sup>5</sup> Wynne Russell, ‘Conflict-related sexual violence against men and boys’ (2007) 27 *Forced Migration Review* 22, 22.

<sup>6</sup> Aliraza Javaid, ‘Male Rape Myths: Understanding and Explaining Social Attitudes Surrounding Male Rape’ (2015) 4 *Masculinities & Social Change* 270, 272.

gender crimes under ICL will resolutely be replaced [...] by accountability and deterrence and prevention.<sup>7</sup>

This thesis analyses the topic of SGBV against men and male victims of CRSV within the framework of ICL. This analysis illustrates whether ICL satisfies historical and current objectives in achieving justice for international crimes, specifically SGBV in armed conflict. The subsequent subsections investigate the main problem of the thesis through a combination of research methods in order to arrive at a wholesome conclusion.

## **1.1. Research Question & Sub-questions**

As mentioned, the central theme for this thesis is analysing the prosecution of SGBV against men in ICL. Thus, this paper serves to answer the following research question as its main purpose:

- How have perpetrators of sexual and gender-based violence against men been held accountable at the international criminal level?

In order to answer this question, five sub-questions will be analysed in order to create an extensive understanding of the topic:

1. How does international criminal law understand 'sex', 'gender', and sexual and gender-based violence, and how are they understood in the context of armed conflict?
2. What is the importance in focusing on sexual and gender-based violence against men in particular?
3. How is sexual and gender-based violence framed within the development and context of international criminal law?
4. How have international criminal courts and tribunals adjudicated cases of sexual and gender-based violence and conflict related sexual violence committed against men?
5. What are the factors (if any) which may influence the prosecution of sexual and gender-based violence against men?

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<sup>7</sup> Richard J Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34 Case Western Reserve Journal of International Law 277, 285.

The sub-questions posed above break down the key elements of the main research question into smaller segments in order to create a more comprehensive picture of the issue. While there are other manners in which this topic could be explored, the purpose of this thesis is to analyse ICL, with black-letter law as its foundation to judgements as its outcome and assess male victim treatment in the context of SGBV.

## 1.2. Limitations

The topic of SGBV against men is one which is multifaceted and layered. There are various aspects which, due to constraints, cannot be discussed within this thesis, although they should not go unnoticed.

First and foremost, this thesis will not delve into analysing the experiences of female victims of SGBV and will limit it to that against men and boys only. In doing so, this thesis is not meant to compare the treatment in prosecution of SGBV against women with that against men. This thesis is meant to expose how ICL has dealt with cases concerning male victims and explore the outcomes and possible reasons for them.

Secondly, in consideration of the available jurisprudence in ICL concerning SGBV against men, this thesis will focus on cisgender male victims as its focus – that is individuals who were assigned the male sex at birth and correlate that with their self-identity as man.<sup>8</sup> While the current jurisprudence of SGBV against men is limited, similar jurisprudence which makes reference to other gender identities is nearly non-existent (although there is potential for this to change as will be explained in Chapter 4.4). This limitation should not disregard the experiences of LGBTQ+ individuals, including transgender, non-binary, intersex individuals, and other gender identities which also fall victim to CRSV, although inadequately addressed.<sup>9</sup> Moreover, ICL acknowledges that *all* individuals, regardless of gender identity or sexual orientation, may suffer from CRSV and SGBV.<sup>10</sup>

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<sup>8</sup> Dianne Otto, 'Queering Gender [Identity] in International Law' (2015) 33 *Nordic Journal of Human Rights* 299, 300, footnote 3.

<sup>9</sup> Ligia Kiss and others, 'Male and LGBT Survivors of Sexual Violence in Conflict Situations: A Realist Review of Health Interventions in Low-and Middle-Income Countries' (2020) 14 *Conflict and Health* 11, 2.

<sup>10</sup> ICC OTP, 'Policy Paper on Sexual and Gender-Based Crimes' (2014) 4 <<https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 4 April 2023.

Finally, this thesis will strictly focus on the laws and jurisprudence of institutions which are characterised as international, internationalised, and hybrid courts/tribunals. The organisations and their jurisprudence which are mentioned in this thesis are not meant to be an exhaustive list but highlights those institutions and cases which have greatly contributed to the topic and are repeatedly referenced throughout research and literature concerning this subject. Moreover, this thesis does not provide an in-depth analysis into other fields of international law (with international humanitarian law [IHL] as the exception) and therefore does not look into other aspects of international law which may discuss SGBV (*i.e.* human rights instruments concerning *inter alia* violence against women, sex trafficking, children's rights, etc.).

### 1.3. Methodology

The chosen approach of analysis for this paper is the feminist legal methodology. It is important to understand that this methodology is dynamic and stratified. Charlesworth, Chinkin and Wright explain that while 'there is no single school of feminist jurisprudence', this plurality and 'diversity of voices is not only valuable, but essential' in order to 'capture the reality of women's experience or gender inequality'.<sup>11</sup> Moreover, they contend that international law is immune to feminist analysis, except in some circumstances where the law is 'directly relevant to individuals, as with human rights law'.<sup>12</sup>

In the early 1990s, Charlesworth, Chinkin and Wright argued that '[t]he structure of the international legal order reflects a male perspective and ensures its continued dominance'.<sup>13</sup> However, as noted, the topic of SGBV heavily focuses on female experiences, and pays little attention to male experiences. Charlesworth quoted that '[a]t the most general level, feminist analysis of international law involves searching for the silences of the discipline'.<sup>14</sup> Otto discusses how certain aspects of international law which focus on gender equality are understood as 'women being treated as "the same as" or "equivalent to" men'.<sup>15</sup> 'Understood in this way, gender equality forecloses contestation of the base-line of men's experience and glosses over the

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<sup>11</sup> Hilary Charlesworth and others, 'Feminist Approaches to International Law' (1991) 85 *The American Journal of International Law* 613, 613.

<sup>12</sup> *ibid* 614.

<sup>13</sup> Charlesworth and others (n 11) 621.

<sup>14</sup> Hilary Charlesworth, 'Feminist Critiques of International Law and Their Critics' [1994] *Third World Legal Studies* 1, 1.

<sup>15</sup> Dianne Otto, 'Holding Up Half the Sky, But for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women' (1996) 6 *Australian Feminist Law Journal* 7, 12.

inequalities between men that it reproduces between women.<sup>16</sup> Otto contends that this ‘unidimensional paradigm’ is inequitable.<sup>17</sup> Applied to the topic of this thesis, the experiences of male victims of SGBV should not be based on those of women as the ‘norm’ or the *status quo*.

It could be said that the credit for successful prosecution of SGBV and CRSV against men goes to feminists who have challenged international law.<sup>18</sup> Thus, this thesis weighs the plurality of feminist legal contentions and weighs them against each other considering the topic of this thesis. The purpose of applying the feminist legal approach is not to weigh the rights of men against the rights of women; rather, it is to apply the same reasoning which has brought the disbalance of women’s rights under international law to the surface and scrutinised it towards male victims of SGBV. As stated by Du Toit and Le Roux, ‘the right kind of feminist gender analysis of CRSV not only highlights the continuities between sexual violence during conflict and times of peace, but also between female and male victimisation.’<sup>19</sup>

## 1.4. Structure

In contemplation of the research question, the sub-questions, and the methodology above, this thesis will be divided into five chapters. Chapter 1 serves to introduce and to provide brief insight to the thesis topic and its relevance. Moreover, this section explains the methodology and lens of analysis used throughout this thesis – namely, a feminist legal perspective. Chapter 2 identifies and explains key concepts surrounding SGBV against men in armed conflict, and provide different perspectives drawn from the works of known names on the subject matter. Chapter 3 is rather descriptive and provides an account of the overall historical development of SGBV in ICL (with a brief focus on IHL), starting with the Nuremberg and Tokyo tribunals, and finishing with the ICC and other internationalised/hybrid institutions. Chapter 4 analyses case law which touches on SGBV committed against men and also discusses present and future potentialities of prosecuting SGBV against men. The structure of the fourth chapter similarly follows that of the third chapter by grouping cases by (type of) court or tribunal. Finally, Chapter 5 concludes this paper and will deliver final thoughts on the matter.

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<sup>16</sup> *ibid.*

<sup>17</sup> *ibid.*

<sup>18</sup> Louise Du Toit and Elisabet Le Roux, ‘A Feminist Reflection on Male Victims of Conflict-Related Sexual Violence’ (2021) 28 *European Journal of Women’s Studies* 115, 117.

<sup>19</sup> *ibid.* 119.

## 2. Key Concepts: Understanding ‘Gender’ and ‘Sex’ in the Context of International Law

The term ‘gender’ has long been sitting at the centre of various international law debates, especially in the field of international criminal justice. While more attention has been given to terms such as ‘gender’ and ‘sex’, they do not go without dispute.<sup>20</sup> ‘Gender’ is often used as a substitute for ‘sex’ or ‘women’. It is often debated whether these terminologies are interchangeable; however, they are undoubtedly interconnected.

The aim of this chapter is to explore the emergence and meaning of ‘gender’ and its application in ICL. This chapter provides a definition of ‘gender’, along with other relevant expressions and concepts related to it. Particular attention is given to the differentiation between ‘gender’ and ‘sex’, particularly in the context of SGBV. Finally, this chapter discusses sexual and gender-based crimes (SGBCs) and understanding them within the context of armed conflicts, with most of the attention being given to male victims of CRSV.

### 2.1. What is ‘gender’?

While the word ‘gender’ had been utilised within the United Nations (UN) at least since the late 1980s, it remained widely undefined in international legal texts. For example, the term was used within the Beijing Declaration and Platform for Action of 1995, but no definition was provided.<sup>21</sup> In fact, ‘gender’ was referred to 233 times, without a definition attached.<sup>22</sup> Even the adoption of the 2015 Sustainable Development Goals by the United Nations, which highlights ‘gender equality’ as one of its main goals, does not define ‘gender’.<sup>23</sup>

The first international legal definition of ‘gender’ is entrenched in Article 7(3) of the Rome Statute of the International Criminal Court (discussed further in Chapter 3.4). Oosterveld explains that therefore, the UN system had two approaches in defining ‘gender’. The first one is described as the ‘minimalist approach’ – such as that taken by the Beijing Declaration – which left the term entirely undefined. Contrastingly, the second approach offers several similar

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<sup>20</sup> Indira Rosenthal, Valerie Oosterveld and Susana SáCouto, ‘What Is “Gender” in International Criminal Law?’ in Indira Rosenthal, Valerie Oosterveld and Susana SáCouto (eds), *Gender and International Criminal Law* (1st edn, Oxford University Press 2022) 13–15.

<sup>21</sup> *ibid* 18; Beijing Declaration and Platform for Action (adopted 15 September 1995) A/CONF177/20/Add1.

<sup>22</sup> Jane Adolphe, ‘“Gender” Wars at the United Nations’ (2012) 11 *Ave Maria Law Review* 1, 15.

<sup>23</sup> Rosenthal and others (n 20) 18.



but differing definitions adopted by various UN institutions and agencies. Oosterveld explains that regardless of contrasts in wording, these definitions articulate the same three central themes: 1) 'gender' is a social construct, 2) the complexity of 'gender' with regards to the roles of men and women within societies and the relationships between the two, and 3) the varying nature of 'gender' amongst cultures.<sup>24</sup> For example, the World Health Organisation defines 'gender' as

the characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours and roles associated with being a woman, man, girl or boy, as well as relationships with each other. As a social construct, gender varies from society to society and can change over time.<sup>25</sup>

Some, such as Butler, also understand gender to be a social construction. 'Because there is neither an "essence" that gender expresses or externalizes nor an objective ideal to which gender aspires; because gender is not a fact, the various acts of gender creates the idea of gender, and without those acts, there would be no gender at all.'<sup>26</sup>

'Gender' is also often used to refer to 'women' or made synonymous with 'female'. Rittich referred to the use of 'gender' as 'a code word for "women"', and that '[t]o talk about gender meant to talk about women in general, or about women's absence or marginalisation from international law and politics.'<sup>27</sup> Charlesworth additionally wrote that 'gender' within the UN system has also long been used as a synonym for 'women'.<sup>28</sup> Not only does it adhere gender to the 'fixed' biological attributes of a human being, but, as she puts it, doing so 'leaves both the roles of men and male gender identities unexamined, as though they were somehow natural and immutable.'<sup>29</sup> Rosenthal, Oosterveld and SáCouto describe how this could have severe consequences in ICL, particularly when examining gender-based crimes, and how adopting this concept could equate gender-based crimes with 'crimes against females'.<sup>30</sup> Such an understanding would neglect the 'gendered nature of other crimes, as well as sexual violence against males or gender non-conforming people'.<sup>31</sup>

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<sup>24</sup> Valerie Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55, 66–67.

<sup>25</sup> World Health Organisation, 'Gender and health' (*WHO*) <[https://www.who.int/health-topics/gender#tab=tab\\_1](https://www.who.int/health-topics/gender#tab=tab_1)> accessed 29 May 2023.

<sup>26</sup> Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40 *Theatre Journal* 519, 522.

<sup>27</sup> Kerry Rittich and others, 'The Gender of International Law' (1999) 93 *American Society of International Law* 206, 206.

<sup>28</sup> Hilary Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 *Harvard Human Rights Journal* 1, 14–15.

<sup>29</sup> *ibid* 15.

<sup>30</sup> Rosenthal and others (n 20) 19.

<sup>31</sup> *ibid* 19–20.

There remains no entirely agreed upon definition for ‘gender’, especially in international law. However, attempts are being made at replacing the current ICL definition of ‘gender’ as ‘outdated’. In striving to draft a new treaty on the prosecution of crimes against humanity, the International Law Commission (ILC) has requested that the definition of ‘gender’ as ‘the two sexes, male and female, within the context of society’ be deleted from the draft articles.<sup>32</sup> This removal has been praised by some, including women’s rights groups.<sup>33</sup>

## 2.2. Are ‘gender’ and ‘sex’ one and the same?

While ‘gender’ has not appeared in international legal instruments until recent times, ‘sex’ has often been included in international law as a ground for discrimination which is evident in the Charter of the United Nations (1945). Article 1(3) of the Charter sets ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’ as one of the UN’s main purposes.<sup>34</sup> Additionally, the Universal Declaration on Human Rights of 1948 provides for the rights and freedoms for everyone ‘without distinction of any kind’ such as, amongst others, sex.<sup>35</sup>

As aforementioned, gender refers to the socially constructed characteristics which relate to men and women while the latter refers to ‘the different biological and physiological characteristics of females, males and intersex persons, such as chromosomes, hormones and reproductive organs.’<sup>36</sup> Quotes Charlesworth, ‘[t]he linkage of sex and gender [...] overlooks the performative aspects of gender and its relational nature as well as the role of power relations and the ways that structures of subordination are reproduced.’<sup>37</sup> On the other hand, Butler contends that ‘there will be no way to understand "gender" as a cultural construct which is imposed upon the surface of matter, understood either as "the body" or its given sex.’<sup>38</sup>

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<sup>32</sup> Claire Oh, ‘International Law Convention Evaluates Legal Definition Of Gender’ (*Juris*, 6 November 2019) <<https://dukeundergraduatelawmagazine.org/2019/11/06/international-law-convention-evaluates-legal-definition-of-gender/>> accessed 26 June 2023.

<sup>33</sup> Women’s Initiatives for Gender Justice, ‘Outdated Definition of Gender Deleted from Draft CAH Treaty’ (*Women’s Initiatives for Gender Justice*, 12 June 2019) <<https://4genderjustice.org/uncategorized/outdated-definition-of-gender-deleted-from-cah-treaty/>> accessed 26 June 2023.

<sup>34</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 1(3).

<sup>35</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) art 2.

<sup>36</sup> World Health Organisation (n 25).

<sup>37</sup> Hilary Charlesworth, ‘Gender and International Law’ in Jill Steans and Daniela Tepe, *Handbook on Gender in World Politics* (Edward Elgar Publishing 2016) 138

<<http://www.elgaronline.com/view/9781783470617.00024.xml>> accessed 22 April 2023.

<sup>38</sup> Judith Butler, *Bodies That Matter: On the Discursive Limits of ‘Sex’* (Routledge 1993) 2-3.

Understanding ‘sex’ and ‘gender’ has long been the work of feminists, such as Charlesworth and Butler, and their engagement with international law. Otto explains how, even after the Beijing Declarations segregation of ‘gender’ from ‘sex’, ‘[f]eminists were still prepared to accept that biology (‘sex’) provided the foundation for social conceptions of masculinity and femininity and that gender was a dualistic construction.’<sup>39</sup> Baden and Goetz contend that the use of ‘gender’ by feminist voices in international law should serve to theorise and critique power dynamics. ‘A problem with the concept of ‘gender’ is that it can be used in a very descriptive way and the question of power may easily be removed.’<sup>40</sup> This ‘power’ aspect lies at the cornerstone of the definition of ‘gender’, however it may be worded, which the definition of ‘sex’ does not focus on.

Regardless of how they are understood, their influence to this topic remains significant. This thesis interprets both ‘gender’ and ‘sex’ within respect to how they have been defined by the various international criminal courts and tribunals, their supporting documents and case law.

### **2.3. SGBV and armed conflict**

The concepts of ‘sex’ and ‘gender’ as described in the previous sections are indispensable to the topic of this thesis. Importance of understanding these concepts in the context of armed conflict and international crimes is derived from the presence of SGBV in armed conflict.<sup>41</sup> Just as in present-day conflicts, ‘rape and other forms of sexual violence were used as ways to demoralise conquered populations or groups.’<sup>42</sup> Rajandran explains how sexual violence was previously seen as a by-product of war, but over time has been accepted ‘for what it really is, namely a crime against humanity’, given the adoption of a number of treaties and conventions condemning sexual violence.<sup>43</sup>

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<sup>39</sup> Dianne Otto, ‘International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry’ in Vanessa E Munro and Margaret Davies, *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate Publishing 2013) 204 <<https://ssrn.com/abstract=2178769>> accessed 1 June 2023.

<sup>40</sup> Sally Baden and Anne Marie Goetz, ‘Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing’ [1997] *Feminist Review* 3, 10.

<sup>41</sup> Malaika Rajandran, ‘Sexual Violence and International Law’ (2004) 23 *Refugee Survey Quarterly* 58, 59.

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid* 60–61.

### ***2.3.1 Understanding sexual violence and gender-based violence as distinctive elements***

Especially with the adoption of the Rome Statute and its inclusion of gender-specific crimes, it became apparent that ‘sexual and gender-based violence’ consists of two distinct elements: sexual violence, and gender-based violence.<sup>44</sup> The UN Office of the High Commissioner for Human Rights (OHCHR) defines sexual violence as

a form of gender-based violence and encompasses any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting.<sup>45</sup>

This includes acts such as ‘rape, sexual abuse, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual enslavement, forced circumcision, castration and forced nudity.’<sup>46</sup>

Gender-based violence is defined as ‘any harmful act directed against individuals or groups of individuals on the basis of their gender’ which ‘may include sexual violence, domestic violence, trafficking, forced/early marriage and harmful traditional practices.’<sup>47</sup> Given these examples, it may be apparent that some crimes – such as forced pregnancy, forced marriage, and forced sterilisation – may be gender-based without being considered as ‘sexual’.<sup>48</sup> As an example, forced pregnancy could include forcing a pregnant individual to give birth, or by restricting their access to reproductive health care (*e.g.* abortion services).<sup>49</sup>

International law does not provide for a generally accepted definition of ‘sexual violence’. More than this, there is no clear consensus as to what makes ‘sexual violence’ sexual. Sivakumaran specifies two additional definitions of ‘sexual violence’ which deem to be particularly useful. The first is that of Special Rapporteur Gay J. McDougall who defined it as ‘any violence, physical or psychological, carried out through sexual means or by targeting sexuality’ covering ‘both physical and psychological attacks directed at a person’s sexual characteristics’ and ‘also characterizes situations in which two victims are forced to perform

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<sup>44</sup> *ibid* 61.

<sup>45</sup> OHCHR, ‘Analytical study focusing on gender-based and sexual violence in relation to transitional justice’ (2014) A/HRC/27/21, para 3.

<sup>46</sup> *ibid*.

<sup>47</sup> *ibid*.

<sup>48</sup> Rosenthal and others (n 20) 29.

<sup>49</sup> Amnesty International, ‘Forced Pregnancy: A Commentary on the Crime in International Criminal Law’ [2020] Amnesty International <<https://www.amnesty.org/en/wp-content/uploads/2021/05/IOR5327112020ENGLISH.pdf>> accessed 2 April 2023, 9-11.

sexual acts on one another or to harm one another in a sexual manner.<sup>50</sup> Examples provided include ‘forcing a person to strip naked in public, mutilating a person’s genitals, or slicing off a woman’s breasts’.<sup>51</sup> The second of these definitions can be found in the Elements of Crimes of the Rome Statute. Here, sexual violence as a crime against humanity as defined as

an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion [...].<sup>52</sup>

These definitions provide no clarity as to what ‘sexual characteristics’, ‘sexual acts’ or ‘acts of a sexual nature’ precisely entail. Sivakumaran finds this *lacuna* to be a cause for disagreement; was the act intentionally sexual, or was the act performed ‘so as to inflict the maximum amount of pain on the victim’?<sup>53</sup> Chapter 4 provides insight as to how courts and tribunals have adjudicated on these terms and whether more perspicuity has been given to them.

### ***2.3.2. Men and boys as victims of SGBV in armed conflict: hidden figures***

The focal point of this thesis is to shed light on the issue of men and boys as victims of SGBV, specifically in armed conflict, and their depiction within ICL. While SGBV predominantly affects women and girls in armed conflict due to systemic gender inequalities and discrimination, men and boys are also victims of CRSV.<sup>54</sup>

This is not a novel phenomenon. The castration of men has been performed in conflicts since ancient times.<sup>55</sup> The difference between then and now is that more attention has been brought to the subject.<sup>56</sup> Although, it was only until 2012 that the UN Security Council (UNSC) recognised for the first time in a press statement that ‘sexual violence disproportionately affects women and girls, while *also* affecting men and boys’.<sup>57</sup>

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<sup>50</sup> Sandesh Sivakumaran, ‘Sexual Violence Against Men in Armed Conflict’ (2007) 18 *European Journal of International Law* 253, 261; ECOSOC, ‘Final report submitted by Ms. Gay J. McDougall, Special Rapporteur’ (22 June 1998) E/CN.4/Sub.2/1998/13.

<sup>51</sup> Sivakumaran (n 50) 261.

<sup>52</sup> International Criminal Court, ‘Elements of Crimes’ (2000) ICC-ASP/1/3, art 7(1)(g)-6, element 1.

<sup>53</sup> Sivakumaran (n 50) 262.

<sup>54</sup> Norwegian Red Cross and International Committee of the Red Cross (n 1) 5.

<sup>55</sup> Sandesh Sivakumaran, ‘Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict’ (2010) 92 *International Review of the Red Cross* 259, 264.

<sup>56</sup> *ibid.*

<sup>57</sup> Maïke Isaac, ‘The Prosecution of Sexual Violence against Men in Armed Conflict in International Criminal Law: Past Omissions and Future Prospects for the Enhancement of the Visibility of Male Victimhood’ (Brandeis University 2015) <<http://rgdoi.net/10.13140/RG.2.1.1498.5686>> accessed 9 May 2023, 2 (emphasis added).

In 2014, a report by the UN Secretary General defined CRSV as the ‘rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and any other form of sexual violence of comparable gravity perpetrated against women, men or children with a direct or indirect (temporal, geographical or causal) link to a conflict.’<sup>58</sup> This report further highlights how SGBV suffers from underreporting due to, *inter alia*, ‘deep stigma, the failure of national legislation in many instances to recognize sexual violence against men and boys as a crime, the inadequacy of services specifically for male victims and the lack of access to legal services’.<sup>59</sup>

SGBV committed towards men is further underpinned by the masculinities of war.<sup>60</sup> Schulz explains this by explaining how ‘male-directed sexual violence is predominantly understood to comprise male survivors’ masculine identities, while simultaneously awarding a sense of hypermasculinity to the (mostly but not always) male perpetrators.’<sup>61</sup> Žarkov expounds on this from a sociological point of view, stating that ‘in wars, virility, aggression, and violence are indispensable to and celebrated as militarized masculine power’.<sup>62</sup> She goes further to explain how, even outside of the context of sexual violence, any male victim of war suffers loss. ‘It not only deprives men of symbolic and actual power by destroying their ability to protect themselves and others, it exposes this inability in a public manner’ and ‘deprives men of the social as well as very material means through which their power is built and sustained.’<sup>63</sup>

Such masculinities are ubiquitous in warfare. Žarkov explores this question in depth, calling attention to the symbolism which masculinity and heteronormativity hold within specific communities around the world, and more specifically in the Former Yugoslavia. Destruction and invasion of the biological aspects which make men ‘male’ within these communities – *i.e.* their genitalia – destroys the greater community of that victimised individual. Žarkov expounds on this specifically by stating the following:

In a phallogocentric culture, one man losing a penis symbolically emasculates *every* man. When masculinity is constructed through particular collective identities, and not only through power and heteronormativity, the violated male body becomes an issue of collectivity, and not only of an individual man’s manhood. Emasculation in that case carries multiple forms of symbolism because masculinity epitomises specific aspects of other collective identities. [...] For within collective identities, the phallic

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<sup>58</sup> UNSC, ‘Conflict-related sexual violence: Report of the Secretary-General’ (13 March 2014) S/2014/181, para 1.

<sup>59</sup> *ibid* § 7.

<sup>60</sup> Schulz (n 2) 28.

<sup>61</sup> *ibid*.

<sup>62</sup> Dubravka Žarkov, ‘Sexual Violence Against Men in Contemporary Warfare’ in Indira Rosenthal and others, *Gender and International Criminal Law* (1st edn, Oxford university Press 2022) 104.

<sup>63</sup> *ibid*.

power of the penis defines not only the virility of a single man, but also virility of his community and there can hardly be an appropriate restitution for its loss or destruction.<sup>64</sup>

This ‘homosexualisation’ of the individual has its motivation rooted in power and dominance by foisting a ‘female identity’ or ‘homosexual behaviour’, conceived to be ‘weakening and dishonouring’ towards them.<sup>65</sup> As of March 2023, 64 countries have laws which criminalise homosexuality in some way – some of which have suffered/suffer from armed conflicts (*e.g.* Sudan, Uganda, and Afghanistan).<sup>66</sup>

As the next chapter will show, the development of SGBV in ICL has taken decades to be realised into black-letter law, and even after has not remained static. If anything, SGBV is still undergoing serious development in ICL as explained in Chapter 4.

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<sup>64</sup> *ibid* 106.

<sup>65</sup> Alon Margalit, ‘Still a Blind Spot: The Protection of LGBT Persons during Armed Conflict and Other Situations of Violence’ (2018) 100 *International Review of the Red Cross* 237, 240.

<sup>66</sup> ‘Homosexuality: The Countries Where It Is Illegal to Be Gay’ (*BBC News*, 20 April 2018) <<https://www.bbc.com/news/world-43822234>> accessed 1 June 2023.

### 3. A Brief Historical Overview of Sexual and Gender-based Violence in International Criminal Law

A historical overview is imperative to understand the international criminal justice system as it currently exists, and its further development. This chapter will explore the history of SGBV within ICL, leading up to current developments. Particular attention will be given to the gender aspect, and outline provisions – if any – regarding SGBV. This chapter will also provide definitions for concepts and terms which are necessary to understand for the purpose of this thesis. Simply put, this chapter serves to provide a descriptive background into the general history of SGBV throughout ICL’s dynamic development and will therefore not discuss jurisprudence (to be discussed in Chapter 4).

In pursuit of following the timeline ICL’s creation and development, the post Second World War tribunals will serve as a starting point. These include the International Military Tribunal in Nuremberg (Nuremberg Tribunal) and the International Tribunal for the Far East (Tokyo Tribunal). Following this will be a description of the 1949 Geneva Conventions and the codification of IHL as it currently stands. This is particularly important as international courts and tribunals (ICTs) serve to hold individuals criminally responsible for ‘grave breaches’ of IHL, particularly in times of war and conflict.<sup>67</sup> Next, this chapter will focus on the creation of the *ad hoc* tribunals – namely the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). This will lead us to the eventual development of the International Criminal Court which will serve as an important foundation in providing contemporary international legal definitions under ICL. Additionally, the proliferation of other hybrid and internationalised criminal courts and tribunals will be considered and how they have assisted in the criminalisation of SGBV on the international level.

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<sup>67</sup> ICRC Advisory Service on International Humanitarian Law, ‘International Humanitarian Law and International Human Rights Law: Similarities and differences’ (ICRC, 2003)  
<[https://www.icrc.org/en/doc/assets/files/other/ihl\\_and\\_ihrl.pdf](https://www.icrc.org/en/doc/assets/files/other/ihl_and_ihrl.pdf)> accessed 3 May 2022.



### 3.1. Nuremberg and Tokyo Military Tribunals

In the wake of the Second World War, gender-based crimes gained recognition by tribunals set up to prosecute those individuals responsible for the mass of atrocities committed during the war – namely the Nuremberg and Tokyo Tribunals.<sup>68</sup> Sexual violence committed by soldiers was laboriously present during the Second World War as a part of policy.<sup>69</sup> Leaders within the Axis powers enforced the importance of women for recreational purposes, or pure ‘fun’, as a reward or as a means of ‘encouragement’.<sup>70</sup>

The Nuremberg Tribunal established jurisdiction over three categories of crimes: crimes against peace, war crimes, and crimes against humanity.<sup>71</sup> The two latter categories could be interpreted, *prima facie*, to include the acts of sexual violence against civilians given that the definition of war crimes refers to ‘murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory [...]’ and given that crimes against humanity mention ‘murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds [...]’.<sup>72</sup>

Despite the broad definitions and the evidence of various SGBCs occurring, no reference to ‘rape’ or any other forms of sexual violence was included in the language of the Charter.<sup>73</sup> Additionally, indictments of the defendants lacked any mention of sexual crimes.<sup>74</sup> Campanaro notes that this fact ‘inexcusably perpetuated the notion that rape is not as grave as other war crimes’ and entrenches the notion that sexual violence is an inextricable characteristic of war.<sup>75</sup> The Nuremberg Tribunal had the possibility to prosecute SGBCs, but neglected to do so.<sup>76</sup>

The Charter of the Tokyo Tribunal uses a similar language to its Nuremberg counterpart, also excluding any mention of SGBCs.<sup>77</sup> The same three categories of crimes are listed in the

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<sup>68</sup> Yi Ning Nina Lu, ‘Gender-Based War Crimes: Its Gradual Evolution and Future’ (*The Yale Review of International Studies*, 18 October 2019) <<http://yris.yira.org/essays/3538>> accessed 4 May 2022.

<sup>69</sup> Jocelyn Campanaro, ‘Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes’ (2001) 89(8) *Geo LJ* 2557, 2559.

<sup>70</sup> *ibid.*

<sup>71</sup> Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (signed 8 August 1945) 82 UNTS 279 (Nuremberg Charter), art 6.

<sup>72</sup> *ibid* arts 6(b)-6(c).

<sup>73</sup> Campanaro (n 69) 2561.

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid* 2561–2562.

<sup>76</sup> *ibid* 2562.

<sup>77</sup> Charter of the International Military Tribunal for the Far East (signed 19 January 1946) (Charter of the Tokyo Tribunal).

Charter; however, the definition of war crimes under Article 6(b) is more vaguely described as ‘violations of the laws or customs of war’ without listing any specific examples.<sup>78</sup> However, at the Tokyo Tribunal, sexual assault was recognised as a ‘secondary crime’.<sup>79</sup> Additionally, rape and other sexual crimes were included in the indictments of the defendants.<sup>80</sup> Although, as ‘secondary crimes’, convictions of SGBCs such as rape were listed in conjunction with other crimes such as ill-treatment, inhumane treatment, and as a ‘failure to respect family honour and rights’ – a first for post Second World War international criminal justice.<sup>81</sup> Much of this was evidenced by the atrocities which occurred in Nanking, China, resulting in the rape of around 20,000 women and girls (known as the ‘Rape of Nanking’).<sup>82</sup> Campanaro further argues that viewing such crimes as a sort of ‘minor infraction’ yoked to other ‘greater crimes’ rather than as independent crimes further anchors the idea of sexual crimes as simply a common component present in times of war.<sup>83</sup>

### **3.2. The development and codification of international humanitarian law principles**

As Jarvis and Gardam rightly put it, it is only fitting to consider IHL as the starting point in the discourse of gender within the framework of ICL.<sup>84</sup> Before the development of ICL as we understand it today, prohibitions of sexual violence in international law were almost exclusively provided for in IHL.<sup>85</sup> A notable distinction exists between two codified bodies of IHL: the Laws of Geneva which concern protections for victims of armed conflict, and the Laws of The Hague which govern conduct during hostilities.<sup>86</sup> Focus in this subsection will be given to the Laws of Geneva.

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<sup>78</sup> *ibid* art 6(b).

<sup>79</sup> Julie Mertus, ‘War Crimes Against Women: Prosecution in International War Crimes Tribunals.’ By Kelly Dawn Askin. The Hague, London, Boston: Martinus Nijhoff Publishers, 1997. Pp. Xviii, 455. Index. \$133; £84.’ (1999) 93 *American Journal of International Law* 740, 741.

<sup>80</sup> Campanaro (n 69) 2563.

<sup>81</sup> *ibid* 2563–2564.

<sup>82</sup> Miranda Das and Sukhdev Singh, ‘Crimes of Sexual Violence within International Criminal Law: A Historical Outline’ (2020) 14 *Journal of Politics and Law* 1, 4.

<sup>83</sup> Campanaro (n 69) 2564.

<sup>84</sup> Michelle Jarvis and Judith Gardam, ‘The Gendered Framework of International Humanitarian Law and the Development of International Criminal Law’, in Rosenthal and others (eds), *Gender and International Criminal Law* (1st edn, OUP 2022) 47.

<sup>85</sup> Fionnuala Ní Aoláin, ‘Gendered Harms and Their Interface with International Criminal Law’ (2014) 16(4) *International Feminist Journal of Politics* 622.

<sup>86</sup> Jarvis and Gardam (n 84) 51; ICRC, ‘Hague Conventions’ (*How does law protect in war?*) <<https://casebook.icrc.org/glossary/hague-conventions>> accessed 26 September 2022.

Article 27 of Fourth Geneva Convention states that ‘Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.’<sup>87</sup> This is the only *explicit* mention of rape within the four Geneva Conventions.<sup>88</sup> According to the commentary by the ICRC, Article 27 refers to acts which were also committed during the previous World War against women and children, including ‘rape committed in occupied territories, brutal treatment of every sort, mutilations etc.’<sup>89</sup> Additionally, the commentary refers to the two explicitly mentioned acts in the article – rape and enforced prostitution – as ‘acts constituting an attack on women's honour’.<sup>90</sup> Furthermore, Additional Protocol I to the Geneva Conventions (AP I) lays out provisions concerning the protection of women. In Article 76(1), it highlights that ‘[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.’<sup>91</sup> This rule concerns all women who find themselves in the territory of a party to a conflict.<sup>92</sup> Both of these articles are not listed in Article 85 of AP I as ‘grave breaches’ of IHL.<sup>93</sup> Moreover, Article 4 of Additional Protocol II (AP II) lists a number of sexual crimes as ‘outrages upon personal dignity’, including ‘humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.’<sup>94</sup> Victims of these crimes include ‘all persons’ and are thus prohibited against both men and women.<sup>95</sup> However, AP II lacks ratification by a large number of States.<sup>96</sup> When referring to the Laws of the Hague, almost no mention of SGBV is made. Only in Article 46 of the Convention respecting the Laws and Customs of War on Land of 1907 is reference made to the respect for ‘[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice’.<sup>97</sup> Here, the notion of ‘honour’ is clearly attached to that of the family, rather than of ‘women’ as

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<sup>87</sup> Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention), art 27.

<sup>88</sup> Patricia Viseur Sellers, ‘Sexual Violence and Preemptory Norms: The Legal Value of Rape’ (2002) 34 Case Western Reserve Journal of International Law 287, 297.

<sup>89</sup> ICRC, ‘Treaties, States Parties, and Commentaries - Geneva Convention (IV) on Civilians, 1949 - 27 -- Commentary of 1958’ (ICRC) <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=25179A620578AD49C12563CD0042B949>> accessed 15 April 2022.

<sup>90</sup> *ibid.*

<sup>91</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1977) (‘Additional Protocol I’ or ‘AP I’) art 76(1).

<sup>92</sup> ICRC, ‘Commentary of 1987: Protection of Women’ (ICRC) <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=933D8E1A38F44530C12563CD00436BC5>> accessed 4 May 2022.

<sup>93</sup> Additional Protocol I (n 91) art 85.

<sup>95</sup> Sellers (n 88) 299.

<sup>96</sup> *ibid.*

<sup>97</sup> Convention respecting the Laws and Customs of War on Land (adopted 18 October 1899, entered into force 26 January 1900) (‘Hague Convention IV’) art 46.

prescribed by the Geneva Conventions. It is also worth mentioning that the Laws of the Hague concerning lawful targets can very well have gendered consequences, particularly where women and girls are central to a conflict.<sup>98</sup>

The Geneva Conventions are viewed not just as treaty law, but as a part of international customary law, therefore binding all States, regardless of ratification status.<sup>99</sup> Additionally, in 2005, the ICRC undertook a study which concluded in the identification of 161 IHL norms as international custom.<sup>100</sup> In doing so, the ICRC established that the prohibition of ‘rape and other forms of sexual violence’ constituted a norm of customary IHL (Rule 93).<sup>101</sup> Rule 93 highlights the importance of this norm in both international and non-international armed conflicts. Henckaerts and others note here that ‘Common Article 3 of the Geneva Conventions (CA 3) does not explicitly mention rape or other forms of sexual violence’, yet still, ‘it prohibits “violence to life and person” including cruel treatment and torture and “outrages upon personal dignity”’, alluding to the language used in Article 4 of AP II. What is apparent in blackletter IHL is a total absence of the term ‘gender’, mostly since the concept was not clearly understood at the time.<sup>102</sup>

Moreover, the provisions of IHL expressly provide protections for women from sexual violence. The language used within the Geneva Conventions in relation to women regards the protection of their ‘honour’ and ‘modesty’, referring to their ‘inferior’ and ‘vulnerable’ status – all which primarily stem from the supposed differences of women on the basis of their biological sex.<sup>103</sup> The ICRC has since updated its Commentary to the First Geneva Convention, expressing that the concept of women’s honour’ is outdated and no longer ‘considered appropriate’.<sup>104</sup> While the Geneva Conventions underline the notions of equality and non-discrimination (including on the basis of sex), differentiation is allowed if it has a favourable impact, allowing for the inclusion of special provisions meant to protect women.

While many may agree that special protections for vulnerable individuals during armed conflict such as women and girls are important in the achievement of gender equality, it may be argued that placing women and girls at the centre of the discourse leaves little-to-no room

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<sup>98</sup> Jarvis and Gardam (n 84) 54–55.

<sup>99</sup> *ibid.*

<sup>100</sup> ICRC, ‘Welcome to the Customary IHL Database’ (*ICRC*) <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>> accessed 4 May 2022.

<sup>101</sup> Jean-Marie Henckaerts and others (eds), *Customary International Humanitarian Law*, vol I (CUP 2005) 323.

<sup>102</sup> Jarvis and Gardam (n 84) 51.

<sup>103</sup> *ibid.* 53.

<sup>104</sup> Knut Dörmann and others, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP 2016) footnote 161.

for acknowledging the experiences of male victims to sexual violence.<sup>105</sup> ‘If gender is a potentially powerful analytical, practical and political engine, it is one which is currently firing on only half its cylinders’ quotes Dolan.<sup>106</sup> Sivakumaran earlier defined that this lack of attention is likely due to the fear that dealing with sexual violence against men could remove the spotlight and necessary resources away from protecting women from sexual violence.<sup>107</sup> In spite of this, he argues that the resources and necessities on both sides are similar. ‘Just as with women and girls, men and boys may lose their reproductive capability either as a result of the physical abuse inflicted upon them – through castration, genital mutilation, and the like – or as a psychological consequence of the violence.’<sup>108</sup> Additionally, issues such as underreporting and fear of ostracization from one’s community are common occurrences in both female and male victims.<sup>109</sup>

What will become evident in the following subsections is that this gendered nature of IHL has permeated its way into ICL and its mechanisms. For example, rape and other forms of sexual violence have not been considered to be ‘grave breaches’ of IHL; rather, they go against one’s dignity and honour, a language similar to Campanaro’s contention in the previous subsection concerning the Nuremberg Trials.<sup>110</sup>

### **3.3. The emergence of *ad hoc* criminal tribunals: the ICTY and ICTR**

Both the ICTY and the ICTR were conceived by means of UNSC Resolutions 827 and 955 respectively.<sup>111</sup> Both tribunals were given the material jurisdiction to prosecute war crimes, crimes against humanity, and genocide. While the statutes of the ICTY and the ICTR have many similarities, there are key differences between them which reflect the nature of the conflict for which they were individually created.<sup>112</sup>

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<sup>105</sup> Jarvis and Gardam (n 84) 67.

<sup>106</sup> Chris Dolan, ‘Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence’ (2014) 96 *International Review of the Red Cross* 485, 486.

<sup>107</sup> Sivakumaran (n 55) 265.

<sup>108</sup> *ibid* 266.

<sup>109</sup> *ibid*.

<sup>110</sup> Jarvis and Gardam (n 84) 59–60; Campanaro (n 69) 2561-2562.

<sup>111</sup> UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (‘Statute of the ICTY’ or ‘ICTY Statute’); UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (‘Statute of the ICTR’ or ‘ICTR Statute’).

<sup>112</sup> Kelly D Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles Stefan A. Riesenfeld Symposium 2002’ (2003) 21 *Berkeley Journal of International Law* 288, 306.

Specifically, the ICTY was established in response to the surging number of reports of humanitarian and human rights violations which took place during the Yugoslav Wars, ‘including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing" [...].’<sup>113</sup> In particular, reports of sexual violence against both women and men garnered attention and led to investigations being conducted into these allegations in order to hold individuals criminally liable for their actions.<sup>114</sup> While various actors from the international community had conducted investigations into the situation and compiled evidence of rape and sexual violence, the large number of missions to the region generated an overarching sense of ‘mission fatigue’ and the ‘re-victimisation of some survivors’.<sup>115</sup>

In 1992, the UNSC established the Committee of Experts pursuant to Resolution 780.<sup>116</sup> In its Final Report, the Committee highlighted many accounts of rape and sexual violence. The report found that alongside women, men were also victims of sexual violence, including the ‘castration and mutilation of male sexual organs’.<sup>117</sup> ‘In camps where men are detained, they are also subjected to sexual abuse’ the report states, using witness testimonies to describe the horrid acts which men suffered in detention situations. These include instances where prisoners were forced to bite off the genitalia of other prisoners, electric shocks to the scrotum, and forced sexual acts amongst prisoners, one instance in particular being between a father and son who shared a cell.<sup>118</sup> In one detailed instance, Serb women were forced to stand nude in front of male prisoners, and any male prisoner who had an erection was castrated.<sup>119</sup> These reports highlighted the ‘systematic and widespread’ nature of sexual violence during the conflicts, indicating the use of rape and sexual violence as an organised ‘weapon of war’.<sup>120</sup>

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<sup>113</sup> UNSC Res 827 (n 111), 1.

<sup>114</sup> Grace Harbour, ‘International Concern Regarding Conflict-related Sexual Violence in the Lead-up to the ICTY’s Establishment’ in Serge Brammertz and Michelle Jarvais (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (OUP 2016), 19.

<sup>115</sup> *ibid* 20-21; UNCHR, ‘Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992’ (10 February 1993) UN Doc E/CN.4/1993/50, 20.

<sup>116</sup> UNSC Res 780 (6 October 1992) UN Doc S/RES/780; M Cherif Bassiouni, ‘The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia’ (1994) 5 *Criminal Law Forum* 279 <<http://link.springer.com/10.1007/BF01683220>> accessed 8 June 2022, 279.

<sup>117</sup> UNSC, ‘Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council’ (27 May 1994) UN Doc S/1994/674, annex, para 230(o).

<sup>118</sup> *ibid* para 247.

<sup>119</sup> *ibid*.

<sup>120</sup> Harbour (n 114) 21.

Within the same decade, the international community had simultaneously put its focus towards the genocide occurring in Rwanda.<sup>121</sup> Similarly, the UNSC had set up a Committee of Experts to investigate and compile reports of gross violations of IHL in Rwanda.<sup>122</sup> In 1994, the Committee found that large massacres over the last 45 years had taken place, primarily against the Tutsi population, representing pre-meditated executions of approximately half a million unarmed civilians. Such acts consisted of ‘severe human rights violations, including systematic, widespread and flagrant breaches of IHL, large-scale crimes against humanity and genocide.’<sup>123</sup> The report neglects to provide details on rape or sexual violence having taken place. Additionally, neither the first nor second reports of the Special Rapporteur from the UN Commission on Human Rights made any mention of rape or sexual violence of any kind.<sup>124</sup> A report in 1996 finally addressed allegations of rape and sexual violence; and while numerous forms of rape were listed – the main two being gang rape and incest – the report refers only to female victims of rape.<sup>125</sup>

With the creation of the *ad hoc* tribunals, some progress is made regarding SGBCs within the Statutes themselves, eventually further developed by case law (to be discussed in a later section). The ICTY provides for this direct link to the laws of Geneva and the laws of the Hague in Articles 2 and 3. While particularly the Geneva Conventions do make some reference to sexual crimes (as mentioned previously), there remains a condition: that the persons in question are protected by the relevant Convention.<sup>126</sup> Moreover, the sexual crimes within the Geneva Conventions are not considered to be ‘grave breaches’, although later jurisprudence of the ICTY would alter this by adapting a more liberal approach to the definition of ‘grave breaches’.<sup>127</sup> As it pertains to crimes against humanity under Article 5, explicit mention is made to ‘rape’ as a crime against humanity, though it may also be prosecuted by means of persecution, torture, enslavement, or inhumane acts where the *chapeau* elements for crimes

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<sup>121</sup> Lilian A Barria and Steven D Roper, ‘How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR’ (2005) 9(3) Int J Hum Rights 349, 352.

<sup>122</sup> Helen Hintjens, ‘The creation of the ICTR’ in Anne-Marie de Brouwer and Alette Smeulers, *The Elgar Companion to the International Criminal Tribunal for Rwanda* (Edward Elgar Publishing 2016) <<http://www.elgaronline.com/view/9781784711696.00009.xml>> accessed 10 June 2022, 19.

<sup>123</sup> UNSC, ‘Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council’ (4 October 1994) UN Doc S/1994/1125, annex, paras 42-43.

<sup>124</sup> UNCHR (n 115); UNCHR, ‘Report on the situation of human rights in Rwanda / submitted by René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994’ (12 August 1994) UN Doc E/CN.4/1995/12.

<sup>125</sup> UNCHR, ‘Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994’ (29 January 1996) UN Doc E/CN.4/1996/68.

<sup>126</sup> Askin (n 112) 309.

<sup>127</sup> *ibid* 310.

against humanity are met.<sup>128</sup> Sexual crimes could also be included within elements of genocide.<sup>129</sup>

Much of what has been said about the ICTY Statute translates into the ICTR Statute, especially concerning genocide. However, when examining SGBCs within the ICTR Statute, some differences can be found. The Statute makes a link to Common Article 3 to the Geneva Conventions which lists a clear-cut prohibition to various acts – some of which are referenced in Article 4 of the ICTR Statute with slight, though significant, amendments.<sup>130</sup> An example would be where Common Article 3(1)(c) prohibits ‘outrages upon personal dignity, in particular humiliating and degrading treatment’, Article 4 of the ICTR Statute goes further by including ‘[...] rape, enforced prostitution and any form of indecent assault’.<sup>131</sup>

The inclusion of SGBCs in their statutes is pivotal in the development of ICL as it is understood today. In Bluen’s opinion, ‘the tribunals have contributed to an international legal order in which sexual violence is considered as part of the rubric of atrocity of crimes.’<sup>132</sup>

### **3.4. The adoption of the Rome Statute and the creation of the International Criminal Court**

Nearly half a century after Nuremberg and Tokyo, numerous States deemed it appropriate to finally establish a permanent international criminal court – *the* International Criminal Court. The ICC’s creation is an ‘innovative and exciting development’ with its founding document as ‘one of the most complex international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from comparative criminal law [...]’.<sup>133</sup> On 17 July 1998, the Rome Statute of the International Criminal Court was adopted.<sup>134</sup> It entered into force on 1 July 2002 following the 60<sup>th</sup> State ratification in accordance with Article 126.<sup>135</sup>

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<sup>128</sup> ICTY Statute (n 111) art 5.

<sup>129</sup> Askin (n 112) 316; ICTY Statute (n 111) arts 4(2)(b) and 4(2)(d).

<sup>130</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention), art 3.

<sup>131</sup> First Geneva Convention (n 130) art 3(1)(c); ICTR Statute (n 111) art 4.

<sup>132</sup> Kely-Jo Bluen, ‘Globalizing Justice, Homogenizing Sexual Violence: The Legacy of the ICTY and ICTR in Terms of Sexual Violence’ (2016) 110 *American Journal of International Law* 214, 215.

<sup>133</sup> William Schabas, *An Introduction to the International Criminal Court* (CUP 2001) <<https://doi-org.proxy.library.uu.nl/10.1017/CBO9781139164818>> accessed 1 March 2023, 20.

<sup>134</sup> *ibid* 18.

<sup>135</sup> ICC, ‘The ICC at a Glance’ (*International Criminal Court*) <<https://www.icc-cpi.int/sites/default/files/Publications/ICCAAtAGlanceENG.pdf>> accessed 1 April 2023, 1; ICC Statute art 126(1).



The Rome Statute has jurisdiction over four categories of crimes: genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8), and the crime of aggression (Article 8 *bis*).<sup>136</sup> Notwithstanding separate requirements for the crime of aggression, these crimes must have been committed either after the entry of force of the Statute or after the date in which a State party has ratified the Statute in case done after 1 July 2002 (unless declared otherwise).<sup>137</sup> These crimes must have been committed on the territory of a State Party or by the national of a State Party.<sup>138</sup> Cases may either be referred to the Prosecutor by a State Party, or may be initiated *proprio motu* by the Prosecutor.<sup>139</sup> Cases may also be referred to the Prosecutor by the UNSC by means of a Chapter VII resolution.<sup>140</sup>

The laws and practice of the ICTY and ICTR were exemplary to the drafting of the ICC Statute.<sup>141</sup> Specifically, the inclusion of sexual crimes within the Statutes of the *ad hoc* tribunals for Yugoslavia and Rwanda was pivotal in paving the way for the inclusion of such crimes in the Rome Statute.<sup>142</sup> In the Statute, a number of sexual crimes are enumerated, such as ‘imposing measures intended to prevent births within the group’ within the context of genocide, and ‘rape, sexual slavery, enforced prostitution, forced pregnancy [...] enforced sterilisation, or any other form of sexual violence [...]’ as war crimes and crimes against humanity, amongst others (*e.g.* other inhumane acts, enslavement and the trafficking of women and children in particular).<sup>143</sup> Much of the credit for the explicit listing of these sexual crimes, and for the inclusion of a gender perspective within the Statute, can be attributed to women’s rights activist which formed the Women’s Caucus for Gender Justice in the International Criminal Court. This group also pushed for such crimes to be separated from the ‘problematic notion’ of victim’s ‘honour’ in relation to the criminalisation of sexual crimes.<sup>144</sup>

The Statute is the first example in ICL which states and defines the term ‘gender’, more specifically as a ground for persecution as a crime against humanity.<sup>145</sup> Its definition can be found in Article 7(3) which reads:

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<sup>136</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘Rome Statute’ or ‘ICC Statute’) arts 6-8 *bis*.

<sup>137</sup> Rome Statute (n 136) art 11, 15 *bis*-15 *ter*.

<sup>138</sup> *ibid* art 12.

<sup>139</sup> *ibid* arts 13-15.

<sup>140</sup> *ibid* art 13(b).

<sup>141</sup> Tanja Altunjan, ‘The International Criminal Court and Sexual Violence: Between Aspirations and Reality’ (2021) 22 German Law Journal 878, 879.

<sup>142</sup> Bluen (n 132) 215.

<sup>143</sup> Rome Statute (n 136) arts 6(d), 7(1)(g), 7(1)(k), 7(2)(c), 8(2)(b)(xxii).

<sup>144</sup> Altunjan (n 141) 880.

<sup>145</sup> Rome Statute (n 136) art 7(1)(h).

For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.<sup>146</sup>

Negotiations during the drafting of the Rome Statute concerning the inclusion of the word and its definition caused much division.<sup>147</sup> ‘On one side were the small, but vocal minority of conservative states and the Holy See, with the support of a number of similarly conservative NGOs, primarily from North Africa’ who were highly against the term’s inclusion, referring to it as ‘transgressive’.<sup>148</sup> Meanwhile, a large majority of States advocated for the term’s inclusion as ‘socially constructed femaleness and maleness’.<sup>149</sup> The definition leaves some ‘constructive ambiguity’, purposefully designed to syncretize polarising opinions.<sup>150</sup> While constrictive by making reference to ‘the two sexes, male and female’, effectively excluding other gender groups (*e.g.* non-binary, transgender, and intersex persons, etc.), the inclusion of ‘within the context of society’ leaves much room for interpretation.

In 2014, the Office of the Prosecutor (OTP) at the ICC released its Policy Paper on Sexual and Gender-Based Crimes.<sup>151</sup> This paper provides greater clarity, propagating a culture of best practice, and contributing to the current development of jurisprudence as it regards SGBCs.<sup>152</sup> The OTP emphasises that the definition of gender in the Rome Statute ‘acknowledges the social construction of gender’, and separates it from the definition of ‘sex’ which it defines as ‘the biological and physiological characteristics that define men and women’.<sup>153</sup> The OTP takes a gender neutral approach in addressing SGBV, both conjunctively and separately. Moreover, the OTP expounds upon the intersections between gender and other grounds of discrimination or ‘underlying inequalities’.<sup>154</sup> While most references are made to men/boys and women/girls, the OTP states that it will ‘take into account the evolution of internationally recognised human rights’ in accordance with Article 21(3) of the Rome Statute, and especially as to not have any disfavour placed on ‘gender’ or ‘other status’.<sup>155</sup>

Analysis of the laws and policies of the ICC proves that ICL is dynamic and alive, slowly reorienting itself and adapting to the changes in the world around us. However, practice will

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<sup>146</sup> *ibid* art 7(3).

<sup>147</sup> Rosenthal and others (n 20) 20.

<sup>148</sup> *ibid*.

<sup>149</sup> *ibid* 21.

<sup>150</sup> *ibid*.

<sup>151</sup> ICC OTP (n 10).

<sup>152</sup> *ibid* 10-11.

<sup>153</sup> *ibid* 3.

<sup>154</sup> *ibid* 13.

<sup>155</sup> *ibid* 15.

show that the ICC may be more digressive rather than progressive. An effective gender strategy must ‘rely on an understanding that gender is a socially constructed phenomenon that defines and enforces unequal power dynamics between females and males and operates intersectionally with other identities’.<sup>156</sup> Understanding this is entails understanding how gender ‘affects all aspects of society and social structures’ and that ‘sexual violence and other gender-based crimes are based in gendered power differentials’.<sup>157</sup>

### **3.5. The proliferation of other hybrid and international(ised) criminal courts and tribunals**

Since the turn of the century, many other types of international(-ised) and hybrid tribunals have come into existence. These include – though not limited to – the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Kosovo Specialist Chambers (KSC). These courts were all created with respect to particular conflicts which sparked their creation.

The SCSL was realised in 2002 by the Government of Sierra Leone in collaboration with the UNSC. At the turn of the 21<sup>st</sup> century, the Government of Sierra Leone sought to prosecute leaders of the Revolutionary United Front (RUF) who waged a civil war lasting nearly a decade.<sup>158</sup> In early 2002, an agreement was reached between the UN and Sierra Leone in which a Statute for the Special Court for Sierra Leone was agreed upon and adopted.<sup>159</sup>

In 2003, the UN and the Royal Government of Cambodia signed an Agreement Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, and the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, and thus established the ECCC.<sup>160</sup> The ECCC was created to hold accountable those individuals most responsible for crimes committed during the Khmer Rouge

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<sup>156</sup> *ibid* 42.

<sup>157</sup> *ibid*.

<sup>158</sup> Chernor Jalloh, ‘Special Court for Sierra Leone: Achieving Justice’ (2011) 32 *Michigan Journal of International Law* 395, 398.

<sup>159</sup> Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137 (‘Statute of the Special Court for Sierra Leone’ or ‘SCSL Statute’).

<sup>160</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (adopted 6 June 2003) 2329 UNTS 117; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (adopted 2 January 2001, as amended 27 October 2004) NS/RKM/0801/12 (ECCC Law).

regime and under the rule of the Communist Party of Kampuchea (CPK).<sup>161</sup> The ECCC Law enumerates a number of domestic and international crimes under its jurisdiction, including the crime against humanity of rape – the only explicitly sexual crime listed in the Law.<sup>162</sup>

The KSC was established in 2015 together with the Specialist Prosecutor's Office (SPO) following a report from the Council of Europe on 'Inhumane treatment of people and illicit trafficking in human organs in Kosovo' – known as the 'Marty Report'.<sup>163</sup> The report details that alleged 'serious crimes had been committed during the conflict in Kosovo, including trafficking in human organs' by members of the Kosovo Liberation Army (KLA).<sup>164</sup> The KSC was realised in 2015 by means of an amendment to the Constitution of Kosovo and the adoption of the Law on Specialist Chambers and Specialist Prosecutor's Office.<sup>165</sup>

Each of these tribunals above has very similar provisions concerning SGBV – much of them replicating the provisions laid out in the Rome Statute of the ICC with some minor differences. For example, the ECCC Law further stipulates that crimes against humanity (including rape) have 'no statute of limitations'.<sup>166</sup> Another example is Article 5 of the Statute of the SCSL which allows the prosecution of crimes in violation of the national Prevention of Cruelty to Children Act of 1926 relating to the abuse and abduction of girls.<sup>167</sup> In the Law on the KSC, emphasis is placed on the rights and protections of victims and witnesses of SGBV, including special measures concerning their involvement in trial proceedings.<sup>168</sup>

The following chapter will discuss how these institutions – from the *ad hoc* tribunals, to the ICC, and the internationalised/hybrid tribunals – have interpreted their laws through their prosecution on cases of SGBV against men.

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<sup>161</sup> John D Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (1st edn, University of Michigan Press 2014) 4.

<sup>162</sup> ECCC Law (n 160), art 5.

<sup>163</sup> Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 'Inhumane Treatment of People and Illicit Trafficking in Human Organs in Kosovo' (2017) Doc 12462 <<https://pace.coe.int/pdf/afabd5498f42080053406c343fa3cdda772470d95f4ef23f360de95bd495f217/doc.%2012462.pdf>> accessed 24 May 2023 ('Marty Report').

<sup>164</sup> *ibid* paras 1-2.

<sup>165</sup> Law No 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office 2015 (XK) ('Law on the KSC').

<sup>166</sup> ECCC Law (n 160) art 5.

<sup>167</sup> SCSL Statute (n 159) art 5.

<sup>168</sup> Law on the KSC (n 165) arts 19(3), 22(4), 23(2).

## 4. An Analysis of Sexual and Gender-based Violence against Men in International Criminal Jurisprudence

The laws upon which any court or tribunal is based upon serve as an essential starting point, especially for this thesis. What this chapter aims to show is the contentiousness of holding individuals accountable for SGBV committed against men within these courts and tribunals at the international level, and how these laws are further interpreted into jurisprudence. The structure of this chapter follows a similar chronological pattern to that of the previous one, starting with the *ad hoc* tribunals, moving onto the ICC, and ending with the internationalised and hybrid tribunals before finally discussing cases concerning evidence of SGBV against men which have yet to be prosecuted at the international criminal level. This chapter solely focuses on developments and jurisprudence concerning SGBV against men and boys from an analytical perspective with some descriptive elements for context. Points of praise and criticism are raised throughout, assessing whether these judgements may be considered as triumphs or setbacks for victims of these crimes.

### 4.1. The ICTY and the ICTR: two steps forward, one step back

Both the ICTY and the ICTR were pioneers in the fields of ICL as it regards the prosecution of SGBV. More specifically, the ICTY was the first in achieving a conviction for sexual violence against male victims. Meanwhile, the ICTR was expanding definitions relevant to the prosecution of sexual violence which are still referenced in judgements today.

Beginning with the ICTY, huge achievements were made with the prosecution of the ‘Butcher of Omarska’, Duško Tadić, a Bosnian Serb politician and President of the Serb Democratic Party in Kozarac, Bosnia and Herzegovina (BiH).<sup>169</sup> The Trial Judgement provides evidence of sexual mutilation against a male prisoner in the Omarska Camp.<sup>170</sup> Witnesses were forced to ‘lick his naked bottom’ and ‘to suck his penis’ and then to bite off one of his testicles

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<sup>169</sup> *Prosecutor v Duško Tadić* (Trial Judgement) IT-94-1-T (7 May 1997) paras 180-192.

<sup>170</sup> *ibid* para 45.

before spitting out and being let free.<sup>171</sup> The accused was found guilty for these crimes consisting as cruel treatment (war crime) and other inhumane acts (crime against humanity) under Article 3(1)(a) and Article 5(i) of the ICTY Statute.<sup>172</sup> Though it was not proven that he had committed the acts of sexual violence himself, the Trial Chamber found that on the basis of customary international law that he was personally culpable for ‘assisting, aiding and abetting, or participating in’ such acts.<sup>173</sup> The *Tadić* judgment was the first ever to successfully prosecute sexual violence against both female *and* male victims, although they were not labelled as ‘sexual violence’.<sup>174</sup>

*Tadić* was not the only case which prosecuted acts of sexual violence committed towards men. In the *Češić* case, evidence was presented that the accused had ‘intentionally forced, at gunpoint, two Muslim brothers detained at Luka Camp to perform fellatio on each other in the presence of others’ and that ‘he was fully aware that this was taking place without the consent of the victims’.<sup>175</sup> This sexual assault constituted rape as a crime against humanity, and humiliating and degrading treatment as a war crime.<sup>176</sup>

Other cases before the ICTY were, however, less successful in prosecuting such crimes. In the informally-named *Čelebići* case, the Trial Chamber found one of the accused guilty for the war crimes of wilfully causing great suffering or serious injury and cruel treatment for ‘the placing of a burning fuse cord around the genital areas’ of two male victims.<sup>177</sup> Moreover, he was found liable for forcing two brothers to commit fellatio on each other, which was charged as both inhumane treatment and cruel treatment as war crimes.<sup>178</sup> The Chamber further expressed in the judgement that, had the act been ‘pleaded in an appropriate manner’ by the prosecution, it could have constituted rape.<sup>179</sup> Thus, while the accused was successfully convicted for these acts, they were ultimately not characterised as ‘sexual violence’ or ‘rape’. The *Simić* case presented evidence of ‘ramming a police truncheon in the anus of a detainee.

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<sup>171</sup> *ibid* para 206.

<sup>172</sup> *ibid* paras 722-730.

<sup>173</sup> *Prosecutor v Duško Tadić* (n 169) para 666.

<sup>174</sup> Kelly Askin, ‘Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status’ (1999) 93 *American Journal of International Law* 97, 100; ICTY, ‘Landmark Cases’ (*ICTY*) <[<sup>175</sup> \*Prosecutor v Ranko Češić\* \(Sentencing Judgement\) IT-95-10/1-S \(11 March 2004\) paras 13-14.](https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases#:~:text=Duško%20Tadić%3A%20first%20Ever%20trial%20for%20sexual%20violence%20against%20men&text=This%20trial%20of%20the%20former,trial%20since%20Nuremberg%20and%20Tokyo.></a> accessed 1 June 2023.</p></div><div data-bbox=)

<sup>176</sup> *ibid* para 107.

<sup>177</sup> *Prosecutor v Željko Delalić et al* (Judgement) IT-96-21 (16 November 1998) (*Čelebići Case*) paras 1019-1048.

<sup>178</sup> *ibid* paras 1062-1066.

<sup>179</sup> *ibid* para 1066.

Other incidents involved forcing male prisoners to perform oral sex on each other [...] sometimes in front of other prisoners.<sup>180</sup> This act of sexual violence was referenced in the Trial judgement under the heading ‘Evidence relevant to other acts’, and characterised as torture, not as sexual violence.<sup>181</sup> In *Brđanin*, guards in the Omarska camp attempted to force an elderly Bosnian Muslim man to rape a female detainee before he was murdered.<sup>182</sup> The Trial Chamber found that ‘the threat of rape constituted a sexual assault *vis-à-vis* the female detainee’, unreservedly ignoring the idea of the man himself as a victim under duress.<sup>183</sup>

Even in cases where acts are labelled as ‘sexual’ or ‘rape’, it has been complicated to prove such acts beyond reasonable grounds. In the Second Amended Indictment in the *Sikirica et al* case, two individuals were charged with the crimes against humanity and war crimes of murder, torture, rape, inhumane acts and cruel treatment for acts such as forcing a man to ‘[engage] in fellatio on another prisoner and having objects forced into his anus.’<sup>184</sup> These crimes were never convicted. *Todorovic* provides examples of the acts of guards forcing six different prisoners to forcefully engage in fellatio, which were charged as rape.<sup>185</sup> These charges were dropped by means of a guilty plea in which the prosecution and the accused agreed that some facts were true, including ‘ordering six men to perform fellatio on each other at the police station in Bosanski Šamac, BiH on three different occasions.’<sup>186</sup>

It is clear that a vast number of evidence of SGBV was presented at the ICTY, although the number of failed convictions of CRSV towards men outweighs that of the successes. While some of the reasons for this seem to be procedural, it begs the question whether there is also influence stemming from traditional or conservative values, and societal taboos. Žarkov explains how the rape of men was long considered a heavily taboo topic in Yugoslav media.<sup>187</sup> Specifically, the lack of attention towards the rape of men compared to that of women proves that ‘there must be some difference in the meaning of rape in relation to masculinity and femininity’ since ‘the rape of a woman does not destroy her femininity in the same way it destroys man’s masculinity.’<sup>188</sup>

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<sup>180</sup> *Prosecutor v Blagoje Simić et al* (Judgement) IT-95-9-T (17 October 2003) para 728.

<sup>181</sup> Sivakumaran (n 55) 273.

<sup>182</sup> *Prosecutor v Radoslaw Brđanin* (Judgement) IT-99-36-T (1 September 2004) para 516.

<sup>183</sup> *ibid.*

<sup>184</sup> *Prosecutor v Duško Sikirica et al* (Second Amended Indictment) IT-95-8-PT (3 January 2001) para 46.

<sup>185</sup> *Prosecutor v Stevan Todorović* (Second Amended Indictment) IT-95-9 (19 November 1998) paras 44-46.

<sup>186</sup> *Prosecutor v Stefan Todorović* (Sentencing Judgement) IT-95-9/1-S (31 July 2001) paras 8-9.

<sup>187</sup> Žarkov (n 62) 113.

<sup>188</sup> *ibid* 114.

At the ICTR, little-to-no mention is made in the court’s jurisprudence concerning SGBV against men; the focus was heavily on women as victims. Despite this, one case deserves notable mention for the purpose of this thesis – that is the case against Mr Jean-Paul Akayesu, former *bourgmestre* of the Taba commune in Rwanda. Within this role, he was consequentially in complete control over public order within the area, including over the police forces.<sup>189</sup> Known for being the first case to convict an individual for genocide, the case heavily focused on sexual violence, including rape.<sup>190</sup> The Trial Chamber noted that, in defining the term ‘rape’, that ‘there is no commonly accepted definition of the term in international law’, despite the term being used by numerous witnesses in their testimonies.<sup>191</sup> The Trial Chamber therefore defined ‘rape’ and subsequently ‘sexual violence’ as follows:

[t]he Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, 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. [...] The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.<sup>192</sup>

Scholars welcomed this definition as being both ‘broad and sensible’ as these definitions widened the scope of acts which may be considered as ‘rape’ or ‘sexual violence’<sup>193</sup>

However, a few months following the *Akayesu* judgement, the ICTY released its judgement in the *Furundžija* case where the Trial Chamber also provided its own definition of the elements of ‘rape’. Here, it found that rape consisted of

- (i) 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;

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<sup>189</sup> Askin (n 174) 106.

<sup>190</sup> *ibid* 105-106.

<sup>191</sup> *Prosecutor v Jean-Paul Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) para 686.

<sup>192</sup> *ibid* para 688.

<sup>193</sup> Askin (n 174) 109; Thomas Charman, ‘A Story That Can(Not) Be Told: Sexual Violence against Men in ICTR and ICTY Jurisprudence’ in Sofia Stolk and Renske Vos (eds), *International Law’s Collected Stories* (Springer International Publishing 2020) 65.



(ii) by coercion or force or threat of force against the victim or a third person.<sup>194</sup>

This definition is exclusionary to the experiences of male victims of sexual violence by restricting to the male-perpetrator/female-victim dialogue with references to specific biological body parts.<sup>195</sup> Regardless, the ICTY reiterated this definition in the *Kunarac* case, agreeing with the findings in *Furundžija*.<sup>196</sup> Regardless of the innovative definitions in *Akayesu*, which was the fruit of the Trial Chamber's own analysis based on definitions provided for in national legislations, *Furundžija* conducted its own analysis of national legislation, and concluded that 'the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus' is the most important element.<sup>197</sup>

While there is a stark contrast in the amount of SGBV cases against men between the ICTY and ICTR, there are achievements and downfalls to be recognised within both institutions. The ICTY is the first of its kind to express that men can be victims of such crimes, and to different extents. Although not every mention of SGBV against men lead to a conviction, the mere fact that the evidence presented is now an integral part of international criminal jurisprudence is an achievement on its own. On the other hand, there seems to have been reluctance to label the crimes in more liberal terms – namely as rape or sexual violence – and instead labelled under torture, cruel or inhumane treatment, or serious bodily harm. In tandem, the ICTR made substantive progress with its definitions of 'rape' and 'sexual violence'. While the ICTR did not focus on SGBV committed against male victims, its definitions have allowed for a more gender-inclusive approach for future cases to consider, creating space for male victims of CRSV to be recognised as such.

## **4.2. The International Criminal Court: a work in progress or doomed from the start?**

With a Statute that comprises a more inclusive approach to SGBCs, the ICC should technically allow for (continuous) greater success as the first permanent international criminal court. As will be discussed in this section, the scarcity of successful prosecution at the ICC, with

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<sup>194</sup> *Prosecutor v Anto Furundžija* (Judgement) IT-95-17/1-T (10 December 1998)

<sup>195</sup> Charman (n 193) 66.

<sup>196</sup> *Prosecutor v Dragoljub Kunarac et al* (Judgement) IT-96-23-T & IT-96-23/1-T (22 February 2001) paras 437-438.

<sup>197</sup> *Prosecutor v Furundžija* (n 194) para 181.

17 per cent of cases charging sexual violence resulting in conviction, has various causes, many lying in procedural matters.<sup>198</sup>

The first case to successfully prosecute an individual for sexual violence committed against men was that of Mr Jean-Pierre Bemba Gombo, former president of the *Mouvement de libération du Congo* (MLC) political party which he founded, and former commander-in-chief of its *Armée de libération du Congo* (ALC) military branch.<sup>199</sup> In March 2016, Mr Bemba was convicted for multiple crimes, including rape as a crime against humanity and a war crime – specifically, the rape of both women and men by MLC soldiers.<sup>200</sup> The judgement highlighted evidence of such crimes committed also against men, including the following:

three armed soldiers forcefully penetrated P23's anus with their penises in his compound, while family members and his neighbour looked on. In light of the above, the Chamber finds that [...] three perpetrators, by force, invaded P23's body by penetrating his anus with their penises. After the events, P23 could not walk, as his anus was swollen and he was treated only with traditional leaves. People in his community disrespected him. He considered himself a 'dead man'.<sup>201</sup>

The case was heralded by many as a step forward in combatting SGBV at the international criminal level and setting a standard for the ICC.<sup>202</sup> However, on appeal, the judgement of the Trial Chamber was overturned, and Mr Bemba was acquitted of all charges.<sup>203</sup> The reasons for this are two-fold: 1) the Trial Chamber had convicted Mr Bemba for crimes which fell outside the scope of the Confirmation of Charges, and 2) the Trial Chamber erred in concluding that the accused had 'failed to take all necessary and reasonable measures in response to MLC crimes [...]'.<sup>204</sup> This acquittal consequentially entails that 5,000+ victims participating are no longer eligible to claim reparations as compensation for the harm suffered, assistance programmes of the Trust Fund for Victims (TFV) aside.<sup>205</sup>

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<sup>198</sup> Rosenthal and others (n 20) 23; ICTY, 'In Numbers' (*ICTY*, September 2016) <<https://www.icty.org/en/features/crimes-sexual-violence/in-numbers>> accessed 10 June 2023; FIDH and Women's Initiatives for Gender Justice, 'Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor Bensouda's Legacy' (18 June 2021) <<https://www.fidh.org/IMG/pdf/cpiproc772ang-1.pdf>> accessed 10 June 2023.

<sup>199</sup> *Prosecutor v Jean-Pierre Bemba Gombo* (Trial Judgement) ICC-01/05-01/08 (21 March 2016) para 1.

<sup>200</sup> *ibid* paras 633-638.

<sup>201</sup> *ibid* para 494.

<sup>202</sup> Karen Allen, 'Bemba Conviction a Step Forward for ICC and Africa' *BBC News* (21 June 2016) <<https://www.bbc.com/news/world-africa-36585195>> accessed 11 June 2023.

<sup>203</sup> *Prosecutor v Jean-Pierre Bemba Gombo* (Appeal's Judgement) ICC-01/05-01/08 A (8 June 2018).

<sup>204</sup> *ibid* para 196.

<sup>205</sup> FIDH, '5,000 Victims of Bemba's Crimes in Central African Republic Anxiously Await Reparation' (*International Federation for Human Rights*, 20 November 2017) <<https://www.fidh.org/en/issues/international-justice/5-000-victims-of-bemba-s-crimes-in-central-african-republic-anxiously>> accessed 16 June 2023; ICC, 'Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic' (*International Criminal Court*, 13 June 2018) <<https://www.icc->

Similar to a number of cases at the ICTY, the ICC has utilised sexual violence against men simply as evidence to support other charged crimes. In the *Muthaura et al* case, confirmed charges contained evidence of the forced circumcision of Luo men in Kenya.<sup>206</sup> Medical records expressed that men were ‘treated for traumatic circumcision and penile amputation’, and in one case ‘a 22-year-old man's penis was entirely cut off.’<sup>207</sup> Furthermore, the Pre-Trial Chamber expressed that ‘not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence’ and concluded that the acts were instead committed with ‘ethnic prejudice’.<sup>208</sup> In a Decision by the Pre-Trial Chamber, it was highlighted that the prosecution included forced circumcision as ‘other forms of sexual violence’ as a crime against humanity. However, the Chamber established that

the acts of forcible circumcision cannot be considered acts of a ‘sexual nature’ as required by the Elements of Crimes but are to be more properly qualified as ‘other inhumane acts’ within the meaning of article 7(l)(k) of the Statute. The Chamber reaches 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.<sup>209</sup>

The legal representatives for the victims (LRVs) responded to this decision by stating that the Pre-Trial Chamber may have ‘relied on an outdated conceptualisation of sexual violence’, negating the idea that all forms of sexual violence involve power dynamics.<sup>210</sup> In stating this, the LRVs quoted the following from Kamau-Rutenberg:

The forced circumcisions were not just acts of violence; they must be understood as occurring within the context of Luo feminisation. This feminisation fit within the context of a biased history that tells Kenya’s story as that of brave Kikuyu warriors, the Mau Mau, who rescued the state from its colonial masters. [...] Other ethnic groups are constructed as weaker, belonging less, having less of a stake in: as feminine. The forced circumcisions represented Kikuyu men declaring that they wield a masculine power over the feminised Luo men whose flesh they mutilated.<sup>211</sup>

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[cpi.int/news/following-mr-bembas-acquittal-trust-fund-victims-icc-decides-accelerate-launch-assistance](https://www.cpi.int/news/following-mr-bembas-acquittal-trust-fund-victims-icc-decides-accelerate-launch-assistance)> accessed 11 June 2023.

<sup>206</sup> *Prosecutor v Francis Kirimi Muthaura et al* (Decision on the Confirmation of Charges) ICC-01/09-02/11 (23 January 2012) para 262.

<sup>207</sup> *ibid.*

<sup>208</sup> *ibid* para 265-266.

<sup>209</sup> *Prosecutor v Francis Kirimi Muthaura et al* (Decision on the Prosecutor's Application for Summonses to Appear) ICC-01/09-02/11 (8 March 2011) para 27.

<sup>210</sup> *Prosecutor v Francis Kirimi Muthaura et al* (Victims’ Observations on the “Prosecution’s application for notice to be given under Regulation 55(2) with respect to certain crimes charged”) ICC-01/09-02/11 (24 July 2012) para 12.

<sup>211</sup> *ibid* 11.

This clearly explains the power dynamics involved in the feminisation of Luo men by means of forced circumcision and penile amputation – an important and germane facet of the situation which was rejected by the Pre-Trial Chamber.

A recent judgment of the court from 2021 further illustrates how procedural regulations can interfere in the successful conviction of SGBV against men and boys at the ICC. In the *Ongwen* case, the former Sinia Brigade Commander of the Lord's Resistance Army (LRA) in Northern Uganda, and former child soldier himself, was found guilty for 61 counts of crimes against humanity and war crimes, including the first convictions of forced marriage and forced pregnancy.<sup>212</sup> In the Decision on the Confirmation of Charges, no evidence of SGBV against men and boys were documented.<sup>213</sup> However, during the trial phase, allegations of sexual violence against men and boys were introduced by the LRVs which stated that '[a] significant number of male participating victims were either victims of rape, forced to carry out rapes, or forced to abuse the corpses of killed abductees in sexualised ways.'<sup>214</sup> The LRVs further emphasised to the Chamber the importance of sexual violence's intention to assert power and dominance over the victims(s) – in essence the 'humiliation, emasculation, homo-sexualisation and "feminisation" of the victim' – and has less to do with sexual gratification.<sup>215</sup> Subsequently, the Trial Chamber rejected the admission of such evidence, as it was not considered in the confirmed charges.<sup>216</sup> If such acts were committed, and were pertinent to the case, then the OTP had failed to initially include them in their charges.

The *Ntaganda* case provides the first clear and triumphant example of how SGBV against men may be successfully charged and prosecuted. The former Deputy Chief of Staff in charge of Operations and Organisation in the *Forces Patriotique pour la Libération du Congo* (FPLC) was found guilty of 18 counts of crimes against humanity and war crimes, including rape and sexual slavery as both a crime against humanity and a war crime, and persecution.<sup>217</sup> The judgement included evidence from individuals who witnessed sexual crimes being committed by militia soldiers. Witnesses stated that 'soldiers anally penetrate[d] men with their penises or by using "bits of wood"' in which one afterwards suffered and died as a result.<sup>218</sup> The case also concluded

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<sup>212</sup> Nisha Varia, 'LRA's Ongwen: A critical first ICC conviction' (*Human Rights Watch*, 13 March 2021)

<<https://www.hrw.org/news/2021/03/13/lras-ongwen-critical-first-icc-conviction>> accessed 11 June 2023.

<sup>213</sup> *Prosecutor v Dominic Ongwen* (Decision on the Confirmation of Charges) ICC-02/04-01/15 (23 March 2016).

<sup>214</sup> *Prosecutor v Dominic Ongwen* (Victims' requests for leave to present evidence and to present victims' views and concerns in person) ICC-02/04-01/15 (2 February 2018) para 16.

<sup>215</sup> *ibid* para 17.

<sup>216</sup> *Prosecutor v Dominic Ongwen* (Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests) ICC-02/04-01/15 (6 March 2018) paras 55-59.

<sup>217</sup> *Prosecutor v Bosco Ntaganda* (Trial Judgement) ICC-01/04-02/06 (8 July 2019) para 32.

<sup>218</sup> *ibid* paras 623, 940.

that intra-party sexual violence may still be charged and convicted as a war crime.<sup>219</sup> This case is a huge step in the development of international jurisprudence on SGBV, particularly against men.<sup>220</sup>

The final case before the ICC which is critical for the purpose of this topic is the *Abd-Al-Rahman* case, currently in the trial phase. Mr Abd-Al-Rahman, is an alleged former senior leader of the Janjaweed Militia in West Darfur, Sudan.<sup>221</sup> The case is the first at the Court to charge persecution on the grounds of gender as it pertains to crimes said to have been committed against men and boys of Fur ethnicity. As outlined by the Prosecution, ‘the victims’ Fur ethnicity, combined with the socially-constructed gender role presuming males to be fighters, underpinned the perpetrators perception of them as rebels or rebel sympathisers.’<sup>222</sup> These charges could be seen as a true reflection of the commitments outlined in the OTPs Policy Paper on Sexual and Gender-Based Violence. Additionally, it will be interesting to see how the Trial Chamber will conclude its findings in this case without any similar precedent for guidance.

Thus, the ICC has made attempts to achieve international justice for SGBV against men, but has successfully done so only once. The impediment seems to be primarily procedural. In cases such as *Ongwen*, the question as to why the charges of SGBV against men and boys were not originally a part of the confirmation of charges could be posed. Beyond the procedural aspects, it also seems that some Chambers are still holding onto more conservative ideals surrounding sexual violence and what considers violence of a ‘sexual nature’. While such cases are important in the fight against global impunity, it is important to note that, as set forth in Article 21(2) of the Rome Statute, the ICC is not bound by the principle of *stare decisis*;<sup>223</sup> although, the Court tends to refer to its own precedent and that of other criminal tribunals, likely as a means to ensure legal certainty and regularity in its judgements and legal reasoning.<sup>224</sup> Moreover, the burden of proof lies with the OTP to bring charges to prosecute,

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<sup>219</sup> Altunjan (n 141) 888.

<sup>220</sup> *ibid* 879.

<sup>221</sup> *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)* (Prosecution’s submission of the Document Containing the Charges) ICC-02/05-01/20 (29 March 2021) annex 1, para 1.

<sup>222</sup> *ibid* annex 1, para 129.

<sup>223</sup> Rome Statute (n 136) art 21(2).

<sup>224</sup> Agnieszka Jachec-Neale, ‘The Unintended Consequences of International Court Decisions’ (*Lieber Institute West Point*, 19 November 2020) <<https://lieber.westpoint.edu/unintended-consequences-international-courts-decisions/>> accessed 20 June 2023.

including SGBCs which the OTP has proven in the past to have missed related opportunities to prosecute.<sup>225</sup>

### **4.3. Internationalised and hybrid tribunals: the future of effective prosecution for SGBV against men?**

Internationalised and hybrid tribunals have also added to the increasing amount of jurisprudence of SGBV against men within ICL; specifically, there have been cases before the SCSL and the ECCC which have addressed SGBV towards men.

At the SCSL, the *RUF* case is most noteworthy in discussing successful prosecution of sexual violence against men. The trial judgement listed several cases of sexual violence concerning male victims, such as ordering a couple to engage in intercourse in front of other captured civilians, forcing a man's daughter to wash his penis, and both male and female captives being forced to have sex with each other.<sup>226</sup> Additionally, it was noted that 'sexual violence was combined with sexual mutilations, with the rebels slitting the private parts of several male and female civilians with a knife.'<sup>227</sup> In discussing the elements of the crime of rape, the Trial Chamber concluded that the definition of 'invasion' – namely 'the penetration of any part of the body of either the victim or the [a]ccused with a sexual organ' by genital, anal or oral penetration, and/or 'the penetration of the genital or anal opening of the victim with any object or any other part of the body' – is broad enough to be considered as gender neutral 'as both men and women can be victims of rape.'<sup>228</sup> Although, a defect was present in the indictment concerning charges of sexual violence only having been charged against women; the Chamber eventually considered this defect had been 'cured in a timely, clear and consistent manner' and thus allowed for evidence from male victims to be charged.<sup>229</sup>

Contrary to the *RUF* case, two cases before the SCSL in which sexual violence against men was committed were left unprosecuted. In the *AFRC* case, the indictment stated that attacks included, amongst others, physical and sexual violence against civilian men', but limited

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<sup>225</sup> Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential* (Cambridge University Press 2019) 255 <<https://www.cambridge.org/core/books/prosecuting-sexual-and-genderbased-crimes-at-the-international-criminal-court/AFC30CF36F45A7E4AEB26FEF5D9F3758>> accessed 20 June 2023.

<sup>226</sup> *Prosecutor v Issa Hassan Sesay et al* (Trial Judgement) SCSL-04-15-T (2 March 2009) paras 1205, 1207.

<sup>227</sup> *ibid* para 1208.

<sup>228</sup> *ibid* para 146.

<sup>229</sup> *ibid* paras 1304,

charges to those against women and girls.<sup>230</sup> As such, the Trial Chamber did not consider evidence or charges of sexual violence against men.<sup>231</sup> A similar situation arose in the case against Charles Taylor, former Liberian president from 1997 until 2003.<sup>232</sup> The indictment against Mr Taylor did not list any crimes of sexual violence against men and boys. Such evidence was presented later in the proceedings by the prosecution without (sufficient) prior notice to the Defence, although the original indictments by the prosecution included citations of sexual violence against men and boys; these allegations were eventually removed from the final charges.<sup>233</sup> The Trial Chamber subsequently concluded that it would not consider such evidence.<sup>234</sup> Thus, only one case at the SCSL provides a positive outcome in the prosecution of such crimes.

The ECCC has also done its part in yielding jurisprudence concerning SGBV against men, particularly with regards to the crime of forced marriage. In Case 002/02, primarily against Mr Khieu Samphan, the Trial Chamber found that the definition of rape did not allow for men to be considered as victims within the context of forced marriage.<sup>235</sup> The Co-Prosecutors advised that the Chamber adopt a more gender-neutral definition of rape ‘under which both women and men could be the subject of a “physical invasion”’ as ‘forcing any person or couple to engage in sexual relations without their consent is clearly a crime of equal seriousness to other crimes against humanity.’<sup>236</sup> There were numerous instances of individuals forced to marry and consummate their marriages by means of sexual intercourse. Punishment for not doing so could have resulted in rape.<sup>237</sup> According to one witness, ‘men also suffered greatly when they had to force themselves to rape their wives.’<sup>238</sup> Consequently, the crimes were charged as rape within the context of forced marriage under the crime against humanity of ‘other inhumane acts’.<sup>239</sup> In assessing men as victims in this regard, the Chamber referred to the *Akayesu* definition of sexual violence, therefore adopting a more gender-neutral approach. However, while it did find men were unable to refuse consummating their marriages and acknowledged them as victims of sexual violence, the absence of ‘clear evidence’, particularly

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<sup>230</sup> *Prosecutor v Alex Tamba Brima et al* (Amended Consolidated Indictment) SCSL-04-16-PT (18 February 2005) paras 39, 51.

<sup>231</sup> *Prosecutor v Alex Tamba Brima et al* (Trial Judgement) SCSL-04-16-T (20 June 2007) paras 968-969.

<sup>232</sup> *Prosecutor v Charles Ghankay Taylor* (Trial Judgement) SC SL-O.3-O 1-T (18 May 2012) para 12.

<sup>233</sup> *ibid* para 126, 128.

<sup>234</sup> *ibid* para 134.

<sup>235</sup> *Trial Chamber Case 002/02 Against Nuon Chea and Khieu Samphan* (Trial Judgement) 002/19-09-2007/ECCC/TC (16 November 2018) para 731.

<sup>236</sup> *ibid* para 730.

<sup>237</sup> *ibid* para 3658.

<sup>238</sup> *ibid* para 3684.

<sup>239</sup> *ibid* para 3700.

on its ‘impact on males’, did not allow the Chamber to conclude such crimes to constitute the crime against humanity of ‘other inhumane acts’ through sexual violence as such.<sup>240</sup> This case remains one of the only cases in ICL which makes such reference to men as victims with reference to forced marriages.

As seen between these two courts, there is very limited, but highly significant cases concerning male victims of sexual violence. Notwithstanding this, the cases which did not effectively prosecute such crimes seem to base their reasoning on various grounds – some being procedural defects such as in the *AFRC* and *Taylor* cases. Although the ECCC found the accused guilty of rape within the context of forced marriages, substantive reasons – namely the lack of proper evidence – barred similar crimes to be prosecuted as sexual violence within the same context. Additionally, the ECCC and the SCSL have further entrenched the broad and gender-neutral definition of sexual violence as put forward in the *Akayesu* judgement, further establishing this notion in international criminal jurisprudence.

#### **4.4. Evidence without conviction: a hopeful future**

There are other instances where evidence of CRSV has been recorded which are yet to face prosecution. As referred to previously, the KSC and the SPO were created in order to prosecute crimes committed during the Kosovo War between 1 January 1998 and 31 December 2000.<sup>241</sup> While none of the cases before the KSC currently involve accounts of SGBV committed against men during the conflict, there are reports which document that such crimes did take place during the time period of the institution’s mandate. Halili documented the experiences of a Kosovar man having been raped by a Serbian parliamentary member during the Spring of 1999 at the age of 17.<sup>242</sup>

In 2014, a law was passed by the Kosovo Assembly to provide legal recognition for survivors of CRSV in Kosovo.<sup>243</sup> This subsequently led to the establishment of the Government Commission to Recognise and Verify Survivors of Sexual Violence During the Kosovo War

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<sup>240</sup> *ibid* para 3701.

<sup>241</sup> Law on the KSC (n 165) art 7.

<sup>242</sup> Dafina Halili, “‘I Never Imagined This Could Be Done Also to Men’” (*Kosovo 2.0*, 27 October 2022) <<https://kosovotwopointzero.com/en/i-never-imagined-this-could-be-done-also-to-men/>> accessed 23 June 2023.

<sup>243</sup> UN Women, ‘In Kosovo, Legal Recognition of War-Time Sexual Violence Survivors after 18 Years’ (*UN Women*, 19 October 2017) <<https://www.unwomen.org/en/news/stories/2017/10/feature-kosovo-legal-recognition-of-war-time-sexual-violence-survivors>> accessed 25 April 2023.



which began its work in 2018.<sup>244</sup> By January 2023, it had only received around 1,870 applications.<sup>245</sup> In October 2022, only 67 of the applicants before the Commission were men.<sup>246</sup> The commission was set to cease receiving applications in February 2023, but is due to be extended due to the ‘low number of applications’.<sup>247</sup> The reasons for the low number are likely due to the lack of sensitivity (especially towards male victims), the scepticism of being ‘labelled’ as a victim of CRSV, the reluctance or inability of victims to provide detailed accounts of the acts, and fear of having their identity exposed (which was unfortunately the case for some victims in the *Milošević* case before the ICTY).<sup>248</sup> For men, underreporting in this regard may be linked to stigmatisation, and the lack of expertise in dealing with male victims of CRSV, particularly since many of the organisations in this area focus on women’s rights and female survivors.<sup>249</sup>

Evidence of CRSV against men has been reported in several other situations. At the ICC, there are several situations undergoing preliminary examinations and investigations which could eventually turn into active cases. In the Bangladesh/Myanmar situation concerning the forced deportation and persecution of the Rohingya population from Myanmar into Bangladesh, sexual violence has not been limited to just women and girls, but also towards men and boys, towards the *hijra* – a third gender – and transgender individuals.<sup>250</sup> The two latter categories of individuals have reportedly been targets for rape and sexual violence.<sup>251</sup> In Nigeria, the OTP has learned that SGBV has been specifically targeted against both men and women by Boko Haram, and the acts constitute persecution on the grounds of gender.<sup>252</sup> In Venezuela, the OTP has also identified occurrences of sexual violence against both men and

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<sup>244</sup> *ibid*; Brikena Avdyli, ‘Sexual violence as a weapon of war – support to victims and survivors’ (*Konrad Adenauer Stiftung*, 19 June 2022) <<https://www.kas.de/en/web/newyork/un-agera-blog/detail/-/content/international-day-for-the-elimination-of-sexual-violence-in-conflict>> accessed 23 June 2023.

<sup>245</sup> Serbeze Haxhijaj, ‘Kosovo’s War Rape Survivors Scheme Hindered by Enduring Stigmas’ (*Balkan Insight*, 27 January 2023) <<https://balkaninsight.com/2023/01/27/kosovos-war-rape-survivors-scheme-hindered-by-enduring-stigmas/>> accessed 25 April 2023.

<sup>246</sup> Halili (n 242).

<sup>247</sup> Haxhijaj (n 245).

<sup>248</sup> *ibid*.

<sup>249</sup> Halili (n 242).

<sup>250</sup> Andrea Raab and Siobhan Robbs, ‘The Prosecutor’s Request for a Ruling on the ICC’s Jurisdiction over the Deportation of Rohingya from Myanmar to Bangladesh: A Gender Perspective’ (*EJIL: Talk!*, 18 April 2018) <<https://www.ejiltalk.org/the-prosecutors-request-for-a-ruling-on-the-iccs-jurisdiction-over-the-deportation-of-rohingya-from-myanmar-to-bangladesh-a-gender-perspective/>> accessed 25 June 2023; Lindsey Green and others, ‘“Most of the Cases Are Very Similar.”: Documenting and Corroborating Conflict-Related Sexual Violence Affecting Rohingya Refugees’ (2022) 22 *BMC Public Health* 700, 9.

<sup>251</sup> ICC, ‘Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar’ (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar) ICC-01/19-27 (14 November 2019), para 86.

<sup>252</sup> ICC OTP, ‘Report on Preliminary Examination Activities’ (5 December 2019) para 186.

women having taken place in detention settings.<sup>253</sup> The Registry recently submitted a report which included accounts from various victims of SGBCs, including a gender-diverse individual who was ‘sexually tortured and exposed as a rapist to other prisoners, who sexually abused of the victim’, a male who received ‘electric shocks to his genitals and intimate parts’, and a non-binary individual who was stripped naked, received electric shocks to their genitals, and forced to perform oral sex.<sup>254</sup> Another male victim suffered a Rottweiler dog biting off his testicles.<sup>255</sup>

The situation in Ukraine has recently fallen under the purview of the ICC and is currently in the investigations stage.<sup>256</sup> A report on CRSV in Ukraine from March 2017 by the OHCHR identifies that both men and women have been subjected to sexual violence following the Russian annexation of Crimea in 2014.<sup>257</sup> ‘Beatings and electrocution in the genital area, rape, threats of rape, and forced nudity were used as a method of torture and ill-treatment to punish, humiliate, or extract confessions.’<sup>258</sup> Particularly, one man was ‘subjected to electroshocks (with wires attached to his fingers and genitals), mock executions, and threatened with rape and being cut into pieces’ after being arrested by the Ukrainian forces.<sup>259</sup> Following the Russian invasion in February 2022, the OHCHR reported that SGBV against men have also been committed.<sup>260</sup> It was reported that ‘[t]he cases of sexual and gender-based violence in confinement affected mostly men, both civilians and prisoners of war’ by Russian authorities, including ‘rape, electric shocks on genitals, traction on the penis using a rope, and emasculation.’<sup>261</sup> Additionally, forced nudity was said to have been imposed on a 17-year-old boy.<sup>262</sup> As this case is still very novel for the ICC, there are yet to be any reports from the Court itself on the situation.

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<sup>253</sup> *ibid* para 79.

<sup>254</sup> ICC, ‘Situation in the Bolivarian Republic of Venezuela I’ (Public Redacted Version of “Final Consolidated Registry Report on Article 18(2) Victims’ Views and Concerns Pursuant to Pre-Trial Chamber’s Order) ICC-02/18-40-Red (20 April 2023) annex I, para 57.

<sup>255</sup> *ibid* annex I, paras 57-58.

<sup>256</sup> ICC, ‘Ukraine’ (*International Criminal Court*) <<https://www.icc-cpi.int/situations/ukraine>> accessed 23 June 2023.

<sup>257</sup> OHCHR, ‘Conflict-Related Sexual Violence in Ukraine’ (16 March 2017) A/HRC/34/CRP 4, para 9.

<sup>258</sup> *ibid* para 58(e).

<sup>259</sup> *ibid* para 70.

<sup>260</sup> OHCHR, ‘Report of the Independent International Commission of Inquiry on Ukraine’ (15 March 2023) A/HRC/52/62, para 78.

<sup>261</sup> *ibid* para 81.

<sup>262</sup> *ibid* para 83.

## 5. Conclusion

ICL is a field of law which has altered and developed over time, continues to do so today, and will continue for decades to come. Sivakumaran expresses that the jurisprudence of ICL does not suggest that a ‘single judicial philosophy exists’ and that ‘judges and chambers will adopt their own approach to the subject.’<sup>263</sup> This is evident in the brief analysis as previously conducted. Beyond these institutions, he further insists that there is tension in addressing SGBV against men and boys alongside combatting SGBV against women and girls. ‘There may be real reason to focus on one particular aspect of the problem’; although this creates various practical, political and theoretical issues such as the (re)allocation of resources, ensuring attention is paid to SGBV and CRSV against women and girls as the most vulnerable and affected victims, and ensuring that there is a clear understanding of gender-based violence and those who experience it within the various contexts where it occurs.<sup>264</sup>

This raises a key question: ‘[d]o we relinquish the notion of sexual violence as the archetypal women's human rights abuse, and reframe it as a human rights abuse more generally?’ While this would broaden the scope for both female and male victims, it could dismantle the idea of women as victims and men as perpetrators, though each are not exclusive to them. Moreover, she asks ‘[i]f feminists stop talking about rape, who will?’<sup>265</sup> The topic of SGBV against men is just as gendered as the same topic concerning women. It might be possible to ‘acknowledge and address the reality of male victims and even female agents whilst still maintaining sexual violence as a feminist issue within the framework of human rights - though definitely not as *exclusively* a women's issue’.<sup>266</sup>

This discussion is inherently gendered, thus making it complex depending on the focus: male, female, or other victims.<sup>267</sup> The idea of ‘rape’ as a ‘weapon of war’ (as mentioned in Chapter 3.3) could imply that the penis itself is a weapon.<sup>268</sup> Such an idea sets female victims at the centre of the conversation about SGBV during armed conflict and consequentially causes male victims to fade into the background. Moreover, the discussion of men as victims of SGBV

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<sup>263</sup> Sivakumaran (n 55) 275.

<sup>264</sup> *ibid* 276.

<sup>265</sup> Miranda Alison, ‘Wartime Sexual Violence: Women’s Human Rights and Questions of Masculinity’ (2007) 33 *Review of International Studies* 75, 90.

<sup>266</sup> *ibid*.

<sup>267</sup> Janine Natalya Clark, ‘The Vulnerability of the Penis: Sexual Violence against Men in Conflict and Security Frames’ (2019) 22 *Men and Masculinities* 778, 783.

<sup>268</sup> *ibid* 782.

and CRSV ‘[challenges] dominant gendered scripts of who does what to whom in war.’<sup>269</sup> This does not denote that the discussion surrounding male victims should be side-lined or repressed, nor is that the conclusion of this thesis. Instead, a balance should exist where equitable attention is paid to the various scenarios and numerous experiences victims of SGBV in warfare may face.

Furthermore, a lack of clear and common understanding of basic concepts (*e.g.* ‘gender’ and ‘sex’), reluctance of male victims to speak out due to stigmatisation and ostracization, procedural impediments within international criminal institutions, their repeated reluctance to label crimes as ‘sexual’ as such, and the lack of (clear) evidence have engendered a ‘justice gap’.<sup>270</sup> In May 2023, Chief Prosecutor at the ICC Mr Karim Khan announced a call for submissions in light to a revision of the OTP’s 2014 Policy Paper on Sexual and Gender-Based Crimes.<sup>271</sup> The OTP hopes to ‘reflect recent advances in its pursuit of accountability for sexual and gender-based crimes as well as incorporate new and innovative approaches to investigating and prosecuting these acts.’<sup>272</sup> In doing so, it is important that the ‘justice interests’ of victims of CRSV and SGBV are clearly and effectively understood in order to fill this gap.<sup>273</sup> This is not only important for the ICC as the first and only permanent international criminal court, but for institutions/organisations, academics, practitioners, care providers, and other stakeholders concerned. Without such understanding, there can be no adequate response to such violence, especially as it pertains to the pursuit of justice under the law and affording reparations to victims.<sup>274</sup> Until the international criminal justice and legal systems can learn from this, criminal prosecution will not be a preferred means of achieving justice for the ones who require it the most.

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<sup>269</sup> *ibid.*

<sup>270</sup> Clare McGlynn and Nicole Westmarland, ‘Kaleidoscopic Justice: Sexual Violence and Victim-Survivors’ Perceptions of Justice’ (2019) 28 *Social & Legal Studies* 179, 180.

<sup>271</sup> ICC, ‘The Office of the Prosecutor Launches Public Consultation to Renew Policy Paper on Sexual and Gender-Based Crimes’ (*International Criminal Court*, 12 May 2023) <<https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-renew-policy-paper-sexual-and-gender-based>> accessed 13 May 2023.

<sup>272</sup> *ibid.*

<sup>273</sup> *ibid.*

<sup>274</sup> Fionnuala Ní Aoláin, Catherine O’Rourke and Aisling Swaine, ‘Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice’ [2015] *Harvard Human Rights Journal* 1, 3.

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Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (signed 8 August 1945) 82 UNTS 279 (Nuremberg Charter)

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