Published online by the Journal of International Law and International Relations.

ISSN: 1712-2988.

The *Journal of International Law and International Relations* is a peer-reviewed scholarly journal that fosters interdisciplinary discourse at the nexus of international law and international relations, but the opinions expressed in the Journal of International Law and International Relations are those of the individual authors and do not necessarily reflect the opinions of the journal, its editors or its publisher.

The *Journal of International Law and International Relations* gratefully acknowledges the financial and institutional support of the Faculty of Law and the Munk School of Global Affairs at the University of Toronto.

Subscription to the Journal of International Law and International Relations, beginning in 2013, will be open and free of charge. All issues, pass, present, and future, will forthwith be made available online at www.jilir.org.

Please direct all questions to:
Journal of International Law and International Relations
University of Toronto
84 Queen's Park Crescent, Toronto, Ontario M5S 2C5

Questions may also be sent, via e-mail, to editor@jilir.org.

Past issues of the Journal of International Law and International Relations can be found online at Westlaw, Hein Online, Proquset and EBSCOhost.

The citation for this issue is (2014) 10 J Int'l L & Int'l Rel

EDITORIAL BOARD

The *Journal of International Law and International Relations* is published by the University of Toronto Faculty of Law.

JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS
VOLUME 10
WINTER 2014

Contents

EDITORS' ACKNOWLEDGEMENT

LIN CONG, CAROLINE SENINI & SEAN TYLER

JILIR is a joint project of the University of Toronto Faculty of Law and the Munk School of Global Affairs. It is our goal to facilitate and promote scholarly exploration of the nexus of international law and international relations. Our commitment to this endeavor stems from a belief in the complementarity of these fields and the value of stimulating conversation on their common themes. The recent expansion of the Master of Global Affairs program at the Munk School of Global Affairs boosts the diversity of voices in our review process and better equips the journal to ensure it achieves this mandate.

This issue marks a unique collaboration, which we are very honoured to have participated in, with the University of Toronto Faculty of Law's International Human Rights Program (IHRP). On 8 February 2013, the IHRP and the Munk School of Global Affairs convened a conference of leading scholars, international lawyers, and policy makers to discuss "Sexual Violence in the Recent Conflicts in Libya & Syria: Challenges to Protecting Victims & Protecting Accountability." In a special section of this issue, three articles and one book review from that conference are presented. We hope they serve to supplement the impact of the conference by bringing further attention to the crucial issues of sexual violence in these conflicts.

JILIR is a team effort, with many hands shaping the current volume. Over eighty students contributed to this volume, and we extend our deepest gratitude to each of them. From the Associate Editors to the Senior Editors, the journal simply could not exist without the time and intellect these students volunteer. We are also deeply appreciative of the team of our Business Manager, Pedram Moussavi, and our Executive Editors who served so ably on this volume: Nerin Ali, Glenn Gibson, and Jim Robson.

It is the blessing of Editors in Chief to inherit the momentum from previous years' work and the curse to have only a fleeting window in which to build for the future success of JILIR. With that said, our debt to Jonathan Bright, Kate Robertson and Graham Smith—our predecessors—is immense for their innovative zeal and commitment to expanding the journal's reach.

We also have the upmost faith that next year's Editors in Chief—Joel Parsan and Rebeca Ramirez of the Munk School of Global Affairs, and Amy Tang from the Faculty of Law—will continue to build on JILIR's successes.

We also wish to express our deep appreciation for professors Jutta Brunnée, Karen Knop, and Audrey Macklin for their guidance, and the entire Advisory Board for their time and support.

Our greatest acknowledgements must go to the contributors. The pages that follow are a testament to months of editorial and peer review, feedback, dialogue and revision. Through it all, these scholars have been receptive, committed and patient. We are very proud that they chose to publish their excellent scholarship in our journal.

Lin Cong, Caroline Senini & Sean Tyler
Editors-in-Chief

Resolving Claims to Self-Determination

JENNIFER A. ORANGE*

Andrew K. Coleman, *Resolving Claims to Self-Determination: Is There a Role for the International Court of Justice?* (London and New York: Routledge, 2013)

In March 2014, following the close of the 22nd Winter Olympic games in Sochi, Russia, the world turned its view from the athletes' podiums to the militants rolling into the Crimean peninsula of the Ukrainian state. By March 16th, the Russian government had supported a referendum of Crimeans, and announced that 87% had voted to "reunite with Russia as a constituent part of the Russian Federation".[1] On March 18th, President Putin gave a lengthy speech recalling the historic relationships between the Crimean and Russian peoples and decrying the tyranny that had oppressed the Crimeans, among other Russian groups, over the ages. He celebrated the referendum as "the first time in history [the residents of Crimea] were able to peacefully express their free will regarding their own future."[2]

Andrew K. Coleman's book, *Resolving Claims to Self-Determination: Is there a role for the International Court of Justice?*,[3] could not be more timely. In this volume, which grew out of his Ph.D. thesis on the same subject, Coleman attempts to provide a framework whereby claims for self-determination could be resolved peacefully, and with the expertise and impartiality of the International Court of Justice (ICJ) that would support the claims' legitimacy. His central question is, "to what extent can and should legal tribunals by applying legal analysis, and principles of international law, assist with the resolution of claims for self-determination?"[4]

The book answers this question through four parts that logically set out Coleman's argument. Part One establishes a framework by which the court could determine whether or not a claim for self-determination is legitimate. Part Two describes how in theory and practice the international community determines whether or not a nation or people is a "state". Part Three analyzes the different jurisdictions of the ICJ and argues that the court's advisory jurisdiction offers promise for resolving claims of self-determination. Part Four assesses the potential contribution of the ICJ for

* SJD candidate, Faculty of Law, University of Toronto.

[1] "Crimean Referendum: What does the ballot paper say?", BBC News, March 10, 2014, online: <http://www.bbc.com/news/world-europe-26514797>.

[2] Bridget Kendall, "Crimea Crisis: Russian President Putin's Annotated Speech", BBC News, March 19, 2014, online: <http://www.bbc.com/news/world-europe-26652058> [*Kendall*].

[3] Andrew K. Coleman, *Resolving Claims to Self-Determination: Is there a role for the International Court of Justice?*, (London and New York: Routledge, 2013) [*Coleman*].

[4] Coleman, *supra* note 3 at 18.

Vol 10, pages 1-3. ISSN: 1712-2988.

"highly political matters."

Coleman crafts his argument in incremental steps, making his case point by point, so that reading the book in its entirety makes the thesis whole. Nonetheless, the book is also a helpful resource in its parts. For example, Part 2 contains a section on state recognition and the role of states in determining statehood, which helpfully outlines competing theories and a history of state practice. Many sections of the book provide a topical review of theory and ICJ case law so as to provide a stand-alone reference for research or for teaching sections of a course on self-determination or international law. As necessary, Coleman repeats cases and theories so that each section can be read on its own.

Throughout *Resolving Claims to Self-Determination*, three themes permeate Coleman's argument. The first theme is that claims for self-determination are relational. The right to self-determination arises from a relationship of domination/subjugation more than a purely territorial dominion. Using decisions such as the Supreme Court of Canada's *Reference re Secession of Quebec*[5] and the ICJ's *Kosovo Opinion*,[6] Coleman finds that freedom from oppression and alien subjugation is the "golden thread" that determines the legitimacy of claims for self-determination.[7]

Coleman's second theme is that states support or oppose claims for self-determination on political rather than legal grounds, and that such reasoning threatens long-term peace and stability. As states act in their self-interest, they do not recognize claims for self-determination on the basis of legal criteria, which leads to the inconsistent application of legal norms by states.[8]

The third theme of the book is that the international community should strengthen the role of its institutions so that they can resolve disputes before they develop into armed conflicts. As Coleman notes, most claims for self-determination simmer for an average of 13 years before they break out into violence,[9] and then take an average of 14 subsequent years of serious conflict before the group's goals are met.[10] The cost in human life, violations of human rights and economic growth is staggering. Coleman refers to a "structural deficiency" in the UN's ability to resolve disputes regarding self-determination that leaves claimants with no option other than violence.[11]

Interestingly, all three of these themes were present in President Putin's March 18 speech: he spoke of the oppression of the Crimean and Russian peoples, the political motivations underlying the West's opposition to Crimea's independence and the weakness of international institutions.

Coleman's argument requires the reader to imagine a world where the ICJ could contribute to the resolution of highly political claims, but he

---

[5] *Reference re Succession of Quebec* [1998] 2 SCR 217.
[6] *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, (Advisory Opinion)*, [2010] ICJ Rep 403.
[7] Coleman, *supra* note 3 at 82-83.
[8] *Ibid*, at 141.
[9] *Ibid*, at 6-7.
[10] *Ibid*, at 3.
[11] *Ibid*, at 11.

acknowledges the practical difficulties claimants may face. For example, only states have standing before the ICJ, making it impossible for a subjugated people to bring a claim to the court.[12] Furthermore, state parties must consent to the contentious jurisdiction of the court before any state-to-state complaint may be heard.[13] Thus it is unlikely, for example, that Ukraine could ever bring a claim to the court regarding Russia's intervention in Crimea. For this reason, among others, Coleman argues that the ICJ's contribution would best be realized through its advisory jurisdiction.

Can we imagine what would happen if the United Nations General Assembly followed Coleman's method and submitted the Crimean claim for self-determination to the ICJ for an Advisory Opinion? In the event that the court held that the claim and the actions of the Russian government violated international law, would future oppression and violence be avoided? Would President Putin change his policies? In spite of Coleman's carefully crafted argument, the sum of these political challenges leaves the reader with a less optimistic view of the court's potential. In Putin's March 18th speech, he acknowledged the weak stature of institutions:

> Colleagues. Like a mirror, the situation in Ukraine reflects what is going on and what has been happening in the world over the past several decades. After the dissolution of bipolarity on the planet, we no longer have stability. Key international institutions are not getting any stronger; on the contrary, in many cases, they are sadly degrading.[14]

But perhaps this is precisely why Coleman is making his case. He inspires us to think about the potential for the court to act as a "legal guardian" for the international community.[15] If states used the ICJ's advisory jurisdiction to determine legal questions at the request of the UN General Assembly or Security Council, political negotiations could move forward between the parties with the aid of relevant UN organs.[16] Even if the ICJ is not able to assist in the resolution of the particular conflict at issue, by clarifying legal issues it could improve the capacity of the international community to resolve future conflicts.[17] If we use our legal imagination, perhaps we can envision an ICJ Advisory Opinion regarding the legality of Crimea's secession that would aid in stabilizing the future in an increasingly vulnerable region.

---

[12] Coleman, *supra* note 3 at 16, citing Article 34(1) of the *ICJ Statute*: United Nations, *Statute of the International Court of Justice*, 18 April 1946, online: <http://www.refworld.org/docid/3deb4b9c0.html> [accessed 23 March 2014].
[13] *Ibid*, *at* 17, citing Article 36 of the *ICJ Statute*.
[14] Kendall, *supra*, note 2.
[15] Coleman, *supra* note 3 at 315.
[16] *Coleman*, *supra* note 3 at 316.
[17] *Ibid*, *at* 291.

Toward Post-National Membership?
Tensions and Transformation in German and EU Citizenship

KIRAN BANERJEE*

I. INTRODUCTION

We are in a time of transition, or at least uncertainty, with regard to the status and future of our contemporary conceptions of community, membership, and belonging. The recent explosion of global discussions, both scholarly and political, about immigration, multiculturalism, and the role of universal human rights norms in constraining state action, are a testament to the unsettled and contested nature of our traditional conceptual frameworks in light of the rapid developments of the post-war era.

Very much at the intersection of such concerns has been the long-running debate over post-national citizenship, which has focused on perceived transformations in the meaning and significance of citizenship rights and status in relation to nationality, the state and emerging transnational forces. Beginning with Yasemin Soysal's influential and provocative *The Limits of Citizenship*, proponents of the post-nationalist position have argued that we have witnessed and are continuing witness to a fundamental transformation in the nature of citizenship.[1] Pointing to a

* Vanier Scholar and Doctoral Candidate, Department of Political Science, University of Toronto.
I am grateful for input and comments from Joseph Carens, Randall Hansen, Willem Maas, Anthony Mohen, and Phil Triadafilopoulos, as well from participants at the conferences where this piece has been presented. The author also is thankful for the helpful suggestions of the JILIR editorial team, as well as the Journal's anonymous reviews. Any remaining errors or omissions remain my own. Date accepted with revisions: November 6, 2013.

[1] See Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006); David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (Baltimore: Johns Hopkins University Press, 1996); Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Colombia University Press, 1996); Saskia Sassen, "Towards Post-National and Denationalized Citizenship" in Engin F Isin & Bryan S Turner eds, *Handbook of Citizenship Studies* (London: Sage, 2002); Saskia Sassen, *Territory,*

Vol 10, pages 4-30. ISSN: 1712-2988.

diverse set of phenomena such as globalization, the expansion and entrenchment of extensive migrants' rights decoupled from national citizenship, and the growing power of human rights norms to shape state behavior and policy, they have sought to examine shifts in the forms of identity, rights, and status, that have traditionally been associated with national membership, while also problematizing the substance, location, and category of citizenship as traditionally understood.[2] At their most bold, these scholars question "the assumption that national citizenship is central to membership in a polity" and argue that our contemporary world is characterized by the diminished importance—and inevitable irrelevance—of the nation state and national citizenship, alongside the rise of a "broadened, post-national constellation of membership."[3] Moreover, they argue that states are experiencing a "weakening of sovereign control" as globalization challenges the competencies of the nation state and human rights discourse further inscribes normative bounds on the exercise of sovereignty with regard to immigration and the status of non-citizen residents.[4]

In response, a number of trenchant critiques have challenged the claims of post-nationalists on both empirical and conceptual grounds. These critics have argued for the persisting centrality of national citizenship to full membership in a state, called into question the significance of international norms by pointing to the role of domestic dynamics, and suggested that post-nationalist theorists irresponsibly, if unwittingly, glorify what is at most a derivative legal status, amounting to little more than a tribute to second class citizenship.[5] Simply put, given the continued preeminence of the nation state, any "citizenship" outside of national citizenship is not worthy of the name and talk of the declining importance of national membership is at best

---

Authority, Rights: from Medieval to Global Assemblages (New York: Columbia University Press, 2006); Yasemin Soysal, *The Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994).

[2] See Bosniak, *supra* note 1 at 17-36; Jacobson, *supra* note 1 at 18-41; Soysal, *supra* note 1 at 137-67.

[3] Soysal, *supra* note 1 at 3, 164.

[4] Jacobson, *supra* note 1 at 9.

[5] For powerful challenges to post-nationalist claims regarding the importance of international human rights norms in transforming non-citizen rights and immigration policies of states, see Christian Joppke, "Why Liberal States Accept Unwanted Immigration" (1998) 50:2 Wld Pol at 226; Christian Joppke, ed, *Challenge to the Nation State: Immigration in Western Europe and the United States*, (Oxford: Oxford University Press, 1998); Christian Joppke, "Exclusion in the Liberal State: The case of Immigration and Citizenship Policy" (2005) 8:1 European J of Soc. Theory at 43; Christian Joppke, "Citizenship" in M. Gibney & R. Hansen, eds, *Immigration and Asylum: from 1900 to the Present* (Oxford: Oxford University Press, 2005) at 86. For important critiques of the empirical and normative issues entailed by assertions about the devaluation of national citizenship, see Christian Joppke, "Asylum and State Sovereignty: A Comparative Analysis of the United States, Germany, and Britain" (1997) 30:3 Comp Pol Stud at 259 ; Christian Joppke, "The Vulnerability of Non-Citizens" (2009) 39:2 Perspectives on Europe - CES at 18; Randall Hansen, "A European Citizenship or a Europe of Citizens? Third Country Nationals in the EU" (1998) 24:4 JEMS at 751; Randall Hansen, "The Poverty of Postnationalism" (2009) 38:1 Theor Soc at 1. Recently, Willem Maas has also raised important concerns regarding the robustness of EU citizenship as a form of transnational membership; see Willem Maas, "Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union" (2007) 15:2 Colum J Eur L at 265; Willem Maas, "Migrants, States, and EU Citizenship's Unfulfilled Promise" (2008) 12:6 Citizenship Studies at 583.

unrealistic and, at worst, dangerous.

This long-running debate over the nature of contemporary articulations of citizenship has taken on increasing practical significance, especially in the European context. There, the unfolding implications of the European Union, growing doubts about the integrationist policies of several member states, and attempts of domestic governments to shore up the meaning of national "membership" all suggest a series of further potential transformations and shifts in state policy. Such phenomena clearly imbricates with the significance of citizenship and point to the need to clarify the relationship of citizenship status, rights, and identity to both the domestic and international sphere.

Against this backdrop of scholarly discussions and emerging policy responses, this article seeks to address the salience of the post-nationalist position for understanding contemporary practices of membership in Europe and more broadly, using the context of Germany to examine two developing, though seemingly diverging, regimes of non-citizen resident rights. I begin by explaining the importance of the German case for assessing transformations of citizenship and membership beyond the national. From here I move to a conceptual clarification of the post-nationalist position in order to show the emphasis placed on the "emergence of locations for citizenship outside the confines of the nation state."[6] Following recent scholarship, I suggest that the central aspects of the post-national position can be distinguished as two sets of separate claims.[7] First, post-nationalists assert that the modes of identity, bundles of rights, and status traditionally accorded through national membership are becoming decoupled from citizenship, nationhood, and the nation state. Second, post-nationalists make important claims about the sources and forces at play in the generation of these new forms of membership—in particular, they suggest that the growing prominence of transnational and international human rights norms are responsible for these transformations.

My goal in this article is to assess the first claim advanced by post-nationalists in light of recent developments in German domestic citizenship law and the continued evolution of European Union citizenship status. I argue that taking these features into account leads to an ambivalent, though provocative, perspective on the emergence of post-nationalist trends. It is clear that questions of nationality remain central to the status of Germany's 'non-European' migrant population. Even in the wake of a substantive liberalization of German citizenship law, the dynamics surrounding Germany's third-country migrant populations seemingly point toward the continued importance of the national, both in the ways membership is conceived in German political discourse, as exemplified in continued opposition to dual nationality, and in the ambivalent response of migrants themselves to the current naturalization reforms. Yet, alongside this re-

[6] Sassen, *Losing Control? Sovereignty in an Age of Globalization*, *supra* note 1 at 304.
[7] I adapt this from Hansen, "The Poverty of Postnationalism," *supra* note 5.

inscription of the national, recent transformations in European Union Citizenship and their concomitant implications within Germany do point to the belated emergence of an, albeit narrowly accessible, post-national form of membership.[8]

I conclude by suggesting that even as post-nationalist trends are emerging as a reality, we ought to remain far from optimistic about the normative implications of such developments and recognize that we may be witnessing the contingent coexistence of multiple regimes of membership. The incipient post-national status instantiated in Germany within the context of the EU is highly selective, and while generating a class of rather privileged and protected transnational citizens, exists alongside the continued political exclusion of the majority of Germany's non-European migrants. Thus, lacking the protection of a robust supranational authority, the position of third-country nationals within Germany remains substantively precarious.

II. GERMAN MEMBERSHIP REGIMES: A CRUCIAL CASE

Contemporary Germany provides an ideal case for assessing the robustness of arguments regarding the emergence of post-national citizenship, as well as the significance of such potential transformations. As of 2008, Germany possessed the largest population of foreign citizens of the 27 EU member states, with 7.25 million persons comprising 8.8 per cent of its total population.[9] Therefore, in matters of sheer scale and prominence among fellow EU states, Germany is a pivotal test for assessing the relationship of nationality and citizenship rights. Moreover, of its non-nationals, Germany hosts the greatest number of both non-national EU-citizens and third-country nationals of all member states at 2.5 and 4.7 million, respectively.[10] Attending to the features of the still unfolding status of European Union Citizenship is particularly important, given that post-nationalists frequently cite EU citizenship as the most elaborate legal enactment of post-national membership.[11] Moreover, as a result of historically restrictive naturalization policies and relatively high levels of immigration, Germany's population of

[8] Here I bracket the latter aspect of the post-nationalist position. In other (forthcoming) work I explore the impact of transnational and international liberal democratic and human rights norms in driving transformations in membership. There I argue that the post-nationalist claim that transnational and international legal norms are increasingly constraining and shaping the behaviour of states has been vindicated, at least in a qualified sense. As post-nationalists are more than willing to acknowledge, the effects of such norms 'tend to instantiate inside the national' and yet the there is an undeniable transnational influence on the contours of citizenship policy and immigration, as exhibited both by German domestic dynamics and by a general European convergence toward upholding liberal democratic and human rights norms. See Sassen, *Territory, Authority, Rights: from Medieval to Global Assemblages*, supra note 1 at 305.

[9] Eurostat, News Release, 184/2009, "Population of Foreign Citizens in the EU27 in 2008" (16 December 2009) online: EU Commission - Euro State <http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-16122009-BP/EN/3-16122009-BP-EN.PDF>

[10] *Ibid.*

[11] Soysal, *supra* note 1 at 147-48.

third-country nationals far exceeds those of other member states, comprising 45 per cent of the EU total.[12] Thus the contemporary position of Germany ought to provide a telling framework for determining the salience of nationality in the provision of membership rights and the status *between* EU-citizens and third-country residents.

In addition to current dynamics that highlight its central importance in assessing transformations in citizenship, further historical reasons suggest that Germany is a meaningful context for appraising claims regarding the growing potential and meaning of forms of post-national status, rights, and identity. In particular, Germany's past history of restrictive approaches toward naturalization and nationality, followed by a relatively recent transformation of such policies, point to the significance of Germany as a site for the emergence of post-national trends. Rogers Brubaker's 1992 path-breaking study of immigration and nationalism influentially characterized Germany as exemplifying an ethno-cultural and differentialist conception of nationhood and citizenship, one grounded in "habits of national self-understanding that were deeply rooted in the national past."[13] According to Brubaker, Germany's restrictive approach to both citizenship and naturalization have been fundamentally related to conceptions of descent and ethno-cultural membership, as embodied most definitively by the central place of *jus sanguinis* in German nationality law.[14] While the continued validity of such an ideal-type characterization of contemporary Germany is upset by the rapid sequences of reforms that German citizenship and nationality law has undergone in the past 20 years, Germany's long prior history of approaching national belonging in narrow terms makes it an important case study for examining the claims of the post-nationalist hypothesis. In particular, it suggests a context in which the interaction between a historically restrictive approach toward naturalization and the growing salience of liberal democratic and human rights norms may have paradoxically led to the emergence of robust civil and social membership rights dissociated from national belonging. Moreover, the German case has

[12] Jan Palmowski, "In Search of the German Nation: Citizenship and the Challenges of Integration" (2008) 12:6 Citizenship Studies 547-563.
[13] William Rogers Brubaker, "Citizenship and Nationhood in France and Germany" (Cambridge: Harvard University Press, 1992) at 187 [Brubaker, Citizenship and Nationhood].
[14] *Jus sanguinis* and *jus soli* are principles of nationality law underlying birthright claims to nationality or citizenship. The former, from the Latin for right of blood, ties the acquisition of citizenship or nationality to decent, dictating that citizenship is inherited from one or both parents. The latter, from the Latin for right of soil, tethers the acquisition of citizenship to the territory of the county in which the individual is born. Although scholarship tends to identify *jus sanguinis* as embodying a less progressive form of citizenship grounded in exclusionary conceptions of ethnonationalism and *jus soli* as progressive given its apparent inclusionary dynamic, this is arguably rather anachronistic given the actual history of these concepts. For a more extensive discussion of Brubaker's position, see Brubaker, Citizenship and Nationhood, *supra* note 13, Dieter Gosewinkel, "Citizenship and Naturalization Politics in Germany in the Nineteenth and Twentieth Centuries" in Daniel Levi and Yfaat Wess, eds, *Challenging Ethnic Citizenship: German and Israeli Perspectives on Immigration* (Oxford: Berghahn, 2002) at 59 for an account that complicates Brubaker's depiction of German citizenship as linked to an ethno-cultural conception of the German nation.

important implications for broader conclusions we might wish to draw about emerging post-national trends both across the EU and globally insofar as it exemplifies how completing membership regimes or 'multileveled' forms of citizenship can result in problematically qualified and stratified forms of status.

III. THEORIZING POST-NATIONALISM: CONCEPTS AND CLAIMS

Before turning to an assessment of the prospects and possibilities of post-national forms of membership within the German context, it is imperative that we first clarify the conceptual dimensions of the post-nationalist position that is to be assessed. This is of central importance, given that the post-national debate hinges on a series of claims regarding the changing status, meaning, and significance of central conceptual categories such as citizenship, membership, and nationality, as well as assertions about the sources of such transformations. Moreover, the contours of the debate between post-nationalists and proponents of the nation-centered perspective speak to the need to lay out the specifics of the post-nationalist claims to be assessed, if only to avoid the risks of a discussion characterized by potential misconstrual and confusion.

The conceptual ambiguities and misunderstandings that have frequently characterized exchanges between post-nationalists and their critics have been highlighted by Christian Joppke, leading him to suggest that post-nationalists and defenders of citizenship frequently find themselves talking past one another.[15] More recently, Randall Hansen has noted that divergences both *between* and *within* the perspective of those who defend post-nationalist claims regarding the status of citizenship have led to a great degree of ambiguity over the implications of the post-nationalist thesis.[16] For their own part, proponents of the post-nationalist position have defensively bemoaned being frequently "misinterpreted" and "misread" by critics, as well as having their arguments misrepresented by "strawmen versions of post-nationalism."[17] These considerations all suggest the need for specifying the theoretical commitments of the post-national perspective under consideration. Accordingly, I offer a brief reconstruction of the crucial elements of the post-nationalist position, one accommodating the post-nationalist assertion that they do indeed recognize the persisting importance of national institutions alongside emerging transnational and global trends.

A central component of the post-nationalist thesis to be assessed is the historical and conceptual claim of a progressive decoupling of components

---

[15] Christian Joppke, "Transformation of Citizenship: Status, Rights, Identity" (2007) 11:1 Citizenship Studies 37 at 37.
[16] Hansen, "The Poverty of Postnationalism," *supra* note 5 at 4-5.
[17] David Jacobson, "Citizenship Redux: Why Citizenship Remains Pivotal in a Globalizing World" in Diane E Davis & Julian Go, eds, *Political Power and Social Theory* (Bingley, UK: Emerald Group Publishing Limited, 2009) 20:281 at 283; Saskia Sassen, "Commentary" in Marco Giugni & Florence Passy, eds, *Dialogues on Migration Policy* (Lanham, MD: Lexington Books, 2006) 57 at 59.

of citizenship from nationhood and the nation state. As Saskia Sassen writes, "[w]hether it is the organization of formal status, the protection of rights, citizenship practices, or the experience of collective identities and solidarities, the nation state is not the exclusive site for their enactment."[18] In sketching out the post-nationalist position it is helpful to further distinguish between the multiple dimensions of citizenship that are potentially undergoing transformation. Following Joppke, we may differentiate analytically between the elements of citizenship along three levels.[19] First, with regard to citizenship as formal membership status in the state, post-nationalists argue that contemporary trends indicate the diminishing importance of national membership. Second, with regards to rights traditionally accorded by such status, they stress that a growing set of entitlements have become decoupled from formal citizenship.[20] Pointing to contemporary examples of the extension of broad social and economic rights to non-citizens, post-nationalists emphasize that the status of residency is coming to approximate that of citizenship in important ways. As one commentator has put it, "the membership status and rights of resident foreigners have reached the point where the distinction between citizen and noncitizen is not very significant."[21] But of equal importance, in a move that spans both the status and rights dimensions of citizenship in liberal democratic states, post-nationalists have advanced the ambitious claim that the nation state is no longer exclusively the most important *generator* of rights. Emphasizing the novel character of EU citizenship as an embodiment of "postnational citizenship in its most elaborate legal form," they thus argue for a partial decoupling of both rights and status from the state itself.[22] Third, with regard to identity, to the extent that rights come to assume "universality, legal uniformity, and abstractness" alongside persisting conceptions of national identity as expressions of bounded particularity, rights and identity can be said to part ways.[23] But concurrent with this is a transformation in the nature of the identity of citizenship itself, which comes to be decoupled from particularistic accounts of nationhood as "national identities that celebrate discriminatory uniqueness and naturalistic canonization become more and more discredited."[24] As a former critic of post-nationalism has noted, "the increasing universalism of citizenship, which we could observe on its status and rights dimensions, cannot but

---

[18] Sassen, *Towards Post-National and Denationalized Citizenship*, *supra* note 1 at 278.
[19] Joppke, "Transformation of Citizenship: Status, Rights, Identity", *supra* note 15 at 38; Christian Joppke, *Citizenship and Immigration* (Cambridge: Polity, 2010) at 28-33.
[20] The distinction between citizenship status and rights is important, because it is frequently only in the context of liberal democratic regimes that the former can be presumed to entail the latter. As the citizens of authoritarian states can well attest, it is quite possible to possess the status of citizenship without enjoying many rights; because of this, we ought not imagine that all states are liberal when theorizing citizenship.
[21] Jacobson, *supra* note 1 at 38.
[22] Soysal, *supra* note 1 at 148.
[23] *Ibid, at* 159.
[24] *Ibid, at* 161.

affect the identity of citizenship, diluting its national distinctness."[25]

In addition to arguing for shifts in the location, status, and meaning of elements of citizenship, post-nationalists make a related claim about the sources of these dynamics. In this vein, they have contended that traditional configurations of membership are being transformed by international and transnational human rights norms that have increasingly come to inform the behaviour of states. Thus these authors suggest a post-national source to the historical decoupling of the elements of citizenship—that is, "global factors transform the national order of citizenship."[26] The various contemporary shifts in the nature of membership noted above are driven by the emergent influence and power of the post-war international human rights regime, whose stress on the context-transcending rights of universal personhood has come to at least contest and destabilize more exclusionary forms of membership. This has been framed by Soysal as the redefining of individual rights as "human rights on a universalistic basis and legitimized at the transnational level," and by Sassen as processes of "denationalization" marked by the growing use of transnational and international human rights instruments in national courts.[27] These authors therefore controversially contend that the forces that have driven the decoupling of rights from exclusive conceptions of national citizenship, alongside a concomitant expansion of migrant rights, lie outside the confines of the nation state. This is not to say that post-nationalists dismiss the "national" as a frame or imagine that international and transnational norms have fully dissolved the importance of the state. Indeed, they are quick to concede that "the exercise of universalistic rights is tied to specific states and their institutions" and that "it is through the agency of the state that rights are enacted and implemented."[28] But they do argue that international and transnational human rights norms are increasingly coming to influence the contours of immigration and citizenship policy, as well as the status accorded to non-citizens. In sum, for these scholars, the emergence of post-national forms of membership signifying the decoupling of rights, status, and identity from national citizenship is ultimately driven by sources outside particular states.[29]

IV. THE DIS-AGGREGATION OF CITIZENSHIP? GERMANY'S MIGRANT POPULATIONS

[25] Joppke, "Citizenship and Immigration", *supra* note 19 at 111.
[26] Soysal, *supra* note 1 at 148.
[27] *Ibid, at* 164. See also Sassen, *Territory, Authority, Rights: from Medieval to Global Assemblages*, *supra* note 1 at 309.
[28] Soysal, *supra* note 1 at 157, 165.
[29] As noted, discussion of this part of the post-nationalist claim will be bracketed for the purposes of this piece. For persuasive analysis see: James Ingram and Triadafilos Triadafilopoulos. (2010) "Rights, Norms, and Politics: the case of German Citizenship Reform", *Social Research*, 77(1): 353-383; Triadafilos Triadafilopoulos and Karen Schönwälde. (2006) "How the Federal Republic Became an Immigration Country: Norms, Politics and the Failure of West Germany's Guest Worker System", *German Politics and Society*, 24(3): 1-19.

As discussed above, the two central claims of the post-nationalist position concern particular transformations in the nature of membership within a polity and locating the source of these post-national dynamics of inclusion and universalism outside the confines of the nation state. Here I turn to an assessment of the first of these claims within the context of Germany with an eye to identifying and attending to potentially competing trends in the dynamics surrounding membership in the German polity. Tracking the implications of shifts both in the significance of EU citizenship and recent reforms in nationality policy that bear on the status of third-country nationals, I suggest that a close examination of Germany provides ambivalent evidence for the post-nationalist thesis. On the one hand, the recent emergence of an increasingly "thick" European Union citizenship lends greater credence to the position that it exemplifies a form of post-national membership decoupled from possession of nationality in the state of *residence*. Thus non-nationals within Germany with privileged access to the exclusive entitlements of Union status enjoy rights and benefits that approach, and indeed potentially exceed, those of nationals. On the other hand, the contemporary situation of Germany's larger third-country population tells a different story, one in which traces of exclusivist conceptions of national belonging continue to play a prominent role despite attempts to move to a more inclusive model of membership. The enduring gap between the rights of third-country migrants and formal citizens, as well as the persistence of the national in debates over German naturalization and dual citizenship thus cut against the grain of the post-nationalist trends seemingly exemplified by EU citizenship. What is more, these developments provocatively suggest the potential emergence of a "European" border on access to full membership.

As a novel form of transnational or supranational legal status, European Union citizenship has long been heralded by post-nationalists as an exemplar of the decoupling of membership rights and identity from nationality. Originally formalized by the Maastricht Treaty in 1992 and further elaborated by the Amsterdam Treaty in 1997, citizenship in the Union is conferred on the nationals of all EU member states and has come to be linked to a number of increasingly impressive rights and entitlements. Given that Germany hosts the largest population of resident non-national EU-citizens among member states, the recent developments in the status of EU citizenship have important implications for how we should understand the nature of membership within the German context and more broadly.

The central features of EU citizenship include a number of important rights originally intended to supplement the status of nationals of member states. These include the right to move freely between EU member states, as well as the right to settle and take up employment in their chosen country of residence. These rights of movement are complemented by the right to vote and stand as a candidate in both local and European Parliament elections where they reside, as well as accountability mechanisms in the form of the right to petition the European Parliament and an Ombudsman. Moreover, EU citizens enjoy the right to diplomatic protection of other member states

when in third-countries. Arguably the most important of these rights with regard to the expansionist thrust of EU citizenship, the right to free movement for employment and residence purposes, is linked to prohibitions against any discrimination on the basis of nationality. Thus, European Union law bans "discrimination based on nationality among workers of the member states with regard to employment, social security, trade union rights, living and working conditions, and education."[30] Recent transformations in the significance of EU citizenship, primarily driven by European Court of Justice (ECJ) activism, have played on exactly this obligation of non-discrimination to extend the implications of this status.[31] Thus, following post-nationalist predictions, European Union law has indeed come to increasingly entitle EU citizens to "equal status and treatment with the nationals of the host country."[32] As we shall see, in a certain sense, the seemingly limited right of freedom of movement proved to be the sharp end of a large wedge.

But while the evolution of EU citizenship no doubt represents a novel legal development, the significance of its emergence for the post-nationalist thesis has remained rather contested. Thus we must ask: does EU citizenship in the context of Germany constitute a form of post-national membership? Is it emblematic of the dis-aggregation of crucial components of citizenship away from nationality and nationhood and therefore signify a diminishment in the importance of national citizenship? In order to adequately answer these questions we must account for two challenges raised by scholars skeptical of post-nationalist claims regarding the nature of EU citizenship.[33]

First, critics of post-nationalists have suggested that EU citizenship, far from exemplifying a superceding of the national, is best understood as a subset of national citizenship, given that it is enjoyed only by the nationals of member states.[34] As they have stressed, EU citizenship is a derivative status that "itself independently generates not a single right" and therefore, they suggest, it is a mistake to construe EU citizenship as a challenge to the nation state as it ultimately "reinforces rather than detracts from national citizenship."[35] This criticism, attentive to the foundational treaty-language of EU citizenship that did indeed cast the status as supplementary to national citizenship, admittedly provided an important correction to the optimism of early post-nationalists. More recent commentators have also stressed the persistently 'contingent' status of EU citizenship, access to which still remains entirely dependent on the acquisition of national citizenship in

---

[30] *Ibid, at* 148.
[31] Joppke, "Citizenship and Immigration", *supra* note 19 at 162-68; Marlene Wind, "Post-National Citizenship in Europe: The EU as a Welfare Rights Generator" (2009) 15 Colum J Eur L 239.
[32] Soysal, *supra* note 1 at 148.
[33] I take this important set of challenges from Hansen, "A European Citizenship or a Europe of Citizens? Third Country Nationals in the EU," *supra* note 5.
[34] Hansen, "A European Citizenship or a Europe of Citizens? Third Country Nationals in the EU," *supra* note 5 at 2; Hansen, "The Poverty of Postnationalism," *supra* note 5; Joppke, Challenge to the Nation State: Immigration in Western Europe and the United States, *supra* note 5.
[35] Hansen, "The Poverty of Postnationalism," *supra* note 5 at 6.

Member states.[36] However, contemporary dynamics, most notably the ECJ's judicial activism discussed above, have transformed EU citizenship in significant ways. Indeed, these dramatic and expansive changes in the nature of EU citizenship as a result of recent ECJ case law have lead Joppke, a former critic of post-nationalism now turned convert, to concede that this status now represents "a free-standing source of rights" worthy of the name of post-national citizenship.[37] In a series of crucial developments, the ECJ has established a right to free moment and residence inherent in Union citizenship independent of a tie to economic activity and moreover that there are, "next to formal rights of free movement and residence, substantive social rights that accrue to EU citizens qua citizens, outside prior economic status categories."[38] As one commentator has noted, the ECJ has thus increasingly granted "autonomous content" to EU citizenship, transforming the "Union's non-discrimination provisions into a fundamental and personal right for all European citizens."[39] Through a series of rulings leading up to its historical decision of *Grzelczyk* in 2001, the ECJ extended the principled prohibition against discrimination on grounds of nationality toward EU citizens exercising their right to free movement to entail extensive access to social benefits, thus lending credence to its claim that "Union citizenship is destined to be the fundamental status of nationals of the Member States."[40] While this statement may still have more the sound of prophecy than present day reality, it does speak to the remarkable transformations in the nature of EU citizenship that have taken place. Indeed, the more recent ECJ case *Rottmann v. Freistaat Bayern*, involving the relationship of Community law to the loss of nationality, seems to herald the potential for an even greater degree of preeminence of Union citizenship over national citizenship.[41] The court's decision both highlighted the dependent relationship between national citizenship in an EU member state and EU citizenship, while simultaneously suggesting that judgments concerning the loss of the former should be subject to considerations flowing from the importance of the latter status.[42] The outcome of *Rottmann* is particularly striking, as nationality and citizenship are matters traditionally "considered as falling within the domestic jurisdiction, within the internal legislative competence, of the individual State."[43] Thus, while it remains too early to speculate on the

---

[36] Maas, "Unrespected, Unequal, Hollow," *supra* note 5 at 267.
[37] Joppke, "Citizenship and Immigration", *supra* note 19 at 164.
[38] *Ibid*.
[39] Wind, *supra* note 31 at 242.
[40] *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, C-184/99, [2001] ECJ I-6229 [*Grzelczyk*].
[41] *Janko Rottmann v. Freistaat Bayern*, C-135/08, [2010] ECJ I-1467 [*Rottmann*].
[42] Echoing the sentiments of *Grzelczyk*, the ECJ both established that the potential loss of citizenship fell 'within the ambit of European Union law' in the event that it would render an individual capable of losing 'the status conferred by Article 17 EC and the rights attaching thereto' (*Grzelczyk* at I-1487) and that states must apply standards of proportionality take into account the consequences of a decision revoke citizenship 'with regard to the loss of the rights enjoyed by every citizen of the Union' (*Grzelczyk* at I-1490).
[43] Peter Weis, *Nationality and Statelessness in International Law*, 2nd ed. (1979), at 65. As Weis notes of the conventional view, the "right of a State to determine who are, and who are not, its

eventual ramifications of these developments, it is hard not to interpret *Rottmann* as signaling only the beginning of a likely encroachment of EU citizenship rights on member states' control over nationality itself. In light of this, EU citizenship has become increasingly hard to conceptualize as merely a derivative status while its development as well as expansion appears to be directly challenging what has been viewed as the exclusive competencies and prerogatives of member states.[44]

This connects up with the second challenge critics have raised against the post-nationalist claim that EU citizenship should be read as a competing status on par with and challenging national membership. Pointing to the limits of EU citizenship—most notably restrictions on political rights and public service—scholars have raised doubts regarding the significance of EU vis-à-vis nationality and thereby called into question its significance.[45] However, contemporary trends seem to have vindicated the post-nationalist position. With regard to social and economic rights, the dramatic judicial and policy changes outlined above have radically reinvented the entitlements of EU citizens relative to nationals. Indeed, as Joppke has stressed, the increasingly robust nature of the rights and entitlements of EU citizenship has opened up the possibility of reverse discrimination against nationals, "who, for instance, now perversely have lesser family reunification rights under national law than border-hopping EU citizens may enjoy in the same country under European law."[46] This striking outcome emerges from the interaction of EU and national law, where Community law rights attached to the free movement provisions generally become salient only with transit across an EU internal border, while the absence of such movement leaves the jurisdiction wholly internal and under domestic law.[47] Thus, the interaction of these two jurisdictions means that "EC law sometimes engenders reverse

---

nationals is an essential element of sovereignty" thereby highlighting the rather important implications that may be drawn from the *Rottmann* ruling. (*ibid*.)

[44] Given that international law traditionally has largely left control over nationality almost entirely at the discretion of states, this represents no small shift to the prior status quo. Here consider the far from ambivalent wording of Article 2 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law: "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State." League of Nations, (1930) Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, League of Nations, Treaty Series, vol. 179, No. 4137.

[45] See Hansen, "A European Citizenship or a Europe of Citizens? Third Country Nationals in the EU," *supra* note 5 at 2; Mass, "Unrespected, Unequal, Hollow? Contingent Citizenship and Reversible Rights in the European Union," *supra* note 5; Mass, "Migrants, States, and EU Citizenship's Unfulfilled Promise," *supra* note 5.

[46] Joppke, "Citizenship and Immigration", *supra* note 19 at 165. Lisa Conant, "Contested Boundaries: Citizens, States and Supranational Belonging in the European Union" in Joel S. Migdal, ed, *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices* (Cambridge: Cambridge University Press, 2004) 284 at 306 for discussion of how these transformations are constraining German policymakers. With reference to the Fink Modell, she indicates how the 'prospect of future ECJ interference altered the course of German policy making'. Another field in which the implications of EU citizenship for reverse discrimination produce particularly stark and surprising effects is in the area of family reunification.

[47] For an account of the antecedent legal transformations that formed the extended conditions of possibility for this remarkable situation see Alina Tryfonidou, *Reverse Discrimination in EC Law* (Netherlands: Kluwer Law International, 2009).

discrimination internally against nationals of Member States in relation to other EU nationals who have moved there and benefit from EC law."[48]

Additionally, it appears that nationals can take advantage of these jurisdictional slippages to upgrade their status in relation to their fellow citizens. Thus, border-crossing nationals can in some instances draw on a broader range of entitlements than their stationary counterparts in virtue of exercising their free movement rights.[49] Instances of this possibility of differential rights for citizens or of nationals enjoying fewer rights than foreigners are deeply anomalous from the traditional standpoint of national citizenship and are presumably unlikely to persist for long. Yet, perhaps more importantly for the post-national implications of Union citizenship, subsequent developments in EU case law point in the direction of the erosion of this anomaly from 'above' rather than from 'below' insofar as the ECJ has suggested that actual cross-border movement may be less central to invoking rights derived from EU citizenship. In the important 2011 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* decision on the family reunification rights of EU citizens, the ECJ appeared to move in this very direction. In its decision, the ECJ allowed for the exercise of EU rights in exceptional circumstances in what would appear to be a purely internal situation, given the absence of any prior cross-border movement.[50] Given these realities, the fact that EU citizenship has the potential to generate more expansive legal entitlements and rights than those granted to the nationals of a given territory signals an important transformation and the gradual emergence of a supra-national site of citizenship. Moreover, given that Conant has demonstrated that the anti-discrimination provisions of EU law have already acted as an important constraint on domestic policymakers in Germany, it seems highly likely that contemporary developments in EU citizenship will only reinforce this trend, thereby deepening the significance

---

[48] John Tillotson & Nigel Foster, *Text, Cases and Materials on European Union Law* (Oxford: Oxford University Press, 2003) at 342 [Tillotson & Foster].

[49] The implications of 'reverse discrimination' have at times been quite notable, leading one commentator to go as far as to suggest that "the law as it stands today makes it clear that possessing the nationality of the Member State of residence can make one worse off." See: Dimitry Kochenov, "Double Nationality in the EU: An Argument for Tolerance," (2011) *European Law Journa*l 17:3, at 335.

[50] See: *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEm), Case C-34/09, [2011] ECJ I-01177 [*Zambrano*]. The exceptional circumstances concerned the potential loss of enjoyment of Union rights that would be imposed upon minor EU citizens compelled to leave Union territory, absent the conferring of derivative rights of residence and employment upon the parents. Notably, the radical potential of *Zambrano* lies in the erosion of the need for any link to actual cross-border movement for the exercise of Union rights, at least in certain situations. The court thus ruled that Article 20 on the Treaty on the Functioning of the European Union "precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union" even in apparently purely 'internal' contexts. However, as have been noted by others, the grounds of this important shift remain rather underdetermined by the decision, leading to significant ambiguity regarding its long-term legal implications; see P. V. Elsuwege and D. Kochenov, "On the limits of judicial intervention: EU citizenship and family reunification rights," (2011) *European Journal of Migration and Law*, 13(4), 443-466.

of this transnational status.[51]

EU citizens also enjoy important political entitlements traditionally reserved for national citizens, including the right to local political participation, diplomatic and consular protection, and freedom of moment with regard to entering and exiting their state of residence. The rights of EU citizens to political participation have not undergone a similar expansion, having remained limited to voting rights and the ability to stand for office in local elections and the European Parliament, but this may be less problematic than we might suspect. A potentially salient reason why persisting limits on political participation within an EU citizen's country of residency may be less *practically*, as well as *normatively*, important for the situation of EU citizens residing in another member state is suggested by the fact that their legal status is seemingly decoupled from national jurisdictions in important ways. As noted above, EU citizens can draw on Community law with regard to regulations affecting their status and situation upon crossing an internal frontier, thereby partially detaching themselves from domestic jurisdiction and the actions of domestic legislatures. Moreover, the actual behavior of EU nationals does in part ask us to reconsider the importance of this continued omission of more robust national-level political status.[52]

While this is not the place to enter into a discussion of the value of active civic engagement in the practice of citizenship, such trends among EU citizens do in part provide a partial response to the charge that post-nationalism is "a tribute to mass disenfranchisement."[53] This is because EU citizens do possess important political entitlements, despite showing a general aloofness toward exercising the important political rights of participation secured under their status. But, perhaps more problematically for those who might argue for the primacy of the right to participate in national elections, EU citizens show an equally striking lack of interest in naturalizing—the necessary prerequisite to participating in *Land* and national elections within Germany. Moreover, such trends have continued even in the wake of important shifts in Germany's policies toward the

---

[51] Conant, "Contested Boundaries", *supra* note 42.

[52] In what should be a matter of some concern to those who celebrate EU citizenship, despite the granting of relatively expansive local political participation rights as foreigners, EU citizens on the whole express little interest in exercising their entitlements to civic participation—despite national initiatives aimed at informing EU citizens of their political rights. This is suggested by a 2006 European Commission report, which found that the proportion of EU non-nationals registered to vote was relatively low; see European Commission, Press Release, MEMO/64/484, "Report on the application of Community law in the 2004 European elections" (13 December 2006) online: European Commission <http://ec.europa.eu/>. The persistence of such trends has led one commentator to assert that there is 'no strong demand for the current [political] rights and responsibilities of EU citizenship'; see Damian Chalmers et al, eds, *European Union Law: Text and Materials* (Cambridge: Cambridge University Press, 2010) at 575. While such political indifference may be a lamentable fact, it seems that EU citizens residing outside their country of nationality themselves place a lesser value on this element of the practice of citizenship. Moreover, this trend with regard to civic engagement is reflected within Germany where, as a proxy of general political participation, non-national EU citizens registered to vote in the 2004 European Parliament elections stood at a dismal 6.1per cent; see European Commission, *supra* note 46.

[53] Hansen, "The Poverty of Postnationalism," *supra* note 5 at 20.

naturalization of EU citizens.

Thus, arguably the strongest case for the growing significance of EU citizenship over national citizenship for Germany's population of EU citizens is captured in their apparent near indifference toward acquiring German citizenship. As one scholar has noted, naturalization rates for EU nationals remained remarkably low from 2001-2008, hovering between 0.6 per cent and 1.0 per cent.[54] This is all the more striking since Germany instituted the automatic toleration of dual nationality for EU citizens from 2007 onward, given that German resistance to dual nationality is widely perceived as the primary impediment to the broader naturalization of its third-country population. Indeed, even as dual nationality has become an available and accessible reality within Germany for privileged residents from EU member states, national citizenship is arguably waning in value relative to EU citizenship.[55]

Extrapolating from such behaviour, we may infer that the benefits of naturalization are sufficiently marginal to this class of non-nationals within Germany that, even with the privilege of full access to German citizenship alongside their original nationality, interest in naturalization remains low. The failure of EU citizens residing in Germany to take up national citizenship despite the liberalization of German nationality law and the formal tolerance of dual nationality would seem to suggest that these EU citizens, on the whole, view their rights as on par with those of nationals. According to Simon Green, "this probably reflects the comprehensive availability of welfare and residential rights, and partial availability of political rights…which has rendered any material gain from naturalization for this group effectively meaningless."[56] But this observation can be put more strongly in light of the discussion of the expansion and development of EU citizenship status. As was noted, as a result of recent ECJ interventions it has become increasingly difficult for states to withhold any substantive rights and privileges to EU citizens that had been previously reserved for nationals. Indeed, in some situations member states have been compelled to grant greater rights to EU non-nationals than to their own citizens. If this observation is correct, we must concede that, in the eyes of EU citizens, the status and rights conferred by EU citizenship closely approximate those of German nationals in all but negligible ways.

While the situation of EU citizens within Germany provides a striking

---

[54] Simon Green, "Much Ado about Not-Very-Much? Assessing Ten Years of German Citizenship Reform" (2012) 16:2 Citizenship Studies 173 at 180 [Green, "Much Ado"]

[55] However, as Green notes elsewhere, the difference between formal citizenship and EU citizenship has not been rendered entirely irrelevant in the German context. As he writes, "[c]ompared with some other EU member-states, the material benefits of nationality in Germany are in fact comparatively high: as well as granting full voting rights, nationality is a prerequisite for civil service positions (Beamte), which in Germany includes most middle- and senior ranking positions in education, law enforcement, the judiciary and the administration at local, Land and federal levels." See Simon Green, "Between Ideology and Pragmatism: The Politics of Dual Nationality in Germany" (2005) 39(4) International Migration Review 921 at 934 [Green, "Ideology"].

[56] Green, "Much Ado", *supra* note 48 at 180.

testament to the emergence of post-national trends, the case of the country's large third-country migrant population arguably has proven to be far more ambiguous in light of contemporary developments. Germany's sizable migrant population is to a great extent the result of the post-war guest-worker program instituted in the 1950s by the (West) German government in response to labour shortages arising in the context of the *Wirtschaftswunder*. Viewing these labour migrants though the prism of Germany's formal rejection of the status of a country of immigration, most Germans "assumed that foreigners were temporary sojourners" whose stay in the country would be far from permanent.[57] However, stay they did and, with some irony as trends toward longer-term residence emerged, belated attempts of the German government to curtail its growing migrant population only "reinforced the process of settlement, sharply limiting back-and-forth migration and prompting a surge in the immigration of family members."[58] Thus even with the end of formal recruitment for its guest worker policy in 1973, Germany's population of foreign nationals continued to grow and became more settled as large numbers of "guests" decided to remain within the country and to sponsor dependents. Coupled with the effects of Germany's up until recently generous asylum policy, the country's non-national population continued to expand only stabilizing in 2004.[59] As of 2008, Germany's population of non-nationals not from EU member states, and therefore lacking the entitlements of EU citizenship, stood at an impressive 4.74 million or roughly 5.8 per cent of Germany's population.[60]

As the host of Europe's largest population of non-EU nationals, recent developments in Germany's citizenship and naturalization policies remain central to an assessment of the post-nationalist position. Moreover, Germany's experiences in its post-war history of immigration have formed an important, though perhaps potentially misleading, part of the story told by post-nationalist scholars. The changing status and expanding resident rights of Germany's guest worker population is cited as a component of Soysal's claim that membership rights and national citizenship have become progressively decoupled, leading to the "decreasing importance of formal citizenship status in determining the rights and privileges of migrants in host countries."[61] Indeed, it was precisely because Germany's notably exclusivist approach toward citizenship, grounded in its 1913 nationality law, coexisted alongside the gradual unfolding of extensive social and economic rights for resident aliens that scholars could take up the case of Germany as an example of broader post-nationalist trends. Moreover, read through this same lens, even Germany's recent liberalization of its citizenship policy could be viewed as a separating of forms of membership from exclusivist

---

[57] Rita Chin & Heide Fehrenbach, "German Democracy and the Question of Difference, 1945-1995" in Rita Chin et. al., eds, *After the Nazi Racial State: Difference and Democracy in Germany and Europe* (Ann Arbor: University of Michigan Press, 2009) at 107.
[58] Brubaker, "Citizenship and Nationhood," *supra* note 14 at 172.
[59] Green, "Much Ado", supra note 48 at 180.
[60] Eurostat, *supra* note 9.
[61] Soysal, *supra* note 1 at 122-30, 132.

ethno-cultural notions of national identity, as a population long regarded as intrinsically foreign was finally becoming ostensibly incorporated into Germany's national citizenship regime through the removal of formal barriers to naturalization and the broader opening up of citizenship. These changes—including the introduction of *jus soli* citizenship alongside Germany's longstanding use of *jus sanguinis*—have been viewed by many as a historical milestone, both with regard to Germany's conception of membership and as conferring belated institution and legal recognition of its long-standing *de facto* status as a country of immigration and thus potentially suggested the emergence of a conception of community membership seemingly characterized by the progressive "decoupling of the citizenry from a particular nation or ethnic group."[62] Such developments should not be trivialized given Germany's past history of conceiving nationality in rather narrow and exclusionary terms. While classically characterized by Brubaker as embodying a conception of its citizenry as a "community of descent," these developments potentially point to the erosion or disappearance of an "ethnocultural inflection of German self-understanding and German citizenship law."[63] For what had remained "unthinkable in Germany" for Brubaker from the standpoint of the country's historically embedded national self-understanding—the adoption of *jus soli*—is a concrete reality less than 20 years later.[64] Thus within Germany the combined trends of progressively expanding alien rights and a remarkable liberalization of access of citizenship seem to lend credence to the post-nationalist claim that the distinction between citizen and alien is "disappearing" and that "citizenship has been devalued."[65]

However, the post-nationalist thesis arguably remains far too sanguine with regard to the status of third-country migrants, despite shifts in the conditions of access to important membership rights as well as more recently undeniable landmark transformations in Germany's citizenship and naturalization policy. As I indicate subsequently, focusing on the developments discussed above should not lead us to paper-over important details in the complex dynamics surrounding membership, rights, and identity within contemporary Germany, lest we overlook important counter-trends that seemingly point to the persisting importance of the national. Three elements of the situation of third-country nationals stand out in this regard.

First, in an important sense, the development of alien rights for Germany's migrant population does not point to the emergence of locations of citizenship outside the state. Unlike the evolution of EU citizenship outlined above, which has progressively decoupled a growing number of membership rights from national boundaries and jurisdictions, the status of

---

[62] Joppke, "Exclusion in the Liberal State: The case of Immigration and Citizenship Policy," *supra* note 5 at 5.
[63] Brubaker, "Citizenship and Nationhood," *supra* note 14 at 14, 178.
[64] *Ibid, at* 185.
[65] Jacobson, *supra* note 1 at 9, 40.

third-country residents remains fairly rooted within a national context, with important consequences. This is particularly salient for two reasons. As Joppke has suggested in his most recent work, there is a clearly identifiable trend toward moving to "upgrade" the value of formal national citizenship in contemporary government policies across Europe. His analysis identifies such policy developments as attempts to compensate for potential political backlash with regard to a "significant opening for legal immigration in Europe" which, though primarily "highly selective and skill-focused," has still proved to be highly unpopular in the eyes of anxious publics.[66] Joppke optimistically interprets such developments as "ultimately futile, rearguard actions against the inevitable lightening of citizenship in the West" with an eye to the increasingly substantive form that EU citizenship has taken.[67]

Tracking the effects of recent ECJ activism rehearsed above, Joppke suggests that any attempts to thicken the entitlements granted in virtue of national status are inevitably stymied by the trend toward virtual equality established between national citizens and residents from EU member states. Thus, by virtue of the non-discrimination provisions attached to their free movement, any differential improvement by governments of nationals rights will have to be opened up to EU residents. Crucially however, while the supra-national status rooted in Community law of resident EU nationals provides an easy-in for Union citizens under the protective gaze of the ECJ, this same logic is not as effortlessly applied to the status of third-country migrants.[68] This suggests that if European governments become serious in their efforts to "thicken citizenship" by delimiting the scope of economic and social welfare rights, or to render the internal frontiers of the Schengen Area increasingly semi-porous, it may very well be that non-EU resident aliens are the ones who will lose out. While such a situation is speculative, it remains an immanent possibility because resident aliens remain primarily the subjects of domestic law and conditions of naturalization are firmly the prerogative of each member state.[69] Therefore, the reemergence of a broadening divergence between the status of Union citizens and third-

[66] Joppke, "Citizenship and Immigration", *supra* note 19 at 156.
[67] *Ibid*.
[68] The application of Community Law is triggered by movement from one member state to another and therefore covers all EU nationals residing within another member state. In contrast, third-country nationals 'rights were originally entirely a matter for national law regulation' and while there has been movement to strengthen third-country nationals rights in recent directives, this has proceeded only very slowly; see Tillotson & Foster, *supra* note 44 at 351. At this stage there seems little possibility that the ECJ will be able to accomplish anything close to the revolution in EU citizenship with regard to third-country nationals, given that the latter process was driven by prohibitions against discrimination on the basis of nationality built into the status of EU citizens.
[69] The fact that naturalization –that is, access to national citizenship—remains firmly rooted in domestic contexts is quite important because it is precisely acquisition of nationality in an EU member state that enables access to the expansive rights regime of Union citizenship. While there has been important legal innovations, as noted above in the discussion of *Rottmann*, regarding the loss of EU status, further development regarding acquisition of EU citizenship either through introducing mechanisms for its acquisition that do no depend upon naturalization in a member state or through harmonization of domestic citizenship laws, has still yet to happen to any significant degree.

country nationals is not beyond the possible, but very much up to the vagaries of the domestic political climate. While Joppke argues that the increased status of EU citizens will only help the status of third-country nationals because it is "inherently difficult to justify a distinction between two types of internal free movers" this follows less convincingly from his arguments.[70] Indeed, we must be careful to avoid the distortions that arise from simply assimilating the situation of EU citizens to that of third-country nationals, most obviously because the latter remain specifically severed from the particular legal status of EU citizenship formulated in the Maastricht Treaty. If governments persist in trying to raise the apparent value of national citizenship in light of its diminished currency in the face of Union citizenship entitlements, there is no strong reason flowing from the logic of an expansive EU citizenship that suggests why third-country nationals will not lose out instead, especially if European states witness growing trends of populist xenophobia and intolerance toward non-nation populations, a far from unimaginable scenario in the context of continuing economic malaise.

A second concern comes from the persisting differences in the entitlements of third-country nationals and German citizens that should cause us to remain skeptical of the post-nationalist claim regarding the progressive decoupling of important membership rights from formal citizenship. While the above discussion highlighted how alien rights remain generally embedded within a domestic legal context and therefore potentially insulated from the expansionist thrust of developing EU citizenship, here I point to the empirical reality of a persisting gap between aliens and citizens.

Third-country nationals who have established permanent residency status do enjoy an impressive array of privileges, ranging from family reunification rights, unrestricted access to the labor market, as well as entitlements to education and many social security benefits on the same conditions as citizens. But though it may be true that at present the social and economic rights of resident aliens within Germany have come to increasingly approximate those of nationals, it would be inappropriate to equate resident status with full membership. As has been stressed more generally by others, certain rights of central importance remain crucially bound up with the possession of formal citizenship, and this certainly remains the case with regard to Germany's third-country nationals.[71]

First, Germany's non-EU permanent residents lack entitlements to diplomatic and consular representation on behalf of the German government. This is an important omission given that, in crucial circumstances that have become an all too present possibility in our global

[70] Joppke, "Citizenship and Immigration", *supra* note 19 at 169. A clear example of this concerns the continued and sustained domestic resistance toward permitting dual-citizenship among non-EU nationals. While unconditional tolerance of dual nationality is available to all EU nationals who would wish to naturalize, the current German government is strongly opposed to extending such an option to its large population of third-country nationals.

[71] Hansen, "A European Citizenship or a Europe of Citizens? Third Country Nationals in the EU," *supra* note 4; Hansen, "The Poverty of Postnationalism," *supra* note 5.

security climate, the right to diplomatic protection "can be of decisive importance for the individual migrant's life chances."[72] This of course contrasts with the enhanced status of nationals of EU member states who are in certain circumstances able to draw on the diplomatic representation of Germany by virtue of their Union citizenship. Second, unlike formal citizens, third-country nationals are not free from the threat of deportation and expulsion.[73] This is an important vulnerability given that Germany is among the "chief deporting states in the advanced industrialized world" having conducted over 35,000 deportations in 2000.[74] It is true that in Germany *permanent* residents do enjoy a greater degree of protection against expulsion than temporary residents; however even that protection is by no means total. For instance, third-country nationals may be expelled on grounds of posing a threat to public order, or on the basis of providing false information to gain residency status.[75] Remarkably, the latter provision has been applied to allow for the discretionary deportation of the children of migrants on the basis of their parents' deception with regard to immigration proceedings—despite the former having been born and raised to adulthood in Germany. Here the experience of Mohammad Eke is a disturbing reminder of the vulnerability to deportation of third-country nationals; despite having lived his entire life in Germany, Elke was deported at the age of 21 to Turkey, a country he had never even visited, on the grounds that his parents relied on false papers to gain residency status over two decades prior.[76] Indeed, it is important to note that in Germany receiving social assistance *may* provide legal grounds for the deportation of even permanent residents, though in practice such expulsions are rare.[77] Thus, to view the situation of Germany's third-country migrants as one to be experienced as notably precarious when contrasted with the status of citizens would not be without reason. Whether pursued under the banner of national security or immigration policy, these trends point to the continuing salience of an unqualified right against expulsion for Germany's third-country migrants, the absence of which emphasizes the lasting

---

[72] Hansen, "The Poverty of Postnationalism," *supra* note 5 at 13.
[73] The legal basis for such measures is contained in the "Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners" (Immigration Act) of 2002.
[74] Antje Ellermann, *States Against Migrants: Deportation in Germany and the United States* (Cambridge: Cambridge University Press, 2009) at 4. This total reflects a three-fold growth in the number of expulsions over ten years, corresponding to "a period of highly politicized immigration politics that culminated in far-reaching policy reform" (Ellermann at 4). The policy response was a historical tightening of Germany's asylum controls (Ellermann at 18-21)
[75] Kees, Groenedijk, Elspeth Guild & Robin Barzilay, *The Legal Status of Third-Country Nationals Who Are Long Term Residents in a Member State of the European Union* (Nijmegen: Centre for Migration Law, University of Nijmegen, 2000) at 47 [Groenendijk]. In fact, "total protection from expulsion only exists for minor children under 14 years" Groenendijk at 48.
[76] Gutsch Jochen-Martin, "Victim of Immigration Policy: The German Forced to Become a Turk" (4 December 2009), online: Spiegel Online International <http://www.spiegel.de> [Jochen-Martin].
[77] Groenendijk, *supra* note 67 at 46. This is particularly relevant in light of the prior discussion of the expanding status of EU nationals, given that ECJ rulings have expanded Union citizen's social rights to almost mirror those of nationals including so-called 'mixed type' benefits. Also see Joppke, *supra* note 5 at 46; Conant, "Contested Boundaries", *supra* note 42 at 305-08.

importance of access to national citizenship for this population.

Finally, a last crucial category of rights refused to third-country migrants in Germany concerns the continued denial of access to either active or passive political participation. Prior to Germany's partial easing of naturalization policies in 1992 and the more recent integration of *jus soli* into its nationality law, this total political exclusion of a inter-generational population of guest-workers turned long-term residents—what Michael Walzer called a "disenfranchised class"—was particularly scandalous from the standpoint of the normative commitments at the core of modern liberal democracies.[78] As Joppke has eloquently put it, "liberal democracy demands congruence between the subjects and objects of rule, irrespective of the ethnic composition of the population"—and it was arguably the persisting lack of such congruence that finally led to the emergence of a rights-based claim to naturalization and the reforms of Germany's nationality law.[79] Yet, even following the partial liberalization of access to citizenship, Germany has continued to host a large population of third-country nationals whose continued disenfranchisement constitutes an important challenge to the post-nationalist claim regarding the decoupling of rights from formal citizenship. Ironically, in many ways the presence and expanding entitlements of EU citizens only further throws into sharp relief the third-*class* status of third-country nationals within Germany.

Unlike other member states that grant to third-country nationals the right to vote in local elections, and in some cases the right to stand for office, Germany has persisted in offering neither.[80] This means that third-country migrants who may have been long-term residents, or perhaps even born within Germany, not only hold less political rights than German citizens, who possess full entitlement to civic participation on the local, *Land*, federal, and EU level, but also, remarkably, enjoy fewer political rights than non-nationals from EU member states who have resided within Germany for a far shorter time.[81] Participation in political organizations is limited because naturalization remains a precondition for candidacy in Germany's political parties and under German law immigrants that have not naturalized cannot

---

[78] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 59.

[79] Joppke, "Citizenship", *supra* note 5 at 87.

[80] Florian Geyer, "Trends in the EU-27 regarding participation of third-country nationals in the host country's political life" (2007) Briefing Paper, Directorate-General for Internal Policies, Directorate C - Citizens' Rights and Constitutional Affairs, European Parliament, 7.

[81] Länder based initiatives to introduce local voting rights to long term residents were ruled unconstitutional in 1990 by the German Constitutional Court, signaling that the extension of electoral rights to third-country nationals could only be accomplished through legislative changes facilitating naturalization or through the amendment of the Basic Law to allow non-nationals access to political rights. However, as noted above, all EU citizens gained access to local political rights as a result of the transposition into German law of European Council Directive 94/80/EC. Given that the original rational for the denial of municipal voting rights rested on the purported link between German nationality and the exercise of local voting rights, this disjunction in the treatment of two categories of resident foreigners appears rather problematic.

constitute the majority of members in any political party.[82] Moreover, unlike their privileged European counterparts, third-country nationals lack the robust protections granted on EU citizens by Community Law, while remaining politically excluded subjects of a framework of laws and institutions in which they have no say. Indeed, political rights seem all the more important given that there are persisting trends of social marginalization toward the largest minority group among German's third-country residents with unemployment at double the national average for Turkish nationals and 28 per cent reporting discrimination when searching for employment.[83] What official political voice that Germany's non-naturalized Turkish nationals possess is limited to the *Ausländerbeiräte* councils established to articulate immigrant's interests, but these organizations are widely perceived as ineffective by those they are meant to represent.[84] In this context, given that the modern emancipatory thrust of the meaning of citizenship has been tied to the progressive extension of political inclusion, through which those subject to the laws of the state are allowed to participate, it is hard not to view arguments regarding the "post-national membership" of Germany's population of third-country nations as anything but a perverse tribute to second-class citizenship. Thus, because of these reasons, national citizenship continues to remain crucial to securing an important array of rights.

A final way in which the situation of Germany's third-country nationals seems to undermine assertions about the waning importance of national membership and the nation state is captured in the tensions that have emerged in the context of recent reforms in German nationality and citizenship law. On a superficial level, the gradual opening up of access to national citizenship to Germany's large third-party migrant population may be viewed as more grist for the mill for post-nationalists. From this perspective, these progressive reforms are indicative of an emerging recognition of the rights of long-term residents, while the shift to more inclusive notions of citizenship suggests the decoupling of full membership status from particularistic and exclusionary conceptions of community and nationhood. However, I wish to suggest that the developments leading up to Germany's current regime of naturalization and citizenship with regard to third-country nationals should be understood as an important challenge to the post-national thesis.

On the one hand, if formal national membership has progressively become less important, then why has Germany's approach to citizenship law reform focused on opening up access to German nationality some 15 years after the post-nationalist thesis initially emerged? Put another way, if the

---

[82] Nedim Ögelman, "Documenting and Explaining the Persistence of Homeland Politics Among Germany's Turks", (2003) 37:1 International Migration Review 163 [Ögelman].
[83] Jochen-Martin, supra note 68; see also Open Society Foundations, "Muslims in Europe: A Report on 11 EU Cities" (2010), online: Open Society Foundations <http://www.opensocietyfoundations.org>
[84] Ögelman, *supra* note 73.

development of extensive membership rights for permanent residents suggests the waning importance of citizenship, how are we to explain the appearance of access to citizenship and naturalization as a central political issue? Arguably the reemergence of a right to citizenship with regard to Germany's large non-EU national population should be read as a powerful counterpoint to the post-nationalist claim that the acquisition of citizenship has lost much of its significance as a result of "the disappearing distinction between citizen and alien".[85] Such a view is supported both by the statements of German government officials who progressively have come to view the continued exclusion from citizenship of the country's large guest-worker population turned settled residents as deeply problematic and by the actions of third-country migrants, who responded to the easing of naturalization requirements by increasingly taking up German citizenship, that is until provisions disallowing dual nationality were tightened.[86] Therefore, the rise of citizenship reform in Germany indicates the persisting value and meaningfulness—both in the eyes of government officials and of third-country nations—of the formal status of national citizenship.

On the other hand, features of Germany's reformed citizenship and naturalization regime, while of course marking a historical departure from the country's prior approach toward its population of third-country nationals, arguably still betrays more than a trace of exclusionary forms of national membership. If post-nationalists wish to suggest that our contemporary political context is marked by the progressive decoupling of citizenship from exclusionary forms of identity and membership, then Germany's contemporary citizenship regime, which cannot quite be called post-ethnonationalist, poses a further challenge to their claims. In this sense, the politics of naturalization in Germany show not only that citizenship still matters, but also that it seems to matter in ways that are strikingly contrary to the post-nationalist position.

The exclusionary dimensions of German's approach to nationality have come out most clearly through the continued, though markedly selective, rejection of dual nationality in the country's contemporary citizenship policy, even while access to naturalization and citizenship have been broadly re-configured in light of the reforms introduced in 2000. Aspects of these and subsequent amendments to German citizenship and nationality law not only eliminated loopholes that had allowed Turkish nationals to gain dual citizenship through re-acquiring Turkish citizenship after naturalizing in Germany, but introduced *jus soli* in an importantly circumscribed form.[87]

---

[85] Jacobson, *supra* note 1 at 39.

[86] Green, "Much Ado", *supra* note 48 at 184. Thus, as early as 1984, there was widespread agreement that the integration of Germany's large third-country population represented an important government priority, with officials declaring that "no state can in the long run accept that a significant part of its population remain outside the political community." See Brubaker, "Citizenship and Nationhood", *supra* note 14 at 78.

[87] For a more extensive discussion of the elimination of informal mechanisms for dual citizenship for Germany's Turkish population and the frequently resulting loss of nationality in the wake of the reforms introduced in 2000, see Betty De Hart & Kees Groenendij, "Multiple

This latter feature of the new citizenship regime is exemplified in the *Optionsmodell*, which sought to render possible cases of dual citizenship generated through the country's adoption of jus soli only temporary, by requiring individuals to opt out of other nationalities at the age of 23 or risk losing German citizenship. Indeed, it is worth noting that the implications of the *Optionsmodell* are no longer merely prospective - there have now already been a number of cases of individuals being stripped of their German nationality as a result of these provisions, sometimes merely as a result of inaction resulting from ignorance of the implications of the new citizenship regime.[88]

Moreover, while proposed reforms suggest the introduction of a more relaxed policy toward dual nationality under the Optionsmodell, this does little to address the position of third-country nationals not falling under such provisions, while also highlighting the persisting importance of the acquisition of national citizenship to full status."

While this is not the place for a theoretical discussion of the merits or deficiencies of dual citizenship, in the German context the continued formal rejection of dual citizenship has particular importance for how we should understand citizenship more broadly. The refusal to allow dual nationality for a significant portion of Germany's largest group of third-country nationals is widely perceived to be the chief deterrent against naturalization among those of Turkish origin. Thus in a development that would seem paradoxical for a series of policy reforms intended to both encourage and open up access to naturalization, since the introduction of the 2000 reforms naturalizations have reduced by half—falling from 2.6 per cent to 1.6 per cent from 2000-2007, with the drop in naturalizations German's Turkish population being considerably greater.[89] As Simon Green has put it, far from opening up citizenship to Germany's large population of resident third-country nationals, the new naturalization regime "is actually helping to create fewer citizens than the old, supposedly more restrictive law."[90] But perhaps most problematically, this restrictive approach toward dual nationality for third-country nationals has developed alongside a far more permissive policy reserved for nationals from other EU member states. Recall that under Germany's post-2007 citizenship law amendments, dual citizenship has become automatically permitted for *all* EU citizen applicants. Reminiscent of Germany's long-running policy of automatically granting access to citizenship to so-called ethnic Germans who may have never

---

Nationality: Germany and the Netherlands" in Ryszard Cholewinski et. al., eds, *International Migration Law: Developing Paradigms and Key Challenges* (Cambridge: Cambridge University Press, 2007) at 100.

[88] These problematic dimensions of the Optionsmodell coming into effect have received important attention in the press, see: Hannah König. (2013) "Doppelte Staatsbürgerschaft: Optionskinder erzählen", *Spiegel Online*, 3 May 2013; Judy Dempsey. (2013) "A Difficult Choice for Turks in Germany", *New York Times*, 15 April, 2013.

[89] Green, "Much Ado", *supra* note 48 at 179. Green reports that the reduction in naturalization among Turkish nationals represents "a fall from 1999 of over 75 per cent".

[90] *Ibid, at* 14.

resided within the country while effectively denying access to citizenship to its intergenerational population of Turkish residents, the country's current approach toward citizenship embodies a double-standard: formally tolerating dual nationality for EU citizens and "ethnic Germans," while effectively denying it to many third-country nationals. This persisting pattern has led Green to rightly suggest that German citizenship retains "more than a whiff of ethnocultural exclusivity."[91] Recall, for example, the concrete effects the *Optionsmodell* has already begun to have on the lives of descendents of third-country nationals granted access to German nationality under the recent citizenship reforms. That individuals who may have been born and raised in Germany have in some cases been actively stripped of their German, and consequently EU, citizenship simply because of the possession of dual nationality in a non-EU state should certainly trouble our interpretation of the inclusionary dynamics of the reforms in German citizenship law and of the EU more broadly.[92] Importantly for our discussion, this distinction stresses the differential treatment of EU citizens from third-country nationals within Germany and highlights how such divergent experiences should be understood as frustrating post-nationalist expectations, if only because exclusionary conceptions of membership—now perhaps configured around a "European" identity—seemingly continue to take precedence over norms grounded in a conception of universal personhood.

V. GERMANY'S PERSISTING AMBIGUITIES OF BELONGING AND MEMBERSHIP

We have has examined the post-nationalist's assertion that emerging forms of membership point to a important shift in the configuration of the rights, status, and identity attached to citizenship as traditionally understood. This shift has seen the aforementioned components of membership become decoupled in complex ways, leading to the diminished importance of the nation state and national citizenship. Taking contemporary Germany as a crucial case for assessing the existence and meaningfulness of such trends, I have sought to examine empirically whether existing institutional arrangements of the largest host country of non-nationals within the European Union vindicate the post-nationalist claim. Focusing on the

[91] Green, "Ideology", *supra* note 49 at 948.

[92] Indeed, that the *Optionsmodell's* entails and has produced the automatic loss of German citizenship, and consequently, of EU citizenship, would seem to run entirely contrary to the approach defended in *Rottmann* as discussed above. For reports of these outcomes, see Dempsey, "Difficult Choice", *supra* note 87. Whether these outcomes will provoke a legal response similar to that outlined in *Rottmann* is hard to predict given that the *Rottmann* case clearly depended on a cross border movement in order to activate EU competency. "While there are indications of reforms on behalf of the current German government that would alter these circumstances by allowing dual nationality under the Optionsmodell, such a development would be contrary to the post-national thesis, both originating at the domestic level and stressing the persisting importance of the acquisition of actual national citizenship to full status for third-country nationals."

position of EU citizens and third-country migrants, I have suggested that we are confronted with a deeply ambivalent situation. On the one hand, the emerging status of EU citizenship under an intrepid ECJ has come to resemble a post-national form of membership, exemplifying a partial decoupling of both rights and status from the nation state and in its increasingly robust form, paradoxically come to potentially empower EU citizens with greater rights than nationals. On the other hand, Germany's population of third-country nationals remains largely insulated from the post-national dynamics of such developments. Their experience highlights the lasting importance of national citizenship in ways that undermine the post-nationalist position. This is borne out in the many important rights that third-country nationals continue to be denied and in the politics of dual citizenship that has unfolded in Germany in the context of its recent citizenship reforms, the latter highlighting persisting elements of ethno-nationalism. Thus, given the continued precarious position of Germany's large population of third-country migrants, a group frequently far more economically, politically and socially disadvantaged than their EU national neighbors, we must admit that the post-nationalist perspective is a deeply problematic lens for understanding what the current stakes of citizenship are today.

A number of practical considerations emerging from these important dynamics ought to inform our thinking about the contemporary nature of citizenship more broadly. Although I have argued that EU citizenship has recently undergone important transformations that significantly enhance its claim to represent a novel post-national form of membership, juxtaposing the experience of Union citizens with that of third-country nationals alerts us to the persistence of powerful counter-trends in the development of citizenship regimes. This suggests that scholars and practitioners concerned with social and political inclusion should remain wary of viewing developments in EU citizenship as suggesting the unimportance of nationality today. Indeed, the lessons of Germany suggest that multiple, at times problematically stratified, regimes of membership can coexist.

Most concretely, the troubling outcomes of the *Optionsmodell* policy–which has already resulted in the loss of German nationality by descendents of third-country nationals–show how the full retention of state control over naturalization policy, as a subset of citizenship law, can sustain problematic forms of exclusion even within the context of the EU. The treatment of this population with regard to intolerance of dual nationality as a condition of naturalization is hard to justify when compared to the differential treatment accorded to nationals from other EU member states, and yet the current government has expressed little interest in further reforms of the German citizenship regime. Admittedly many scholars believe that Germany's present approach toward citizenship and naturalization with regard to descendents of third-country nationals is deeply unstable, with some suggesting that the denial of dual citizenship to third-country residents is likely to run afoul of the European Convention. Others suggest that the *Optionsmodell's* effect of the automatic loss of nationality is likely to be

equally problematic in the eyes of the German constitutional court, where a legal challenge is to be expected. That said, for the time being, it is hard not to view the position of Germany's third-country nationals as one tantamount to second-class citizenship.

Rethinking Rape Law

HILMI M. ZAWATI*

Clare McGlynn and Vanessa Munro, eds., *Rethinking Rape Law: International and Comparative Perspectives* (New York, NY: Routledge, 2010).

I. INTRODUCTION

Since the first reports on gender-based crimes committed during the Yugoslav dissolution war of 1992-1995 and the Rwandan genocidal war between April and July 1994,[1] feminist legal scholars have produced

* Hilmi M. Zawati, D.C.L. (McGill), M.A. (McGill), Ph.D. (CPU), M.A. (Punjab), Post-Grad. Dipl. (Khartoum), LL.B. (BAU), is currently president of the International Legal Advocacy Forum (ILAF), and an international criminal law jurist and human rights advocate. He is the author of several prize-winning books on international humanitarian and human rights law, including his book *The Triumph of Ethnic Hatred and the Failure of International Political Will: Gendered Violence and Genocide in the Former Yugoslavia and Rwanda* (Lewiston, N.Y.: The Edwin Mellen Press, 2010). Dr. Zawati's most recent work is his book *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (New York, N.Y.: Oxford University Press, 2014). I would like to thank Steve Millier for reading the early draft of this review.

[1] During these wars, thousands of women and men were drafted for several different patterns of military sexual violence and gender-based assaults, including genocidal and systematic mass rape; forced prostitution; sexual slavery; sterilization; castration; forced impregnation; forced maternity; sexual mutilation; and sexual torture. This gender-based violence, based on religious, racial or political motives, has been utilized as a physical and psychological weapon of war to destroy the entire culture and fabric of the opponent's society. Among many earlier scholarly works and UN reports written on these atrocities, one may read Elizabeth A. Kohn, "Rape as a

Vol 10, pages 31-43. ISSN: 1712-2988.

hundreds of scholarly and journalistic works on rape and other forms of sexual violence committed either in peacetime[2] or in conflict situations.[3] This body of scholarly literature addresses the legal treatment of rape in the statutory laws of international criminal tribunals, in international and regional human rights treaties, and a wide range of different domestic penal laws. New to this literature is this thought-provoking work, *Rethinking Rape Law: International and Comparative Perspectives,* edited by Clare McGlynn, professor of law at Durham University, and Vanessa E. Munro, professor of socio-legal studies at the University of Nottingham.[4] The work under review started as a collection of papers submitted to an international conference marking the 10th anniversary of the landmark judgement of the International Criminal Tribunal for Rwanda (ICTR) in the case of Jean-Paul Akayesu, where he was convicted, *inter alia*, for rape as an act of genocide.[5] This milestone judgement constituted a triumph for feminist legal scholars and activists.[6] It was also a turning point for the international justice system, in general, and for the jurisprudence of the international criminal tribunals, in particular.[7]

Weapon of War: Women's Human Rights during the Dissolution of Yugoslavia," (1994) 24:1-3 Golden Gate University Law Review 206; Kelly D. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1997) 12; UN Commission on Human Rights, *Rape and Abuse of women in the Territory of the Former Yugoslavia: Report of the Secretary General*, UN Doc. E/CN.4/1994/5 (30 June 1993) 2.

[2] Rape, whether in peace or in time of war, is an unfortunate constant in human history, constituting a persistent and pervasive element in the lives of women and men. In the United States alone, which has the highest sexual assault rate among countries that report such crimes, more than 65 percent of women do not feel safe in their own homes at night, as a woman is raped every 2-5 minutes. In fact, approximately 350,000 rapes are reported to American law enforcement officials every year. See Ann J. Cahill, *Rethinking Rape* (Ithaca, N.Y.: Cornell University Press, 2001) 1; UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85*, UN Doc. E/CN.4/1996/53 (6 February 1996) 15.

[3] During this period, the writer of this review and Ibtisam M. Mahmoud, librarian at McGill University Health Centre, compiled an extensive selected bibliography on wartime rape and other forms of sexual violence, comprising more than 8,000 entries in 610 pages, in 12 different languages, mainly English and other European languages. See Hilmi M. Zawati & Ibtisam M. Mahmoud, *A Selected Socio-Legal Bibliography on Ethnic Cleansing, Wartime Rape and Genocide in the Former Yugoslavia and Rwanda*, 1st ed. (Lewiston, N.Y.: The Edwin Mellen Press, 2004).

[4] Clare McGlynn & Vanessa E. Munro, eds., *Rethinking Rape Law: International and Comparative Perspectives* (New York, N.Y.: Routledge, 2010). [Rethinking Rape Law].

[5] *Prosecutor* v. *Jean-Paul Akayesu*, (1998) Judgement, 2 September 1998, ICTR-96-4-T. [Akayesu Judgement].

[6] On the basis of the staggering information revealed by different human rights organizations on the horrific rape crimes committed against Tutsi women, the ICTR received an Amicus Brief and several appeals submitted by activists from human rights organizations, feminist legal scholars, and worldwide international human rights lawyers, including the reviewer. See *International Criminal Tribunal for Rwanda: Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and other Sexual Violence within the Competence of the Tribunal in Akayesu,* ICTR-96-4-1, 27 May 1997 (Montreal, Quebec: Rights & Democracy, 1998), at paragraph 1.

[7] Since the Akayesu decision, the trial chambers of the international criminal tribunals re-adopted the Akayesu model, particularly the definition of the crime of rape, while prosecutors brought more charges of rape and other forms of sexual violence within the jurisdiction of the Tribunals.

Acknowledging the lack of a clear central legal argument—due to the nature of the work as a collection of articles dealing with different topics—the editors maintain in their introduction that the aim of this work is to provide the reader with a cross-cultural perspective and a critical evaluation of the latest developments in rape laws embodied in the statutory laws of international, regional, and domestic judicial bodies.[8] Comprised of 22 concise chapters, the work is arranged thematically under four corresponding principal ideas: the theoretical complexities of responding to the wrongs of rape; the relationship between feminist activism and legal reform; the limits of law reform in bringing about social change; and finally, the secondary victimization of rape complainants during the criminal investigation and trial process.[9]

In their introduction the editors provide a meticulous analysis of these themes and underline the need for progressive reform of rape law, including reconceptualizing and criminalizing rape in international and domestic laws. By examining feminists' debates and struggles at the national, regional, and international levels to protect victims and ensure their right to sexual and bodily integrity, they elucidate feminists' responses to the wrongs of rape, their struggle for legal reform within international and national legal systems, and the challenges that prevent law reform from bringing about real changes.

II. THEORETICAL ENGAGEMENTS AND CONCEPTS OF THE CRIME OF RAPE

Vanessa Munro, and Jonathan Herring and Michelle Dempsey present the first two chapters of the collection under the above topic. From a theoretical standpoint, they discuss and evaluate the positions of leading legal scholars on consent as an element of the crime of rape within its jurisprudential and psycho-social contexts, whether in times of peace or during armed conflict. Munro's paper focuses on the criminalization of rape within international and domestic frameworks with reference to consent and coercion as the major elements of this crime. She draws from the case law of two international criminal judicial bodies, namely the ICTR[10] and the International Criminal Tribunal for the Former Yugoslavia (ICTY),[11] as well as from legal scholarship on the issue, particularly the works of Catharine MacKinnon. Munro discusses the definition of rape in the Akayesu Judgement of 2 September 1998,[12] exploring its impact on subsequent judgements of the above tribunals.

---

[8] Rethinking Rape Law, *supra* note 4, at 2.
[9] *Ibid*, at 3.
[10] For example see *Prosecutor* v. *Mikaeli Muhimana*, (2005) Judgement and Sentence, 28 April 2005, ICTR-95-IB-T; *Prosecutor* v. *Sylvestre Gacumbitsi*, (2006) Appeals Judgement, 7 July 2006, ICTR-2001-64-A.
[11] See *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, (2001) Judgement, 22 February 2001, IT-96-23-T and IT-96-23/1-T.
[12] Akayesu Judgement, *supra* note 5, at paras 597-598.

After examining consent and coercion as elements of the crime of rape, Munro argues that there are a number of characteristics that distinguish cases of rape in times of peace from those that occur in wartime settings. She maintains that—in contrast to rape cases in domestic contexts—cases of sexual violence in the context of armed conflict prosecuted under international criminal law usually involve countless forms of wrongdoing, including physical violence, sexual torture, and sexual slavery. Furthermore, she asserts that an exclusive focus on coercion fails to ensure against the "secondary victimisation" that critics associate with the consent threshold, including minimising the extent of the victim's violation[13] and alienating her experiences from the legal process.[14] Munro concludes with an endorsement of George Fletcher's argument on the importance of consent and affirms that the symbolic and practical value of consent should not be dismissed in the context of sexual self-determination.[15]

In their contribution, Jonathan Herring and Michelle Dempsey examine the criminal law's response to sexual penetration in terms of theoretical and practical implications. In addressing this topic, they make four claims: engaging in sexual penetration calls for justification; the penetrated person's consent does not fully justify sexual penetration; the penetrated person's consent plus other reasons can justify sexual penetration; and the acceptance or prohibition of sexual penetration depends on its justification in any social context. After elaborating upon these principles, the authors affirm that the feasibility of prohibiting sexual penetration under criminal laws can vary widely, depending on different societies and contexts.

III. INTERNATIONAL AND REGIONAL PERSPECTIVES

The second theme of the reviewed work examines rape and other forms of sexual violence from a number of viewpoints. The first two chapters in this part, by Alison Cole and Doris Buss, respectively, scrutinize wartime rape and other gender-based crimes under the statutory laws and jurisprudence of the criminal tribunals and courts post-WWII.[16] By contrast,

---

[13] The issue of consent, as defined and governed by Rule 96 of the ICTY's Rules of Procedure and Evidence, has led to one of the most detrimental cross-examination strategies in rape cases. Despite protective measures provided under this rule, which are expected to encourage wartime rape victims to speak out, they are occasionally circumvented by defense lawyers, as happened during the famous Foča Trial. In that trial, when the victim told the court that one night the rapist rejected her and took AB, whom he kept for a short time, and then took No. 87, with whom he spent most of his time, the defense counsellor asked the victim if she was jealous of the woman who had been selected that night. He added that the witness was not telling the truth and she was in love with the perpetrator. In other words, he argued that the witness's consent had been given! Such gruelling cross-examination may cause witnesses to mistrust courts of law and the international criminal justice system altogether. See Foča Trial Transcript (4 April 2000), Testimony 1624; Hilmi M. Zawati, *Gender-Related Crimes in Armed Conflict Settings: Legal Challenges and Prospects* (New York, N.Y: Edwin Mellen Press, forthcoming 2014), 194; Nicola Henry, "Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence," (2009) The International Journal of Transitional Justice14.
[14] Rethinking Rape Law, *supra* note 4, at 24.
[15] *Ibid*, at 27.
[16] *Ibid*, at 47.

the last two chapters in this section, by Patricia Londono and Heléne Combrinck, look at these crimes from the perspectives of the European Convention on Human Rights, on the one hand, and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, as well as two other gender-related protocols in the Great Lakes and Southern African sub-regions, on the other. Whereas Doris Buss provides a comprehensive overview of the work of the ICTR and the dilemma of prosecuting wartime rape under its basic laws and jurisprudence,[17] Karen Engle and Annelies Lottmann, in another contribution to this part of the book, look beyond the crime of rape to explore the effects of shame and stigmatization as ongoing repercussions of rape and barriers to justice from a socio-legal perspective.[18] They examine shame as something which cannot be prevented or avoided in the context of rape, and consider ways of diminishing its harm to a point that would allow victims to come forward and seek justice.[19] In a similar vein, Alice Edwards reviews a number of international human rights treaties with reference to rape and violence against women. She highlights the failure of these treaties to provide a definition for rape although it is explicitly listed in some instruments.[20]

IV. NATIONAL PERSPECTIVES

Moving from international to domestic criminal law, part three contains nine papers providing analysis of rape laws under several European, North American, Australian, and African criminal justice systems. Contributors

[17] Rethinking Rape Law, *supra* note 4, at 47.
[18] *Ibid*, at 76.
[19] In his recent campaign to advocate the rights of Libyan women wartime rape survivors, the writer has published and lectured extensively on the issue of shame as a constant negative effect of rape and a barrier to justice, particularly under transitional justice in war-torn countries. He called upon Libyan society, as well as the Libyan Transitional Council (LTC), to declare wartime rape causalities as wounded combatants rather than as mere victims of sexual violence, as veterans of a just war rather than a shameful statistic. Unfortunately, Libyan women rape survivors suffer in silence, vulnerable to several forms of hidden death and are confronted with a cluster of overwhelming problems. The Libyan people comprise a conservative society that holds women's chastity and honour as highly regarded values. Accordingly, to maintain the family's honour, many Libyan individuals, including victims themselves, believe that raped women must be subjected to "honour killing," regardless of the fact that these women were assaulted against their will. For this reason, many victims have preferred to die in silence while others have urged their families to kill them or have intended to commit suicide, unable to bear the stigma and shame. In this connection, campaigners for the U.S.-based organization Physicians for Human Rights reported that three teenage sisters raped by Gadhafi's soldiers at a school in the town of Misrata were later murdered by their father, who slit their throats in an honour killing for "bringing shame on the family." This is a social value that contravenes Islamic law (in force in Libya), which prohibits victimizing the victim and encourages Muslim men to marry raped women and treat them gently. See Hilmi M. Zawati, *Aftermath of Rape and Sexual Violence: The Dilemma of Libyan Women Wartime Rape Survivors*, Public Lecture, Faculty of Law, Queen's University, Kingston, Ontario, March 29, 2012; Hilmi M. Zawati, "Hidden Deaths of Libyan Rape Survivors: Rape Casualties Should be Considered Wounded Combatants Rather than Mere Victims of Sexual Violence," *The National Law Journal* (9 January 2012) 35; Hilmi M. Zawati, "Libyan Rape Casualties as Veterans of a Just War, Not a Shameful Statistic," 207:2 *The New Jersey Law Journal* (9 January 2012) 31.
[20] Rethinking Rape Law, *supra* note 4, at 96.

examine rape laws in different judicial and socio-political systems, provide critical analyses of how those laws responded to sexual violence, and indicate various avenues for further development and future reform within divergent domestic legal systems.

Covering an extensive range of socio-legal diversity, this part begins with a chapter by Clare McGlynn, investigating the feminist role in rape law reform in England and Wales over the past three decades. It examines three controversial aspects of law reform related to consent, namely: changes to the defence of belief in consent; strict liability in the case of child rape; and the challenges of intoxicated capacity and consent.[21] McGlynn emphasizes the role played by feminists to improve the high rate of attrition and low rate of conviction for the offence, while highlighting the experiences of victims and addressing their needs.[22] Similarly, Sharon Cowan reviews the newly enacted Sexual Offences (Scotland) Act 2009, arguing that the reform process was controlled by its remit, and consequently, the substantive reforms had a limited effect. After a short historical review of the common law of rape in Scotland, Cowan examines the Sexual Offences Act 2009 with respect to elements of rape, including the victim's consent and the perpetrator's *actus reus* and *mens rea*. She notes that the constrained reform process has made only limited progress in improving the conviction rate and reducing the frequency of rape crimes.[23]

Turning their attention to rape laws in Croatia, Italy, and Sweden, Ivana Radačić and Ksenija Turković, Rachel Anne Fenton, and Monica Burman contribute the next three chapters. While Fenton inquires into the recognition of sexual autonomy in Italian law, Radačić and Turković, and Burman focus on consent in the Croatian and Swedish criminal law codes, respectively. Rape law reform is still limited in Croatia, a state in transition, emerging from dictatorship and an independence war following the dissolution of the former Yugoslavia in the early 1990s. At that time, rape and other forms of sexual violence were used as weapons of war, affecting thousands of Croatian women and resulting in thousands of pregnancies and wartime-rape-children.[24] In their analysis, Radačić and Turković maintain that rape is still defined as being accompanied by force or threat of force under the Croatian Criminal Code. Seeing the goal as securing more effective

[21] Rethinking Rape Law, *supra* note 4, at 139.
[22] *Ibid*, at 151.
[23] *Ibid*, at 166.
[24] Although Serbian legislators partially amended the Serbian criminal code to punish "ethnic rape" in the late 1980s, Serb forces waged a systematic ethnic rape campaign, between 1991and 1995 in Bosnia-Herzegovina and Croatia, as a policy of ethnic cleansing, under the slogan *Rodit ces Četnika* (you will give birth to a *Četnik*). However, rape accounts revealed that Serbian women were also raped on reciprocal bases by Croatian and Bosnian Muslim forces. Molested Serbian women, who provided a number of horrific testimonies, claimed that they were brutally raped and told by their rapists that they should "give birth to little Ustašas" or "must bear Muslim children." In turn, perpetrators perceived this behaviour as transgenerational revenge and punishment inflicted on Serbian women for mass rape crimes committed against Bosnian Muslim and Croatian women by Serb combatants. See Hilmi M. Zawati, *The Triumph of Ethnic Hatred and the Failure of International Political Will: Gendered Violence and Genocide in the Former Yugoslavia and Rwanda* (Lewiston, N.Y.: The Edwin Mellen Press, 2010) 167.

protection from rape, the authors argue that the "central element of rape should become non-consent, rather than force or threat of force."[25] Accordingly, they propose an affirmative model of consent based on the idea that submission and lack of resistance should constitute consent in rape crimes.

Monica Burman also raises this issue in reviewing rape law reform in Sweden. She asserts that, despite the fact that rape has been the subject of more official investigations and legislative changes than any other crime in Sweden in the past three decades, there have been very few policy initiatives addressing rape or other forms of sexual violence. Focussing on the latest reform of 2005, when legislators decided not to replace coercion with consent as an element of the crime of rape, Burman asserts that a new construction of rape law in Sweden should be incorporated with a provision in which non-voluntariness replaces coercion as the criminal element.[26]

For her part, Fenton examines the 1996 Italian reform of sexual offence laws to determine whether these reforms had any effect in practice. She reveals that, although the 1996 law led to a fundamental cultural revolution by incorporating a new right to sexual autonomy on the part of adults, recent statistics show an increase in the reporting of sexual violence without a corresponding increase in convictions. She adds that Italy still has a long way to go in changing its rape culture and laws, which means in practice that the symbolic recognition of sexual autonomy embodied in the above laws has not had any significant impact in this respect.[27]

Reviewing rape laws in Canada, the United States, and Australia, Lise Gotell, Donald Dripps, and Peter Rush examine, respectively, Canadian sexual assault law and the erosion of feminist-inspired law reforms, rape laws and American society, and criminal law and the reformation of rape law in Australia. Gotell provides an analysis of the Canadian sexual law reform enacted in 1992 as a direct reaction to the *Seaboyer* decision.[28] In responding to public concerns about the decision of the Supreme Court of Canada on *R. v. Seaboyer*, the federal government passed Bill C-49 after profound consultations and debates with Canadian feminist organizations.[29] Gotell argues that these feminist-inspired changes moved the Canadian Criminal Code in the direction of an affirmative consent standard. She adds that, although the 1992 reforms introduced doctrinal changes supporting sexual autonomy and positive consent, new forms of victim-blaming were

---

[25] Rethinking Rape Law, *supra* note 4, at 169.
[26] *Ibid*, at 196.
[27] *Ibid*, at 194.
[28] *R.* v. *Seaboyer*, (1991), 66 C.C.C. (3d) 321, 7 C.R. (4th) 117, [1991] 2 S.C.R. 577.
[29] Christine Boyle & Marilyn MacCrimmon, "The Constitutionality of Bill C-49: Analyzing Sexual Assault As if Equality Really Mattered," (1998-1999) 41 Criminal Law Quarterly 206; Kwong-leung Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation," (1998) 42 (3) International Journal of Offender Therapy and Comparative Criminology 266; Sheila Mclntyre, "Redefining Reformism: The consultations that Shaped Bill C-49," In Julian Roberts & Renate Mohr, eds., *Confronting sexual assault: A decade of legal and social change* (Toronto, Canada: University of Toronto Press, 1994) 293-326; Don Stuart, "Sexual assault: Substantive issues before and after Bill C-49," (1992) Criminal Law Quarterly, 35.

created with some categories of women being excluded.[30] In the United States, there are 51 different rape codes and 51 different procedural systems. Accordingly, crimes that are not "organized" (such as rape) are investigated by city or state police and state prosecutors make the decisions. Therefore, prosecutors have great discretionary power over case outcome, which can vary tremendously from the perspective of victims.[31] Taking a similar approach, Rush underlines the plurality of Australian penal jurisdictions with their different relations to the common-law tradition.[32] Thus, the variety in definitions of rape crimes leads to inconsistent prosecutions and verdicts. Rush points to the increased reference to social science research to justify law reform in Australia and warns against focusing on procedure rather than on the substantive laws of the offence of rape.[33] He emphasizes that rape law reform would be pointless without first reconstructing the legal definition of the crime of rape.[34]

In the final contribution to this part, Shereen Mills critically investigates rape law reform in South Africa—a country that scores one of the world's highest levels of sexual violence against women and children. An 11-year law reform process resulted in the Sexual Offences Act of 2007. The Act introduced wide-ranging definitional changes, including a definition of rape that restated the meaning of consent, and introduced coercive circumstances to the elements of this crime. In analysing the provisions of the Act with regard to consent, Mills argues that the list of coercive circumstances does not seem to include rape by a perpetrator known to the victim, one of the most common encounters with sexual coercion faced by women. Moreover, this definition also ignores women's vulnerability to sexual exploitation in the face of high levels of poverty and unemployment.[35]

V. NEW AGENDAS AND DIRECTIONS

The last part of this work comprises five chapters highlighting criminal

---

[30] Rethinking Rape Law, *supra* note 4, at 217. In this respect, criticism could be levelled at the rape law reform in the Canadian Criminal Code, which replaces the offences of "rape," "indecent assault," and "attempted rape" with a three tier offence of "sexual assault" comprised of: sexual assault; sexual assault with a weapon, threats to a third party or causing bodily harm; and aggravated sexual assault. This abstract code simply means that differences between distinct types of sexual offences would be dealt with at the sentencing level rather than distinguishing these crimes from the outset with different labels. In other words, this broadly labelled offence would enable trial judges to reduce sentences at their discretion despite the fact that these crimes vary in their nature, seriousness, and levels of blameworthiness. See Hilmi M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (New York, N.Y: Oxford University Press, 2014) 14. See also Duncan Chappell, "Law Reform, Social Policy, and Criminal Sexual Violence: Current Canadian Responses," (2006) 528 Annals of the New York Academy of Sciences 382; Julian V. Roberts & Robert J. Gebotys, "Reforming Rape Laws: Effects of Legislative Change in Canada" (1992) 16:5 Law and Human Behavior 556.

[31] Rethinking Rape Law, *supra* note 4, at 224-225.

[32] *Ibid*, at 237.

[33] *Ibid*, at 238.

[34] *Ibid*, at 249.

[35] *Ibid*, 251-252.

procedure in rape trials and advocating the rights of women victims. The first two chapters by Fiona Raitt, and Louise Ellison and Vanessa Munro, focus on the challenges of responding to rape in connection with the representation of victim witnesses during criminal proceedings, and examining jury deliberation and complainant credibility in rape trials, respectively. The last three chapters in this part, written by Philip Rumney and Natalia Hanley, Aisha Gill, and Janine Benedet and Isabel Grant, address problematic social attitudes towards male rape and the sexual assault of men in peacetime or wartime settings;[36] the marginalization of sexual violence against women in south Asian communities in the United Kingdom; and finally confronting sexual assaults of women with mental disabilities from a Canadian perspective.

Drawing on examples from Scotland, Raitt explores the potential for independent lawyers to advocate the rights of, and provide services for, complainants of rape and other sexual offences. She argues that providing independent legal representation to rape victims would help them cope with the legal process and give their best evidence at trial.[37] In another chapter, Ellison and Munro examine the impact of the jury's deliberation and the complainant's credibility in rape trials on delivering justice to rape victims. They argue that delayed reporting and alleged failure to resist on the part of the complainant may have an unfavourable influence on the jurors' sense of credibility. By the same token, providing educational guidance to jurors in rape trials would help ensure access to justice for victims.[38]

For their part, Rumney and Hanley look at social attitudes and the law's reinforcement of the mythology of adult male rape and sexual victimization within institutions, the general population, the gay community, and in wartime settings. They examine the effect of the complainant's resistance and injuries on the perception of his credibility and conclude that rape myths, stereotypes, and misunderstandings have a great impact on the societal attitudes towards male rape crimes. The findings of this analysis reveal that the failure of a complainant to resist or show injuries sustained as a result of a sexual assault place his credibility on the horns of a dilemma.[39]

Conversely, Aisha Gill highlights the culture of silence in the face of

---

[36] Different reports from the battlefield in Croatia and Bosnia-Herzegovina claimed that male captives were subjected to systematic brutal rape and sexual assaults during armed conflict. It is estimated that Serb militants sexually abused more than 4,000 Croatian men. Ruling on the first case before the ICTY, the Prosecutor charged Dušku Tadić with sexual violence against male prisoners at the Omarska concentration camp. See Hilmi M. Zawati, "Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity," (2007) 17:1 Torture Journal 27 [Zawati]. See also Eric S. Carlson, "Sexual Assault on Men in War," (1997) 349:9045 The Lancet 129; Lara Stemple, "Male Rape and Human Rights," (2008) 60 Hastings Law Journal 605; Lucy Wadham, "Shame of Bosnia's Raped Pow's," *The Sunday Telegraph* (28 April 1996) 10; Monica A. Onyango & Karen Hampanda , "Social Constructions of Masculinity and Male Survivors of Wartime Sexual Violence: An Analytical Review," (2011) 23:4 International Journal of Sexual Health 240; *Prosecutor v. Dušku Tadić also Known as "Dule" & Goran Borovinca*, Indictment of 13 February 1995, 34 I.L.M.1028, IT-94-1-I, at paragraph 2.6.

[37] Rethinking Rape Law, *supra* note 4, at 268.

[38] *Ibid*, at 283.

[39] *Ibid*, at 304.

violence against women in South Asian communities in the UK. She tries to answer two interrelated questions: firstly, to what extent do cultural notions dominate the UK's criminal justice approach when dealing with violence against black and minority ethnic South Asian women? And secondly, how does the underreporting of violence against women complicate the criminal justice system's approach to dealing with such crimes?[40] Gill concludes that violence against such women could be eradicated with political will and socio-cultural motivation working in tandem with investment in preventative work.[41]

Finally, Janine Benedet and Isabel Grant examine whether recent developments in Canadian sexual assault law are adequate to respond to sexual assaults against women with a mental disability. They observe that mentally-challenged women are two to ten times more vulnerable to sexual assaults than women without a disability of this kind, and that 39-68 percent of women with a mental disability are liable to be sexually assaulted before they reach the age of 18. They add that sexual violence against these women is under reported in most cases. Moreover, while approximately one out of five cases of sexual assaults against women without a mental disability is reported, only one out of thirty cases of sexual assaults against such women is ever brought to the attention of the authorities. This is because, on the one hand, these women do not have the capacity to either refuse or consent freely to participate in sexual activity, and, on the other hand, they are dependent on caregivers for their daily basic needs (who constitute the highest percentage of the offenders).[42] Benedet and Grant argue that the Canadian legal system has failed to address these crimes, simply because prosecutors use general sexual assault laws to address sexual assaults involving women with a mental disability.[43] In their conclusion, they stress the necessity of reviewing the basic principles of sexual assault law to address sexual assaults against mentally-challenged women. Moreover, the law must exempt such women from having to communicate their evidence of being assaulted in the same way criminal trial procedure dictates for non-disabled women.[44]

VI. DISCUSSION

In sum, despite the fact that this work lacks a precise central legal argument and follows no single legal theory as guide or theoretical framework, it presents a unique collection of articles on rethinking rape law from a diverse range of cultural standpoints. It offers valuable, well-documented contributions by legal scholars debating rape law reform on both the domestic and international levels. In addition, the varied and rich lists of references that follow each chapter of this book provide the reader

[40] Rethinking Rape Law, *supra* note 4, at 302.
[41] *Ibid*, at 319.
[42] *Ibid*, at 322.
[43] *Ibid*, at 323.
[44] *Ibid*, at 333.

with a wealth of informative sources.

Nevertheless, there are a few points that could have been considered. First, although the introductory parts of this work thoroughly discuss the central legal issues facing the international criminal justice system, including the failure of the international criminal tribunals created after WWII to adequately address the crime of rape and other gender-based crimes, the authors neglect to take the next step. They do not proceed to call for reform within these judicial bodies and their statutory laws—especially the Rome Statute of the ICC—to explicitly define these crimes and prosecute them as crimes of sexual violence, rather than subsuming them under other categories of crimes, such as genocide, crimes against humanity, and war crimes. Regularly, this shortcoming leads to inconsistent verdicts and punishments, and causes inadequate prosecution of such crimes, manifested in the failure of these bodies to deliver adequate justice to both victims and defendants. Second, the third part of this book overlooks Asian, Latin American, and Germanic experiences, as the editors themselves acknowledge in their introduction.[45] The editors may overcome this shortcoming in the next edition and invite legal scholars from those regions to fill this gap. Third, most research papers published in this work generally focus on the rape of women by men, and do not sufficiently discuss the sexual molestation of men by women or the rape of men by men,[46] whether in times of peace or war. Various reports have shown, for instance, that Četnik women assaulted a number of Croatian prisoners of war during the

[45] Rethinking Rape Law, *supra* note 4, at 12.

[46] Although most American states amended their penal laws in the early 1980s to neutralize the sexual concept of rape to include male victims, the male rape crime has increased considerably since then. It has been estimated that there were approximately 60,000 rapes of males age 12 and over in the United States in 1992 only. The 1985 report of the Bureau of Justice statistics, the U.S. Department of Justice, indicated that there were 123,000 male rapes reported over the past ten years. In 1991, the same report showed that male victims filed about 13,000 of the 168,000 rapes reported nationally that year. Moreover, in 1995, justice records indicated that approximately 260,000 individuals were raped in the United States, 23,000 of whom were male victims. A recent study, analyzing the scope and nature of male sexual assault among U.S. active duty soldiers and combat veterans, indicated that 6.7 percent of male army soldiers experienced sexual assaults in their lifetimes. A more recent survey claimed that 13.3 percent of male Gulf War veterans reported a history of sexual assaults compared to 1.7 percent of male WWII veterans.

On the other hand, the English Sexual Offence Act of 1976 continued to limit the use of the term rape to the forced penile penetration of a female's vagina, while the anal penetration of a male by another male's penis is considered non-consensual buggery, for which the perpetrator would receive a lesser penalty than raping a female. In fact, only in 1994 was the English criminal law expanded to define rape as including penile penetration of the anus of a male or a female. Before this date, only vaginal penetration by the penis was considered as sexual intercourse, which the law required to prove the crime of rape. However, the English criminal law has differentiated sharply between rape and indecent assault, which covers acts of oral sex and penetration by objects or other parts of the body. See Claire Laurent, "Male Rape," (1993) 89:6 Nursing Times 18-19; Michael B. King, "Male Rape: Victims Need Sensitive Management," (1990) 301:6765 British Medical Journal 1345; Michael F. Myers, "Men Sexually Assaulted as Adults and Sexually Abused as Boys," (1989) 18:3 Archives of Sexual Behavior 203; P. L. Huckle, "Male Rape Victims Referred to a Forensic Psychiatric Service," (1995) 35:3 Medicine, Science and the Law 187; Richard Goldstone, "Prosecuting Rape as a War Crime," (2002) 34 Case Western Reserve Journal of International Law 277.

independence war in the early 1990s.[47] On the other hand, Serb combatants and U.S. soldiers of both sexes sexually abused Croatian and Iraqi men, respectively. Male rape in time of war is predominantly an assertion of power and aggression rather than an attempt by the perpetrator to satisfy sexual desire. The impact of such a horrible attack can damage the victim's psyche and cause him to lose his pride, break him mentally, and perhaps even extend these feelings to his entire family and community.[48] In ancient wars and societies, male rape in time of war was considered an absolute right of the victorious soldiers to declare the totality of the enemy's defeat and express their own power and control.[49] It was a weapon of war and a means of punishment in many cultures. In the military context, there was a widespread belief that when a victorious soldier emasculated a vanquished enemy and sexually penetrated him, the victim would lose his manhood and could never again be a warrior, much less a ruler.[50]

---

[47] In spite of the fact that most wartime rape victims have been women, investigations have brought to light that men were also raped in ethnic conflicts and mass violence in the former Yugoslavia and Rwanda, and recently in American prisons in occupied Iraq. These assaults were committed either by men against men or women against men. In a personal interview with the author, on 6 June 1998, Dr. S. Lang of the Office of the President of the Republic of Croatia revealed that thousands of Croatian captive men were sexually assaulted in detention camps by Serbian militia men and women. A Croatian eyewitness confirmed this information in testimony submitted to the Medical Center for Human Rights that he was forced by Serbian soldiers to watch the castration of a Croatian man by a female *Četnik.* Furthermore, Pauline Nyiramasuhuko was indicted by the ICTR Prosecutor for ordering Hutu militia men and gendarmes to rape and sexually assault Tutsi women and girls. In the same fashion, during the late nineties' civil war in Sierra Leone, female abductees were subjected to virginity checks and manually raped by female rebels prior to their deflowering by male rebels. Moreover, female rebels forced men to have sexual intercourse at gunpoint. In the January 1999 invasion of Freetown, a female rebel forced a male civilian to have sex. On September 27, 2005, a U.S. Military Court Martial at Fort Hood's Williams Judicial Centre sentenced Lynndie Rana England, a U.S. Army reservist, to three years confinement,. She was charged with violations of the Uniform Code of Military Justice, particularly, inflicting sexual, physical and psychological abuse on Iraqi prisoners of war at Baghdad's central confinement facility at Abu Ghraib. See Carrie Sperling, "Mother of Atrocities: Pauline Nyiramasuhuko's Role in the Rwandan Genocide," (2006) 33:2 Fordham Urban Law Journal 653-654; Laura Sjoberg, *Gender, Justice, and the Wars in Iraq: A Feminist Reformulation of Just War Theory* (Lanham, MD: Lexington Books, 2006) 144; Pauline Oosterhoff, et al., "Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret," (2004) 12:24 Reproductive Health Matters 74-75.

[48] Gary H. Lipscomb, et al., "Male Victims of Sexual Assault," (1992) 267:22 Journal of American Medical Association 3066; Gillian Mezey & Michael King, "The Effects of Sexual Assault on Men: A Survey of 22 Victims," (1989) 19:1 Psychological Medicine 205; Owen D. Jones, "Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention," (1999) 87:4 California Law Review 829; Sarah Ben-David & Peter Silfen, "Rape Death and Resurrection: Male Reaction after Disclosure of the Secret of being a Rape Victim," (1993) 12 Medicine and Law 181; Wynne Russell, "Sexual Violence against Men and Boys," (2006) 27 Forced Migration Review 22.

[49] Noëlle Quénivet, *Sexual Offenses in Armed Conflict and International Law* (Ardsley, N.Y.: Transnational Publishers, 2005) 17; Zawati, *supra* note 36, at 34.

[50] Despite the lack of evidence on male rape incidents during war, recent studies confirmed that men have also been raped, although to a much lesser extent. Some writers have controversially alluded to one of the most famous male rape cases during WWI, when the Ottoman Turks captured and sexually assaulted Thomas Edward Lawrence, known as Lawrence of Arabia, on 2 November 1917 in Deraa, Syria. He was subjected to humiliating treatment, including beatings and sexual assault at the instigation of the governor. See Jeremy Wilson, *Lawrence of Arabia: The Authorized Biography of T. E. Lawrence* (New York, N.Y.: Atheneum, 1990) 5; Lana Stermac, et al., "Sexual Assault of Adult Males," (1996) 11:1 Journal of Interpersonal Violence 52; R. Charli

Finally, the authors could have focussed more attention on the question of consent as an element of the crime of rape. The victim's submission, lack of resistance and failure to show signs of resistance or present wounds sustained as a result of resisting the rapist does not in the least equate to the victim's consent to participate in sexual activity. Accordingly, this element must be reconsidered in relation to the victim's situation, including his or her mental and psychological status. Scholarship can lead the way in changing the opinions of lawmakers on this issue.

VII. CONCLUSION

Overall, notwithstanding the above shortcomings, this book constitutes essential reading in view of its examination of the provisions of domestic and international criminal laws and for its exploration of the similarities and variances between rape in times of peace and in wartime settings. Moreover, by analysing and investigating different fundamental concepts in rape law, it brings together divergent perspectives of leading legal scholars from across the world on international criminal law, international human rights law, and domestic criminal justice systems, thereby moving the rape law reform agenda forward and ensuring appropriate justice for both victims and perpetrators. It is a remarkable, comprehensive work that should be read by legal scholars, jurists, actors in the criminal justice system, law students at all levels, and by anyone looking to deepen their understanding of the multiple tensions inherent in the shifting legal landscape of rape crime.

Carpenter, "Recognizing Gender-Based Violence against Civilian Men and Boys in Conflict Situations," (2006) 37:1 Security Dialogue 94.

The Challenge of Prosecuting Conflict-Related Gender-Based Crimes under Libyan Transitional Justice

HILMI M. ZAWATI*

*Hilmi M. Zawati, D.C.L. (McGill), M.A. in international comparative law (McGill), Ph.D. (CPU), M.A. (Punjab), Post-Graduate Diploma in law (Khartoum), LL.B. (Alexandria), is currently president of the International Legal Advocacy Forum (ILAF), and an international criminal law jurist and human rights advocate. Zawati's most recent work is his book *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (New York, N.Y.: Oxford University Press, 2014). An earlier version of this paper was presented at "Sexual Violence in the Recent Conflicts in Libya and Syria: Challenges to Protecting Victims and Pursuing Accountability," a conference organized by the Faculty of Law and the Munk School of Global Affairs, University of Toronto, 8 February 2013. The author would like to thank Ibtisam M. Mahmoud, Librarian at McGill University Health Centre, for research assistance, and Steve Millier for editing the rough draft of this work. I am also grateful to the Social Sciences and Humanities Research Council (SSHRC) for making funds available to present this work, grant number 3010325 (collaborator). Thanks are due also to the two anonymous referees for their enlightening comments. To simplify the text, wherever possible, masculine pronouns comprise the feminine and singular expressions the plural.

Vol 10, pages 44-91. ISSN: 1712-2988.

"We as Libyans cannot begin Saif's trial. There is no central power to prosecute him."[1]

— *Ahmed al-Jehani, the Libyan Coordinator for the ICC*

I. Introduction

In the recent Libyan armed conflict, as well as in most internal and international wars, civilians, particularly women and children, have formed the primary target for all forms of sexual violence—best expressed as conflict-related gender-based crimes.[2] These crimes have been systematically conducted on a large scale against both Libyan women and men as a weapon of war with the intention of damaging the fabric of Libyan society, driving a wedge between families and tribes, and undermining Libyan social and community cohesion.

Addressing wartime rape and other forms of sexual violence at the outset of any Libyan truth and reconciliation campaign would help ensure a durable peace, amnesty, transparency, and accountability among Libyan communities and tribes.[3] Failure on the part of the Libyan government and the General National Congress to restore justice and build peace may well trigger cycles of revenge and place the whole country on the horns of a dilemma.

However, in the aftermath of internal conflict and civil war, which usually result in mass violence and gross human rights violations, transitional justice must be an essential element and an integral component

[1] Barak Barfi, "Libya's Unwilling Revolutionaries," Online: Project Syndicate (3 July 2012) <http://www.project-syndicate.org/commentary/libya-s-unwilling-revolutionaries> Accessed on: 13 February 2013) [Libya's Unwilling Revolutionaries].
[2] UN Department of Political Affairs, *Guidance for Mediators: Addressing Conflict-Related Sexual Violence in Ceasefire and Peace Agreements* (New York, N.Y.: United Nations Publications, 2012) 8.
[3] *Ibid*, at p. 9.

of any political or legal process that aims at achieving conflict resolution and peace-building.[4] To ensure accountability, establish equity, make justice and achieve reconciliation, Libyan transitional justice should involve a full range of socio-legal mechanisms that would help the Libyan people deal with widespread or systematic human rights violations, particularly conflict-related gender-based crimes committed by all parties to the conflict.[5] Ultimately, transitional justice has to be constituted of different measures and processes, including criminal justice, truth-seeking and reconciliation commissions, reparations to victims, and institutional reforms.[6]

This article argues that the incompetence of the current Libyan transitional justice system, manifested in its failure to respond adequately to conflict-related gender-based crimes, impedes access to justice for victims, encourages the culture of impunity, and leaves the Libyan peace-building process open to the danger of collapse. Accordingly, this analysis deals with gender-based crimes in a war setting as a case study and with transitional justice as a combination of a variety of socio-legal approaches to provide both victims and perpetrators with a sense of justice.[7]

In another work, the author defined the term "gender-based crimes" as those crimes committed against individuals based on socially constructed norms of maleness and femaleness, while sexual violence is a subset of these crimes.[8] In this connection, Article 1 of the Declaration on the Elimination of

---

[4] Jens David Ohlin, "On the Very Idea of Transitional Justice," (Winter/Spring 2007) The Whitehead Journal of Diplomacy and International Relations 52; Laurel E. Fletcher & Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation," (2002) 24 Human Rights Quarterly 574; Matiangai Sirleaf, "Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia," (2009) 21 Florida Journal of International Law 209; Par Engstrom, "Transitional Justice and Ongoing Conflict," (1 November 2011). Available at SSRN: <http://ssrn.com/abstract=2004313> or <http://dx.doi.org/10.2139/ssrn. 2004313> (Accessed on: 15 January 2013) at p. 18 [Transitional Justice and Ongoing Conflict].

[5] Secretary-General's Report on Transitional Justice and the Rule of Law in Conflict and Post-Conflict Societies, 3 August 2004, S/2004/616.

[6] Andrew B. Friedman, "Transitional Justice And local Ownership: A Framework for the Protection of Human Rights," Electronic copy available at: <http://ssrn.com/abstract=1919874> (Accessed on: 15 January 2013) at p. 4; Hemi Mistry, "Transitional Justice and the Arab Spring," Chatham House (1 February 2012) at pp. 3-4 [Transitional Justice and the Arab Spring]; Cybèle Cochran, "Transitional Justice: Responding to Victims of Wartime Sexual Violence in Africa (2008) 9 The Journal of International Policy Solutions 33 [Responding to Victims of Wartime Sexual Violence in Africa]; Katherine M. Franke, "Gendered Subjects of Transitional Justice," (2006) 15:3 Columbia Journal of Gender and Law 813; *The 2012 International and Transitional Justice Forum: 'Drawing Lessons From Local Processes to Improve Regional and International Perspectives of Justice',* Avocats Sans Frontières and others (30th -31st July 2012) at p. 2 [International and Transitional Justice Forum]; UN Support Mission in Libya, *Transitional Justice – Foundation for a New Libya*, 17 September 2012, at p.1.

[7] Fionnuala Ní Aoláin & Catherine Turner," Gender, Truth, and Transition," (2007) 16 UCLA Women's Law Journal 233; International and Transitional Justice Forum, *supra* note 6, at p. 2; Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," (2008) 29:2 Third World Quarterly 276; Zachary D. Kaufman, "The Future of Transitional Justice," (2005) 1 St. Antony's International Review 58.

[8] Hilmi M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (New York, N.Y.: Oxford University Press, 2014) at p. xiii [Hilmi M. Zawati].

Violence against Women states that violence against women "means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[9] The 1995 Beijing Declaration and the Platform for Action expanded this definition to incorporate gender-based crimes and other violations of women's rights in a wartime setting, including systematic rape, sexual slavery, forced pregnancy, forced sterilization, coercive/forced use of contraceptives, and forced abortion.[10]

In addressing the above argument, this research study examines four overarching themes, which emerge in the course of the following sections. The first deals with Libya's conflict-related gender-based crimes and transitional justice. It focuses on gender-based crimes as a weapon of war in the recent Libyan Civil War conducted by both government forces and paramilitaries and to a lesser degree by rebel fighters. It also examines Libya's project of transitional justice and peace-building process. The second section reviews wartime rape crime under Libyan laws. It looks into the laws adopted by the Libyan National Transitional Council (NTC) before the handing over of power to the elected General National Congress (GNC) on 8 August 2012 and into Libyan Penal Law and its amendments. Finally, this section affirms Libya's obligations under the norms of international law to protect victims and prosecute alleged gender-based crimes.

The third part of this analysis underlines the dilemma of prosecuting gender-based crimes under Libyan transitional justice. It brings to light four major obstacles to adequately addressing gender-based crimes under the Libyan transitional justice system, including legal impunity and lawlessness, lack of the rule of law v. militia justice, absence of security and public order, and lack of democratic institutions. Finally, this study scrutinizes three key mechanisms for gender-sensitive transitional justice in Libya, involving urgent reform of the justice system by incorporating the international crimes listed in Articles 6-8 of the Rome Statute of the International Criminal Court (ICC) into the provisions of the Libyan Penal Code, establishing an unprejudiced truth-seeking and reconciliation commission to investigate and address gender-based crimes committed by all parties to the recent civil war in Libya—including those committed by rebel brigades during and after the war—and finally setting up a Libyan special court as a hybrid judicial system for legal accountability similar to the systems founded in Sierra Leone and Cambodia. Finally, this inquiry concludes by elucidating the findings of the above sections and answering the question of what must be done to improve Libyan transitional justice so as to adequately address gender-based crimes and end the culture of impunity.

---

[9] *Declaration on the Elimination of Violence against Women* GA Res. 48/104, 48 UN GAOR Supp. (No. 49) at 217, UN Doc. A/48/49 (1993).

[10] *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) at paras. 15 & 15 *bis*.

II. Gender-Based Crimes and Transitional Justice in Libya

In order to grasp fully the two main components of this study—conflict-related gender-based crimes and the Libyan transitional justice system—it is necessary at the outset of this work to briefly discuss the horrific use of wartime rape and other forms of sexual violence by all parties to the Libyan civil war, whether during or after the conflict, and its damaging impact on the fabric of Libyan society, on the one hand, and the role of the Libyan transitional justice system in addressing the needs of the victims—regardless of their tribal or political orientation—restoring justice, and building peace, on the other.

1. Gender-Based Crimes as a Weapon of War

a. Rape Accounts:

(i) Rape of Libyan Women and Minors

It has been largely reported that thousands of Libyan women, children and men were drafted for different forms of conflict-related gender-based crimes conducted by both government forces and militias, and to a lesser extent by rebel fighters during and after the conflict, [11] whether at the victims' homes or in detention centres for the purpose of extracting information.[12] These crimes included systematic mass rape, gang rape,[13] sexual torture,[14] sexual enslavement,[15] sexual terrorism, gender-based persecution, male rape,[16] and forced nudity.[17] Investigations revealed that

---

[11] See *8000 Wartime Rape Cases in Libya, 2000 of Them by Rebel Forces: An Interview with Seham Sergewa*, Free Libya Satellite Channel (11 June 2012) <https://www.youtube.com/watch?v=9jbV5ly9waE> (Accessed on: 16 February 2013), (Arabic). See also Report of the International Commission of Inquiry on Libya, *infra* note 12, at para. 525.

[12] *The Battle for Libya: Killings, Disappearances and Torture*, Amnesty International, September 2011, Index: MDE 19/025/2011, at pp. 76-77 [the Battle for Libya]; *Militias Threaten Hopes for New Libya*, Amnesty International, February 2012, Index: MDE 19/002/2012, at p. 14 [Militias Threaten Hopes for New Libya]; UN Human Rights Council, "Report of the International Commission of Inquiry on Libya," UN Doc. A/HRC/19/68 (2 March 2012) para. 69 [Report of the International Commission of Inquiry on Libya].

[13] A case in point is the famous instance of Iman al-Obeidi, a lawyer form Benghazi, bursting into the Rixos Hotel in Tripoli to tell the foreign media that she had been tortured and gang raped by fifteen members of the government forces. See Human Rights Watch, "Libya: Transitional Government Should Support Victims, Promote Justice for Sexual Violence," (19 September 2011) at p. 1; Karen Leigh, "Rape in Libya: The Crime that Dare Not Speak its Name," *Time* (Thursday, 9 June 2011). Online: <http://www. time.com/time/world/article/0,8599,2076775,00.html> (Accessed on: 15 February 2013).

[14] Michelle Faul, "Hundreds of Women Raped By Gaddafi Militia," *The Independent* (Sunday, 29 May 2011). Online: <http://www.independent.co.uk/news/world/africa/hundreds-of-women-raped-by-gaddafi-militia-2290609.html> (Accessed on: 15 February 2013); Report of the International Commission of Inquiry on Libya, *supra* note 12, at para. 504.

[15] It was reported to the Independent Civil Society Fact-Finding Mission to Libya by numerous sources that Tawerghans sold girls from Misrata for 7,000 dinars. See Report of the Independent Civil Society, *infra* note 20, at para. 171.

[16] Some reports claim that when Qadhafi was captured by Misrata rebel fighters on 20 October 2011, a militiaman sexually assaulted him by thrusting a bayonet in his anus. See Human Rights Watch, "Death of a Dictator: Bloody Vengeance in Sirte," (October 2012), at p. 28 [Death of a

Qadhafi himself had ordered that a supply of anti-impotence drugs be given to his soldiers and mercenaries and that he had authorized them to deliberately rape Libyan opponent women in a brutal, continuous, and wide-scale campaign.[18] Despite uncertainty about the exact numbers and locations of Libyan rape victims, and the difficulty of investigating allegations of sexual violence conducted during armed conflict, high-ranking officers in the Libyan Revolution's Military Council have affirmed that Libyan rebels found cellphone pictures and videos of rape,[19] as well as condoms and Viagra in the vehicles and uniform pockets of Qadhafi loyalists who were captured on the battlefield.[20] Accordingly, these attacks constituted crimes against humanity, as they were widespread and reportedly inflicted upon the civilian

---

Dictator]; Jennifer Nimry Eseed, "The International Criminal Court's Unjustified Jurisdiction Claims: Libya as a Case Study," (2013) 88:2 Chicago-Kent Law Review 572 [Jennifer Nimry Eseed].

[17] According to Colonel Salim Juha, leader of the Misrata insurgents, who spoke recently on Al Jazeera, many women in Misrata and its suburbs were forced to strip naked in front of strangers or their children, while others were brutally raped in their homes and severely traumatized. See Richard Sollom & Hani Mowafi, "32nd Brigade Massacre: Evidence of War Crimes and the Need to Ensure Justice and Accountability in Libya," Physicians for Human Rights, December 2011, at p. 19-20 & 31; Hilmi M. Zawati, *infra* note 20.

[18] Manpavan Joth Kaur, "'Mercenaries' in Libya: Impact of Legal Impunity," RSIS Commentaries, No. 43/2011 (17 March 2011), at p. 1; Physicians for Human Rights, "Witness to War Crimes: Evidence from Misrata, Libya," (August 2011), at p. 16 [Witness to War Crimes].

[19] The author received two cellphone video clips of sexual torture. One of them shows government security forces sexually torturing a Libyan woman, while the other demonstrates the sexual torture of a man by rebel investigators. The author was unable to independently verify them. See also *Libyan Rebels: Proof of Systematic Rape on Cell Phones*. Duration: 3:52:00. Directed by Sara Sinder, CNN, 2011. Available at: <https://www.youtube.com/watch?v=XWDdUv42VNY> (Accessed on: 15 February 2013).

[20] "Battle for Libya: Rape Used As a Weapon of War," Online: Aljazeera News Chanel (27 March 2011) <http://www.youtube.com/watch?v=ISLz8Fv0eik> (Accessed on: 25 October 2013); Arab Organization for Human Rights, et al., "Report of the Independent Civil Society Fact-Finding Mission to Libya," (January 2012), at para. 110 [Report of the Independent Civil Society]; Elizabeth Marcus, "Rape and the Arab Spring: The Dark Side of the Popular Uprisings in the Middle East," Center for American Progress (December 2011) at p. 3 [Elizabeth Marcus]; Ewen MacAskill "Gaddafi 'Supplies Troops with Viagra to Encourage Mass Rape', Claims Diplomat," Online: The Guardian (29 April 2011) <http://www.theguardian.com/world/2011/apr/29/diplomat-gaddafi-troops-viagra-mass-rape> (Accessed on: 11 October 2013); Hilmi M. Zawati, "Hidden Deaths of Libyan Rape Survivors: Rape Casualties Should be Considered Wounded Combatants Rather than Mere Victims of Sexual Violence," *The National Law Journal* (9 January 2012) 35; Hilmi M. Zawati, "Libyan Rape Casualties as Veterans of a Just War, Not a Shameful Statistic," 207:2 *The New Jersey Law Journal* (9 January 2012) 31 [Hilmi M. Zawati]; "ICC to Investigate Reports of Viagra-Fueled Gang-Rapes in Libya," Online: CNN World (17 May 2011) <http://www.cnn.com/2011/WORLD/africa/05/17/libya.rapes.icc/index.html> (Accessed on: 25 October 2013); Júlia Garraio, "'Arresting Gaddafi Will Be the Most Effective Way to Stop these Rapes': Sexual Violence in the Western Media's Coverage of the War in Libya," in Júlia Garraio, Mihaela Mihai & Teresa Toldy, eds., (Coimbra: Centro de Estudos Sociais, Universidade de Coimbra, 2012) 112; Leila Mokhtarzadeh, "Ending War Rape: A Matter of Cumulative Convictions," (2013) 36 Fordham International Law Journal 1054; Owen Bowcott, "Libya Mass Rape Claims: Using Viagra Would be a Horrific First— Reports of the Distribution of 'Viagra-type' Pills to Troops Add an Unprecedented Element to Gaddafi's Alleged War Crimes," The Guardian (9 June 2011) <http://www.theguardian.com/world/2011/jun/09/libya-mass-rape-viagra-claim> (Accessed on: 11 October 2013); Patrick Cockburn "Amnesty Questions Claim that Gaddafi Ordered Rape as Weapon of War," Online: The Independent (24 June 2011) <http://www.independent.co.uk/news/world/africa/amnesty-questions-claim-that-gaddafi-ordered-rape-as-weapon-of-war2302037.html> (Accessed on: 11 October 2013).

population, with knowledge of the reason for the attack.[21]

(ii) Rape as a Strategic Weapon of War

Utilising rape as a political weapon of war was not a strategy unique to undermining Libyan society. It was carried out in the civil wars of the 1990s that took place in the former Yugoslavia, Rwanda, Sierra Leone, and in other war zones around the world. What makes the Libyan case different is the patriarchal and conservative nature of Libyan society, which holds women's chastity and honour as among the most highly regarded of values. For this reason, wartime rape has caused severe damage to the social foundations of the Libyan community and its familial relations, and has served as a horrific tool of political repression.[22] This notion has been clearly reflected in the following statement by a key informant to Physicians for Human Rights: "If Qaddafi destroys a building, it can be rebuilt. But when he rapes a woman, the whole community is destroyed forever. Qaddafi knows this, and so rape is his best weapon."[23]

b. Challenges Facing the Victims

(i) Socio-legal Challenges

Rape is an endemic of war and previously considered a collateral damage in many armed conflicts. But in Libya, it was deliberate, systematic, and widespread. Rape campaigners in Libya were aware that wartime rape, unlike physical wounds, can permanently devastate the victim's life, particularly in Libya's highly patriarchal and conservative society, which holds women's honour in the highest regard.[24] They were mindful of the fact that raping a Libyan woman, whether in peacetime or in armed conflict, would cast an extended profound shame and humiliation on her and the entire family.[25] Indeed, raping a Libyan woman simply means, in many cases, sentencing her to death, physically, [26] psychologically, or socially.[27]

---

[21] Report of the Independent Civil Society, *supra* note 20, at para. 114; Report of the International Commission of Inquiry on Libya, *supra* note 12, at para. 118.

[22] Elizabeth Marcus, *supra* note 20, at p.1; Gang-Raped for Two Days, Tortured and Strangled: Libyan Woman Finally Reveals Full Horrific Details of Attack by Gaddafi's Thugs, Online: Mail on Line (13 April 2011) <http://www.dailymail.co.uk/news/article-1376235/Libya-Iman-al-Obeidi-describes-rape-o> (Accessed on: 15 February 2013); Paul Salem & Amanda Kadlec, "Libya's Troubled Transition," (Washington, D.C.: Carnegie Endowment for International Peace, 2012), at p. 11 [Libya's Troubled Transition].

[23] Witness to War Crimes, *supra* note 18, at p.15. See also David Cairns, "Libya: Gaddafi's Men 'Use Rape as Weapon of War'" Online: First Post Newsgroup IPR (2011) <http://www.stopdemand.org/ afawcs0153418/CATID=5/ID=222/SID=499253057/Libya> (Accessed on: 15 February 2013); Kareem Fahim, "Claims of Wartime Rapes Unsettle and Divide Libyans," *New York Times* (20 June 2011 A11, available online at: <http://www.nytimes.com/2011/06/20/world/africa/20rape.html?pagewanted=all&_r= 0> (Accessed on: 16 February 2013).

[24] Elizabeth Marcus, *supra* note 20, at p. 3.

[25] Hilmi M. Zawati, *supra* note 20.

[26] To safeguard their honour and protect them from rape and shame, particularly in wartime settings, some Arab families may force their daughters into an early marriage. Women may also be killed to prevent expected rape. It has been reported that a Syrian man shot dead his daughter as they were being approached by a group of Syrian government forces to prevent the

Raped women may commit suicide, being unable to bear the stigma and shame, or be killed by relatives—following the pattern of "honour killing"—or be rejected by families.[28]

In a recent interview, Seham Sergewa, a psychologist in Benghazi Hospital and human rights activist, provides that approximately 30% of married raped women were subsequently divorced by their husbands and 20% abandoned and not treated as wives anymore, while the rest tended either to isolate themselves, flee the country to the unknown, or kill themselves.[29] In this connection, campaigners for the US-based organization "Physicians for Human Rights" reported that three teenage sisters aged 15, 17, and 18 had gone missing after Qaddafi troops arrived in Tomina. They had been raped in the al-Wadi al-Akhdar elementary school for three consecutive days. They were then murdered by their father, who slit their throats in an honour killing for "bringing shame on the family."[30] Of course, this is a social value that contravenes Islamic law, which prohibits victimizing the victim and encourages Muslim men to marry raped women and treat them gently.[31]

Furthermore, there is a constant cause of concern that the Libyan Penal Law does not distinguish between adultery in peacetime and rape in conflict

---

shame of being raped. See *Syria: A Regional Crisis-The IRC Commission on Syrian Refugees*, International Rescue Committee (January 2013), at p.7. See also Hamida Ghafour, "Rape 'prevalent' in Syria conflict," The Toronto Star (14 January 2013), available online at: <http://www.thestar.com/news/world/article/1315048--rape-prevalent-in-syria-conflict> (Accessed on: 16 February 2013).

[27] If a raped woman were single, she would lose the opportunity to get married since she had lost her virginity before marriage, despite this having happened without her consent. And if she were married she might be divorced. See Sophie McBain, "Breaking the Silence: Confronting Rape in Post-War Libya: A Network of Secret Crisis Centres are Struggling to Help the Swathe of Rape Victims in the Wake of the 2011 Libyan Uprising," Online: The Guardian (10 June 2013) <http://www.theguardian.com/global-development-professionals-network/2013/jun/07/confronting-rape-post-war-libya> (Accessed on: 8 October 2013).

[28] Libya: War and Rape, Online: Aljazeera show- People & Power (29 June 2011) <https://www.youtube.com/watch?v=iP_fFP3b3W0> (Accessed on: 17 February 2013). Hilmi M. Zawati, *supra* note 20.

[29] Interview with Seham Sergewa on the Impact of Rape on Libyan Women and Families, Free Libya Satellite Channel (14 November 2011) <https://www.youtube.com/watch?v=2WmgD6n3igA> (Accessed on: 16 February 2013), (Arabic).

[30] See Witness to War Crimes, *supra* note 18, at p. 15; Chris Hughes, "Dad Murders Three Teenage Daughters Raped by Gaddafi Thugs," *Daily Mirror* (31August 2011). Online: <http://www.mirror.co.uk/ news/uk-news/dad-murders-three-teenage-daughters-150740> (Accessed on: 15 February 2013).

[31] ᶜAbdul-ᶜAzīz Ibn Bāz, *Majmūᶜ Fatāwī wa Maqālāt Mutanawwiᶜah* [Collection of Legal Opinions and Various Articles], 14 vols. (al-Riyad, Saudi Arabia: Maktabat al-Maᶜārif, 1996) 8:241; Hilmi M. Zawati, Review Essay of *Forgetting Children Born of War: Setting the Human Rights Agenda in Bosnia and Beyond*, by R. Charli Carpenter (New York, N.Y.: Columbia University Press, 2010), ILAF Review Articles 1 (2012), at pp. 12-14. Available at SSRN: <http://ssrn.com/abstract=2193110> (Accessed on: 15 February 2013); Jād al-Haq ᶜAlī Jād al-Haq, *Buhūth wa Fatāwī Islāmiyyah fī Qadāyā Muᶜāsirah* [Treatises and Islamic Legal Opinions on Contemporary Issues], 4vols. (Cairo: Dār al Hadīth, 2005) 3:175; *Rape of Bosnian Muslim Women.* Produced and Directed by Davor Rocco, running time 00:33:00, the Islamic Relief Organization, Croatia, 1993. *(Videocassette)*; *Wounded Souls: Women of Bosnia-Herzegovina.* Produced and Directed by the Islamic Relief Organization, running time 00:32:00, the Islamic Relief Organization, 1994. *(Videocassette)*.

settings. It treats a woman who was sexually abused in wartime, i.e., entirely against her will, in the same manner as a woman who of her own accord engages in sex out of wedlock. This is another barrier to justice, which makes victims reluctant to come forward and seek judicial remedy. However, the final Report of the International Commission of Inquiry on Libya affirms this dilemma and reveals that the Commission had difficulties in collecting evidence in cases of wartime sexual violence. It maintains that the reluctance of victims to disclose information about their ordeal was due to the associated stigma, on the one hand, and to Libyan law which discriminates against female victims, on the other.[32] Law No. 70 of 1973, which establishes the *hadd* penalty for *zina* (adultery) and modifies some of the provisions of the penal code, criminalizes *zina*, which is defined as sexual intercourse between a man and a woman who are not bound to each other by marriage.[33] It prescribes for illicit intercourse punishment by flogging, or by flogging and imprisonment, [34] regardless of whether or not it was consensual or whether it took place in war or peacetime. Should pregnancy result, the woman has virtually no choice but to give birth, forcing a victim of rape to choose between raising the child of the rapist and shunning him. The conflict between reason and emotions, in this case, eventually produces another horribly painful trauma.

(ii) Health Challenges

Victims of conflict-related gender-based crimes may suffer from a range of medical problems, including sexually transmitted diseases and post-traumatic stress disorder (PTSD). In the case of the former, victims were especially vulnerable due to the fact that some of the rapists had been recruited by the Qadhafi regime from Sub-Saharan Africa, [35] meaning that they may well have infected their victims with HIV. According to the UNAIDS and WHO AIDS epidemic update reports, Sub-Saharan Africa is the region most heavily affected worldwide by HIV, accounting for over two

[32] Report of the International Commission of Inquiry on Libya, *supra* note 12, at papa 497.
[33] Law No. 70 of 1973, regarding the establishment of the *hadd* penalty for *zina* (adultery) and modifying some of the provisions of the penal code, Art. (1).
[34] *Ibid*, Article 2 (1).
[35] The government security forces and paramilitaries, who allegedly committed most of wartime rape accounts, were formed of three major different groups: Libyan troops loyal to Qaddafi; the Qadhafi orphans, including children whom he adopted in the aftermath of the early 1990s civil wars in Eastern Europe—many of whom may have been "rape orphans" as in Bosnia-Herzegovina and Croatia alone there were thousands of women who were forcibly impregnated, resulting in thousands of unwanted children; and finally, African mercenaries. See Alex de Waal, "African Roles in the Libyan Conflict of 2011," (2013) 89: 2 International Affairs 366; Bill Van Auken "The Rape of Libya," Online: World Socialist Web Site (26 August 2011) <http://www.wsws.org/en/articles/2011/08/liby-a26.html> (Accessed on: 22 October 2013); Diana Wueger, "Libya," Online: Women under Siege (8 February 2012) <http://www.womenundersiegeproject.org/conflicts/profile/libya> (Accessed on: 22 October 2013); Thomas Miles "Libya's 'African Mercenary' Problem," Online: The Tomathon (20 February 2011) <http://tomathon.com/mphp/2011/02/libyas-african-mercenary-problem/> (Accessed on: 22 October 2013).

thirds (67%) of all people living with the virus.[36]

However, due to the trauma, shame, and stigma linked to sexual assault, and due to the fear of family ostracism, many victims prefer to suffer in silence rather than seek medical help and psycho-social counselling (all characteristic of PTSD). In this connection, Colonel Salim Juha, leader of the Misrata insurgents, speaking recently on the widely seen Aljazeera show *Bilā Hudūd* (without borders),[37] provides that many women in Misrata and its suburbs were forced to strip naked in front of strangers or their children, while others were brutally raped in their homes—watched by family members—and severely traumatized. Quite apart, therefore, from the danger to women's health overall, ignoring the sufferings of those women and destroying rape evidence would encourage the culture of impunity and constitute a barrier to justice.[38]

2. *Libya's Project for Transitional Justice and Peace-Building*

For the purpose of this analysis, the term transitional justice refers to a variety of approaches, both judicial and non-judicial,[39] that the Libyan transitional government may undertake to deal with widespread or systematic human rights abuse as it moves from the revolution stage to the rule of law, to sustainable peace, democracy, and respect for the rights of all

---

[36] Missale Ayele, *Public Health Implications of Mass Rape as a Weapon of War* (M.Sc., Institute of Public Health, Georgia State University, 2011), at p. 28; Sub-Saharan Africa: Latest Epidemiological Trends, Online: UNAIDS Fact Sheet (24 November 2009) <http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/factsheet/2009/20091124_fs_ssa_en.pdf> (Accessed on: 17 February 2013). See also Colin McInnes, "Conflict, HIV and AIDS: a new dynamic in warfare?," (2009) 21:1 Global Change, Peace & Security 99-114; Jessica Kruger, A Comparative Analysis of Genocidal Rape in Rwanda and the Former Yugoslavia: Implications for the Future (M.A., Department of Sociology, Anthropology, and Criminology, Eastern Michigan University, 2011); *Libya: The Hounding of Migrants Must Stop*, International Federation for Human Rights, 2012, at p. 32 [The Hounding of Migrants Must Stop]; Lahoma Thomas and Rebecca Tiessen, "Human Security, Gender-Based Violence and the Spread of HIV/AIDS in Africa: A Feminist Analysis," (2010) 44:3 Canadian Journal of African Studies 479-502; Zaryab Iqbal and Christopher Zorn, "Violent Conflict and the Spread of HIV/AIDS in Africa," (2010) 72:1 The Journal of Politics 149–162.

[37] The Future of the Libyan Revolution after Liberation: An Interview with Colonel Salim Juha, leader of the Misrata insurgents, Online: Aljazeera show *Bilā Hudūd* (without borders) (26 October 2011) <http://www.aljazeera.net/programs/pages/6313feb8-dd85-469b-9575-bb7fbb5a37b0> (Accessed on: 17 February 2013). (Arabic)

[38] Margot Wallström, "Introduction: Making the Link between Transitional Justice and Conflict-Related Sexual Violence," (2012) 19:1 William & Mary Journal of Women and the Law 2.

[39] Andrew B. Friedman, "Transitional Justice And local Ownership: A Framework for the Protection of Human Rights," at pp.4-5. Electronic copy available at: <http://ssrn.com/abstract=1919874>; Dorota Gierycz, "Transitional Justice – Does It Help or Does It Harm?" NUPI Working Paper No. 737, Norwegian Institute of International Affairs, 2008, at p. 5 [Transitional Justice – Does It Help or Does It Harm]; Transitional Justice and the Arab Spring, *supra* note 6, at p. 3; *Law No. (17) for the Year 2012 on Establishing the Rules of National Reconciliation and Transitional Justice*, National Transitional Council, Libya, 26 February 2012, at Art. 1 [Law No. (17)]; Romi Sigsworth, "Gender-Based Violence in Transition," Centre for the Study of Violence and Reconciliation (September 2008), at p. 14 [Gender-Based Violence in Transition]; Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," (2008) 29:2 Third World Quarterly 276; UN Security Council, "Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," UN Doc. S/2004/616 (23 August 2004), at para. 8.

Libyan citizens.[40] This process requires that the Libyan people tolerate exposure to the painful legacy of the past in order to achieve justice for all citizens, reconcile Libyan society, and prevent future abuses. [41]

To achieve this goal, the NTC adopted in 2012 a number of laws, including Law No. 17 on the "Establishment of Rules of National Reconciliation and Transitional Justice,"[42] Law No. 26 on the "Higher Body for Implementation of the Criteria of Integrity and Transparency,"[43] Law No. 35 "On an Amnesty for Some Crimes,"[44] and Law No. 38 regarding "Some Procedures Relating to the Transitional Period."[45] Moreover, the Council established the "National Council of Human Rights and Fundamental Freedoms" as an independent body, in December 2011, to investigate violations of human rights.[46]

Furthermore, a two-day conference on "Truth and Reconciliation in Libya" was organized on 12-13 December 2012 by the Fact-Finding and Reconciliation Commission and the Human Rights Committee of the General National Congress, in partnership with the United Nations Support Mission in Libya (UNSMIL) and the UN Development Programme (UNDP).[47] After two days of deliberation, the participants discussed the relevance and challenges of truth-seeking, the role of victim groups, as well as the legal and institutional framework required for truth-seeking. The conference also looked at the role of the Fact-Finding and Reconciliation Commission and that of tribal leaders in reconciliation, and called on Libyan authorities to display the political will necessary to pursue transitional justice.[48] However, the conference failed to raise crucial issues, including the lack of security and poor governance, which has resulted in a fragile judicial system and tendency towards revenge and collective punishment.[49]

Nonetheless, after a closer look at the above laws, one may argue that they fell short of the Libyan People's expectations. For example, Law No. 35

---

[40] UN General Assembly, "The Rule of Law at the National and International Levels," a Statement by Fathallah al-Sanusi al-Jadi, Member Libya's Mission to the United Nations, Sixty-Seventh Session, before the Sixth Committee, On Item (83), New York (10 October 2012) [The Rule of Law at the National and International Levels].
[41] UN Support Mission in Libya, *Transitional Justice – Foundation for a New Libya*, 17 September 2012, at p. 2.
[42] *Law No. (17), supra* note 39.
[43] *Law No. (26) for the year 2012 on the High Commission for the Application of National Standards and Integrity*, National Transitional Council, Libya, 4 April 2012 [Law No. (26)].
[44] *Law No. (35) for the YEAR 2012 on Amnesty for Some Crimes*, National Transitional Council, Libya, 2 May 2012 [Law No. (35)].
[45] *Law No. (38) for the Year 2012 on Some Special Measures Regarding the Transitional Period*, National Transitional Council, Libya, 2 May 2012 [Law No. (38)].
[46] The Rule of Law at the National and International Levels, *supra* note 40.
[47] Conference on Truth and Reconciliation Opens in Tripoli, Online: UNSMIL (12 December 2012) <http://unsmil.unmissions.org/Default.aspx?tabid=3543&ctl=Details&mid=6187&ItemID=791590&language=en-US> (Accessed on: 17 February 2013).
[48] Conference on Truth and Reconciliation in Libya Concludes with Recommendations on the Way Forward, Online: UNSMIL (12 December 2012) <http://unsmil.unmissions.org/Default.aspx?tabid=3543&ctl=Details&mid=6187&ItemID=807743&language=en-US> (Accessed on: 17 February 2013).
[49] *Ibid*.

addresses only violations of human rights by former government agents between 1 September 1969 and 15 February 2011. In other words, it fails to consider violations committed individually or collectively by the rebels or the transitional government's agents. Moreover, Article 7(4) of the above law stipulates the exclusion of the members of the Revolutionary Committees from all platforms of national reconciliation as a precondition for reconciliation and implementation of transitional justice.[50] By the same token, Law No. 26 prohibits a large segment of the Libyan population listed in Article 8(B) "General Regulations"[51] —up to 60%, specified in 16 categories who held leading positions in the former Libyan government over the past 35 years—from holding 18 leading positions, listed in Article 9, in the political, economic, military, diplomatic, and educational domains.[52] In addition, Law No. 35 excludes from amnesty Qadhafi's wife, children (biological and adopted), brothers, sisters, sons and daughters in-law, and assistants. The latter category is open to interpretation depending on

[50] Law No. (35), *supra* note 44, Art. 7(4).

[51] Law No. (26), *supra* note 43, Art. 8(B). It states: "These regulations are intended to apply to incumbents of positions or candidates for them from the former regime regardless of a positive role played in the February 17 Revolution. They cover the following roles: 1. Those who had proven membership in the revolutionary committees and were active members; 2. Members of the Revolutionary Guard, the Popular Guard, or revolutionary work team; 3. Student union heads after 1976; 4. All those known for glorifying the former regime or calling for the ideology of the Green Book, whether in media or in direct talks with citizens; 5. All those who stood opposed to the February 17 Revolution whether by incitement, financial participation, or otherwise; 6. All those accused or sentenced for any crime of wasting or stealing public funds; 7. All those involved in prisons or torture of citizens during the period of the previous regime; 8. All who have undertaken any act against Libyan dissidents both abroad and at home; 9. All who have undertaken operations to seize people's property during the period of the previous regime or afterward; 10. All corrupt individuals who squandered the money of the Libyan people became rich at their expense, and made riches and accounts home and abroad; 11. All business partners with Gaddafi's sons and the heads of the former regime; 12. All those who took jobs of leadership related to the Gaddafi's sons and their institutions (such as Watassemo Association, the Gaddafi International Foundation for Charity and Development Associations, the Libya of Tomorrow Foundation, etc.); 13. All those who were opponents abroad, negotiated with the regime, and consented to work in leadership positions with the former regime against the interests of the Libyan people; 14. All those who unlawfully obtained gifts or in---kind funds from the former regime; 15. All those who attended graduate studies in the ideology of the Green Book; 16. Members who were named to the Council of Leaders of the Revolution, Free Unionist Officers, and Comrades."

[52] *Ibid*, Art. 9. This prohibition includes the following positions and functions: "1. The head and members of the National Transitional Council; 2. The head and members of the Government; 3. Office of the Transitional Council; 4. Office of the Prime Minister; 5. Agents and assistant agents of ministers; 6. Ambassadors and diplomats; 7. Heads of local councils; 8. Heads and members of local administrations (governors, mayors, and members of municipal councils); 9. Heads and members of boards of directors of public bodies, companies, and institutions; 10. Executive directors of public companies, bodies, and institutions; 11. Security and military leaders (leaders of the security services, the army, immigration control, and first and second class officers); 12. Heads of companies (domestic, foreign, and oil investment and national companies, without exception); 13. Financial monitors; 14. University presidents, deans of faculties, heads of departments, and managers of institutes, schools, and all educational and research institutions; 15. Heads and board members of trade unions, heads of student unions; 16. Candidates of the elections of the General National Congress; 17. Chair and Members of the General National Congress and its office; 18. All those charged with any function before the interim National Transitional Council or interim Government."

personal interests and political orientation. [53]

Finally, Law No. 38 is in conflict with the norms of international treaties and covenants on human rights. For example, Article 4, which put rebels above the law, provides that "there shall be no penalty for military, security, or civil actions dictated by the February 17th Revolution that were performed by revolutionaries with the goal of promoting or protecting the revolution."[54] Earlier reports suggested that this amnesty law was drafted in order to appease Libya's tribal leaders who apparently fear that anti-Qadhafi rebels will be held accountable for human rights violations they committed during the uprising.[55]

Moreover, Article 5 of the same code abolishes the right of individuals who were arbitrary detained by rebels from legally pursuing the government or its agents. It states that even if a court acquits a person who was detained by militia, that person has no right to initiate a criminal or civil complaint against the state or the militia, unless the detention was based on fabricated or mendacious allegations.[56]

Likewise, Article 6 of the same law authorizes the Ministries of Defence and Interior to take measures that restrict a person's movements or place him/her under house arrest if they are considered a threat to public security or stability, based on the person's previous actions or affiliation with an official or unofficial apparatus or tool of the former regime.[57]

Nonetheless, the above law violates Libya's Constitutional Declaration of 3 August 2011.[58] While Article 6 of the Declaration states that Libyans shall be equal before the law and enjoy equal civil and political rights without discrimination of any kind, Article 7 provides that human rights and basic freedoms be respected by the State. The State has committed itself to joining international and regional declarations and charters which protect such rights and freedoms. But it's clear that the blanket amnesty granted for rebels and the transitional government's agents violates Libya's obligations under international law to investigate and prosecute serious violations of international humanitarian and human rights law.[59]

---

[53] Law No. (35), *supra* note 44, Art. 1; Lawyers for Justice in Libya (LFJL), Press Statement, "LFJL Strongly Condemns New Laws Breaching Human Rights and Undermining the Rule of Law," (7 May 2012), p.1 [Laws Breaching Human Rights and Undermining the Rule of Law].

[54] Human Rights Watch, "Libya: Amend New Special Procedures Law," (11 May 2012), at p. 1 [Amend New Special Procedures Law]; Law No. (38), *supra* note 45, at Art. 4.

[55] Mark Kersten, "Impunity Rules: Libya Passes Controversial Amnesty Law," Online: Justice in Conflict (8 May 2012) <http://justiceinconflict.org/2012/05/08/impunity-rules-libya-passes-controversial-amnesty-law/> (Accessed on: 1 January 2013) [Libya Passes Controversial Amnesty Law].

[56] Law No. (38), *supra* note 45, at Art. 5.

[57] Amend New Special Procedures Law, *supra* note 54, at p. 1; Law No. (38), *supra* note 45, at Art. 6.

[58] *The Constitutional Declaration*, National Transitional Council, Libya, 3 August 2011 [the Constitutional Declaration].

[59] Christi L. Thornton & Clarinsa v. Grives, "The Contribution of the Arab Spring to the Role of Transitional Justice and Amnesty Laws: A Review of Tunisia, Egypt and Libya," Electronic copy Available at: <http://works.bepress.com/clarinsa_grives/1> [Contribution of the Arab Spring to the Role of Transitional Justice and Amnesty Laws].

Nevertheless, the Libyan case is not unique. In the aftermath of internal and extraterritorial armed conflicts, other states have issued amnesty laws to protect or to reward its agents for their role in protecting political regimes, establishing stability or state-building. Louise Mallinder provides several examples of governments that have acted in this way on the cessation of hostilities, such as: Jimmy Carter's 1977 amnesty to state agents liable for crimes during the Vietnam war;[60] the 1982 Guatemalan amnesty laws designed to protect the government's security forces who had participated in actions against rebellion; and Algeria's 2006 amnesty law to protect its armed forces against prosecution for crimes committed during the civil war that followed the military suspension and nullification of the parliamentary elections won by the Islamic Salvation Front (FIS), an Algerian political party, in 1992.[61]

Likewise, states may also amnesty crimes under international law. A case in point is the American pressure placed on the UN Security Council to issue Resolution 1487 (2003), adopted on 12 June 2003, to exempt the American troops and personnel serving in any UN force in Iraq from prosecution for international war crimes under the Rome Statute of the ICC.[62]

III. Wartime Rape under Libyan Laws

This part examines the crime of wartime rape under recent laws adopted

---

[60] Kieran McEvoy & Louise Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy," (2012) 39:3 Journal of Law and Society 410.

[61] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford; Portland, Ore.: Hart, 2008) 66. For further readings, see Louise Mallinder, "Amnesties and International Criminal Law," in William A. Schabas & Nadia Bérnaz, eds., The Handbook of International Criminal Law (New York, N.Y.: Routledge 2010. Available at SSRN: <http://ssrn.com/ abstract=1531701> (Accessed on: 21 October 2013); Louise Mallinder, "Can Amnesties and International Justice be Reconciled?," (2007) 1:2 The International Journal of Transitional Justice 208–230; Louise Mallinder, "Exploring the Practice of States in Introducing Amnesties," in Kai Ambos, Judith Large, Marieke Wierda, eds., *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development, the Nuremberg Declaration on Peace and Justice* (Berlin: Springer-Verlag, 2009) 127-171; Louise Mallinder, The Ongoing Quest for Truth and Justice: Enacting and Annulling Argentina's Amnesty Laws (May 2009). Available at SSRN: <http://ssrn.com/abstract=1531759> or <http://dx.doi.org/10.2139/ ssrn.1531759> (Accessed on: 21 October 2013); Louise Mallinder, "The Role of Amnesties in Conflict Transformation," Online: School of Law, Queen's University Belfast (11 March 2009) <http://www.queens.ie/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Filetoupload,163783,en.pdf> Accessed on 21 October 2013; Louise Mallinder, Uruguay's Evolving Experience of Amnesty and Civil Society's Response (16 March 2009). Transitional Justice Institute Research. Available at SSRN: <http://ssrn.com/abstract=1387362> or <http://dx.doi.org/ 10.2139/ssrn.1387362> (Accessed on: 21 October 2013); Louise Mallinder & Kieran McEvoy, "Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies," (2011) 6:1 Journal of the Academy of Social Sciences 107-128.

[62] Hilmi M. Zawati, "Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity," (2007) 17:1 Journal on Rehabilitation of Torture Victims and Prevention of Torture 37; UN Security Council's Resolution 1487 (2003), *Requesting that the ICC shall for a 12 months period starting 1 July 2003 not commence or proceed with investigation or prosecution of any case arises involving current or former officials or personnel from a contributing state not a Party to the Rome Statute over acts or omissions relating to a UN established or authorized operations* (12 June 2003) UN Doc. S/RES/1487 (2003).

by the NTC during the transitional period following the fall of the former regime, and under the Libyan Penal Code of 1953 and its amendments. It reveals that the failure of Libyan legislators before and after the recent civil war to amend the Libyan Penal Code and incorporate international crimes embodied in Articles 6-8 of the Rome Statute of the ICC, and to recognize the norms promulgated in several international treaties and conventions of human rights, has resulted in a *lacuna* in Libyan criminal law and in the competence of the latter to adequately address conflict-related gender-based crimes committed by all parties to the conflict. It also underlines Libya's obligations under the provisions of domestic and international humanitarian and human rights law to criminalize and prosecute alleged gender-based crimes and bring justice to both victims and perpetrators.

1. Laws of the Transitional Period

Since it was established on 27 February 2011 and until the handing over of power to the elected General National Congress on 8 August 2012, the NTC has adopted dozens of laws and decisions, although none of them has explicitly condemned wartime rape or other forms of gender-based crimes as crimes of war or crimes against humanity. This was despite the fact that the Council was keenly aware that hundreds of Libyan women and men had been drafted for widespread and systematic rape in Misrata, Zawya, Ajdabya, and other ravished cities by former government security forces and paramilitaries, including African mercenaries.

Sexual crimes are implicitly mentioned twice in the transitional Law, viz., Law No. 17 and Law No. 35, respectively. Article 4(2) of Law 17, referring to the jurisdiction of the newly established Fact Finding and Reconciliation Commission, lists damages sustained as a result of attack on honour (*ᶜird* in Arabic) as being one of the many other incidents that will be examined and investigated by the Commission. Attacks on *ᶜird* might be broadly interpreted as slandering, defamation, rape, or any other form of sexual violence.[63] Another instance may be found in Article 1(3) of Law 35 where reference is made to *al-muwāqaᶜa bil-quwwah*,[64] which literally means having sex with someone by force.[65] This crime, however, happens in peacetime just as it does in the midst of armed conflict! Having that said, none of the transitional laws has criminalized conflict-related gender-based crimes or prosecuted it.

2. The Libyan Penal Code

Historically speaking, The Libyan Penal Code was adopted by a royal decree on 28 November 1953.[66] The code, which contains 507 articles, was largely influenced by the Italian Penal Code, and was subjected to twenty-

[63] Law No. (17), *supra* note 39, at Art. 4(2).
[64] Law No. (35), *supra* note 44, at Art. 1(3).
[65] Mahmūd Ibn ᶜUmar al-Zamakhsharī, *Asās al-Balāġhah* [The Genesis of Eloquence] (Beirut: Dār al-Maᶜrifah, 1982) s.v. "waqaᶜa." (Arabic Dictionary).
[66] *Libyan Penal Code*, 28 November 1953 [Libyan Penal Code].

two amendments, the most worthy of note being two substantive amendments in 1956[67] and 1975 respectively. The latter amended 32 articles in the section entitled "crimes against the public interest," to include 21 articles providing for death penalty for crimes against the interests of the State.[68]

When the Penal Code was adopted in 1953, only a few international humanitarian and human rights treaties had been adopted, including: the United Nations Charter, 1945;[69] the Universal Declaration of Human Rights, 1948;[70] the Four Geneva Conventions, 1949;[71] the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950;[72] and the Convention on the Prevention and Punishment of the Crime of Genocide, 1948.[73]

At the national level, the Code was preceded only by the Libyan Constitution, which had been promulgated in 1951,[74] and included several general rules relevant to human rights law, such as the legality principle,[75] the principle of non-retroactivity of criminal law,[76] and the right to be presumed innocent until proved guilty.[77]

---

[67] Law No. 48 of 23 September 1956, which provided for the cancellation of 9 articles, adding 20 articles, and modifying two hundred and thirteen articles.
[68] Under Law No. 38 of 1975.
[69] *United Nations Charter*, (1945), Signed at San Francisco, 26 June 1945. 59 Stat. 1031, T.S. 993, 3 Bevans 1153, Entered into force on 24 October 1945. Libya was admitted to the United Nations on 14 December 1955 [United Nations Charter].
[70] *Universal Declaration of Human Rights*, Adopted on 10 December 1948, GA Res. 217A (III), 3 UN GAOR (Resolutions, part 1) at 71, UN Doc. A/810 (1948); Reprinted in 43 American Journal of International Law Supp. 127 (1949) [Universal Declaration of Human Rights].
[71] Including *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), Opened* for signature 12 August 1949, 6 U.S.T. 3114, T.I.A.S. No.3362, 75 U.N.T.S. 31 (Entered into force on 21 October 1950) [Geneva I], Ratified/acceded by Libya on 22 May 1956; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II)*, 75 U.N.T.S. 85 (Entered into force on 21 October 1950) [Geneva II], Ratified/acceded by Libya on 22 May 1956; *Convention Relative to the Treatment of Prisoners of War (Geneva III), Opened* for signature 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No.3364, 75 U.N.T.S. 135 (Entered into force on 21 October 1950) [Geneva III], Ratified/acceded by Libya on 22 May 1956; *Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV)*, Opened for signature 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No.3365, 75 U.N.T.S. 287 (Entered into force on 21 October 1950) [Geneva IV], Ratified/acceded by Libya on 22 May 1956.
[72] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opened for signature 4 November 1950, Europe. T.S. No. 5, 213 U.N.T.S. 221 (Entered into force on 3 September 1953). It was not signed by Libya.
[73] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, GA Res. 260A (III), 3 UN GAOR at 174, UN Doc. A/810 (1948), 78 U.N.T.S. 277 [Genocide Convention]. Acceded by Libya on 16 May 1986.
[74] *The Constitution of Libya*, contained 213 articles, was promulgated by the National Constituent Assembly on 7th October 1951 and abolished by a military *coup d'etat* on 1st September 1969. Available online at <http://www.libyanconstitutionalunion.net/constitution%20of%20libya.htm> (Accessed on: 18 February 2013) [The Constitution of Libya].
[75] Article 17 of the Libyan Constitution of 1951 states the "No offence may be established or penalty inflicted except shall be subject to the penalties specified therein for those offences; the penalty inflicted shall not be heavier than the penalty that was applicable at the time the offence was committed."
[76] *Ibid.*
[77] Article 15 of the Libyan Constitution of 1951 provides that "Everyone charged with an offence shall be presumed to be innocent until proved guilty according to law in a trial at which he has

However, despite the several amendments made over the past sixty years, it is an unfortunate fact that none of the above agreements' norms came to be reflected in the provisions of the Libyan Penal Code. In other words, Libyan legislators utterly failed during this long period of time to incorporate international crimes into the Libyan Penal Code or to take steps to domesticate war crimes and crimes against humanity embodied in the Rome Statute of the ICC. Accordingly, Libya has no criminal jurisdiction over such crimes.

Nonetheless, Book III of the Libyan Penal Code, entitled "Offences against Freedom, Honour, and Morals," does condemn different forms of sexual violence in 17 articles (407-424), where an inventory is made of gender-based crimes that may be expected to occur, and to be dealt with, in peacetime.[78]

3. *Libya's Obligations under Domestic and International Law to Prosecute Alleged Conflict-Related Gender-Based Crimes*

Although the Rome Statute of the ICC does not include a provision explicitly requesting States to adopt the principle of universal jurisdiction for the crimes of genocide, crimes against humanity and war crimes, listed in Articles 6-8, in their own domestic criminal law, it does insist that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[79] In fact, the failure of the Libyan legislator, either before or after the recent civil war, to incorporate these crimes into the Libyan Penal Code leaves the country in a *vacuum juris* that will likely result in unfair trials, chaos, and bloody cycles of revenge.

However, Libya is obligated to investigate, prosecute, and bring to justice persons having allegedly committed international crimes, including gender-based crimes, whether they belong to the former regime's security forces or to the rebels, under a number of legal principles and provisions of different domestic, international humanitarian and human rights law instruments, and under regional treaties ratified by Libya.

a. Obligations under Domestic Law

On the national level, there are several legal instruments that would make it an obligation on the part of the Libyan transitional government to criminalize and prosecute gender-based crimes. Article 14 of the 1951 Libyan Constitution provides that "Everyone shall have the right to resource to the

---

the guarantees necessary for his defence. The trial shall be public save in exceptional cases prescribed by law."

[78] Including: carnal connection by force (Art. 407); indecent assaults (Art. 408); seduction of juvenile (Art. 409); indecent acts between persons of the same sex (Art. 410); abduction with intention to marry (peacetime forced marriage) (Art. 411); abduction for the commission of indecent acts (Art. 412); abduction without force of a juvenile under fourteen years of age or a mental defective (Art. 413); incitement to prostitution (Art. 415); forced prostitution (Art. 416); and trafficking in women to foreign territory (Art. 418). See Libyan Penal Code, *supra* note 66.

[79] *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998), 37 I.L.M. (Entered into force on 1 July 2002), the Preamble [The Rome Statute of the ICC].

Courts, in accordance with the provisions of the law."[80] Similarly, Articles 6 & 7 of the Constitutional Declaration of 3 August 2011[81] emphasize the following values to the Libyan people without any kind of discrimination:

> Libyans shall be equal before the law, enjoy equal civil and political rights with, have the same opportunities in all areas and be subject to the same public duties and obligations, without distinction on the grounds of religion, belief, language, wealth, gender, kinship, political opinions, social status, or tribal, regional or familial adherence.[82]
>
> The State shall safeguard human rights and fundamental freedoms, endeavor to join the regional and international declarations and covenants which protect these rights and freedoms and strive for the promulgation of new covenants which recognize the dignity of man as Allah's representative on earth.[83]

Moreover Article 39 of the Libyan Military Penal Code of 1974 provides that "Crimes shall not lapse by time. Provisions relevant to proscription of crimes shall not apply to crimes perpetrated by military personnel or those provided for in the present Law or those which are under the jurisdiction of martial courts."[84]

Furthermore, Article 60 of the Libyan Code of Criminal Procedure for Armed Personnel (1999) guarantees the defendant's right to examine the prosecution witnesses regarding their testimony. Article 64 of the same code entitles the defendant to have an interpreter if he/she does not understand Arabic.[85]

As well, Article 31(C) [criminal justice] of the Libyan Constitutional Proclamation of 11 December 1969 provides that "the defendant shall be presumed innocent until proven guilty. All necessary guarantees for the exercise of his defense shall be provided. The accused or imprisoned shall not be subjected to mental or physical harm."[86]

In addition, Article 9 of the Great Green Charter of Human Rights of the Jamahiriya states that "The Jamahiriyan society guarantees the right to bring a suit or action before the law and the independence of the judicial system. Each of its members is entitled to a fair and complete trial."[87]

Finally, Article 30 of Law No. 20 of 1991 on Promoting Freedom provides that "Every person is entitled to judicial redress according to the law. The Court shall provide all the necessary guarantees, including legal

---

[80] The Constitution of Libya, *supra* note 74, at Art. 14.
[81] The Constitutional Declaration, *supra* note 58.
[82] *Ibid*, at Art. 6.
[83] *Ibid*, at Art. 7.
[84] Libyan Arab Jamahiriya, Military Penal Code, 1974, at Art. 39.
[85] Libyan Arab Jamahiriya, *Libyan Code of Criminal Procedure for Armed Personnel* (1999), at Articles 60 & 64.
[86] Libyan Arab Republic, *Libyan Constitutional Proclamation*, adopted on 11 December 1969, at Art. 31(c).
[87] Libyan Arab Jamahiriya, *the Great Green Charter of Human Rights in the Jamahiriyan Era*, adopted on 12 June 1988 by The General Congress of the People of the Popular and Socialist Libyan Arab Jamahiriya, at Art. 9.

representation." [88]

b. Obligations under General Concepts and Principles of International Criminal Law

The Libyan transitional government is obliged to prosecute or arrest and extradite perpetrators of gender-based crimes to the ICC under the *aut dedere aut judicare principle,* part of the *jus cogens* rule. Accordingly, the duty to prosecute and extradite perpetrators of such heinous and serious crimes—which may constitute a threat to international peace and security if committed on a large scale as a political weapon of war—applies under the customary international law doctrine of universal jurisdiction as a mandatory and affirmative obligation.[89] In other words, Libya cannot derogate from its duty to prosecute or extradite perpetrators indicted by the ICC, and any state that ignores or fails to fulfil its duty in this respect is in breach of its mandatory obligations as a member of the international community.[90]

Moreover, several United Nations documents have emphasized that war crimes and crimes against humanity, including wartime rape and other gender-based crimes, are *hostis humani generis*, and that there are no limitation barriers to prosecutions for such profound crimes under international humanitarian and human rights law. Articles 55 and 56 of the United Nations Charter oblige member states to act jointly and individually in cooperation with the international community to achieve justice by

[88] Libyan Arab Jamahiriya, *Law No 20 of 1991 on Promoting Freedoms*, entered into force on 1 September 1991, at Article 30.

[89] The Four Geneva Conventions of 1949, which Libya had ratified on 22 May 1956, explicitly incorporate the principle *aut dedere aut judicare* by imposing an obligation on High Contracting Parties to search for persons alleged to have committed, or given orders to commit, "grave breaches" of these conventions, and to bring them—regardless of their nationality—to justice, or transfer them, in accordance with a state's own legislation, to stand trial before the courts of another High Contracting Party. See Hilmi M. Zawati, *Gender-Related Crimes in Armed Conflict Settings: Legal Challenges and Prospects* (Lewiston, N.Y: The Edwin Mellen Press). *(Forthcoming, 2014)* at p 274 [Hilmi M. Zawati]; Geneva I, *supra* note 71, at Art. 49; Geneva II, *supra* note 71, at Art. 50; Geneva III, *supra* note 71, at Art. 129; Geneva IV, *supra* note 71, at Art. 46; Laura M. Olson, "Re-enforcing Enforcement in a Specialized Convention on Crimes against Humanity: Inter-State Cooperation, Mutual Legal Assistance, and the *Aut Dedere Aut Judicare* Obligation," in Leila Nadya Sadat, *Forging a Convention for Crimes against Humanity* (New York, N.Y.: Cambridge University Press, 2011) 326; M. Cherif Bassiouni, *International Extradition and World Public Order* (Dobbs Ferry, N. Y.: Sitjhoff-Oceana Publications, 1974) 7; UN Commission on Human Rights, *Progress Report on the Question of the Impunity of Perpetrators of Human Rights Violations, Prepared by Mr. Guissé and Mr. Joinet*, UN Doc. E/CN.4/ Sub.2/1993/6 (19 July 1993) para. 55.

[90] Christopher C. Joyner, "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability," (1996) 59:4 Law & Contemporary Problems 167; Enikő Horváth, et al., Gender-Based Violence Laws in Sub-Saharan Africa, The New York City Bar in collaboration with the Center for Reproductive Rights, and the Cyrus R. Vance Center for International Justice, 2007, at p. 14167; *United Kingdom: Universal Jurisdiction and Absence of Immunity for Crimes against Humanity*, Amnesty International, 1 January 1999, AI-Index: EUR 45/001/1999, at p. 19.

respecting and observing human rights and fundamental freedoms for all people without distinction as to race, sex, language or religion.[91] These rights are articulated and protected by several UN treaties and resolutions, some of which endorsed the Nüremberg principles and individual responsibility for war crimes, crimes against peace, and crimes against humanity.[92]

c. Obligations under International Humanitarian Law

Libya is also obligated under the norms of the Geneva Conventions and their Additional Protocols to investigate and prosecute grave breaches of the conventions, including gender-based crimes during national and international armed conflicts. On 22 May 1956, Libya acceded to and became a Contracting Party to the 1949 Geneva Conventions, including the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War.[93] However, Article 3 common to the Geneva Conventions, prohibits ill-treatment and molestation of civilians, wounded combatants, and *hors de combat*. It proscribes certain acts, *inter alia*, violence to life, mutilation, cruel treatment, torture, outrage upon personal dignity—in particular humiliation and degrading treatment—and passing sentences without a duty constituted court or carrying out summary executions.[94] Moreover, Article 27 of the same convention explicitly requires Contracting Parties to protect women against all forms of sexual violence. It 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."[95]

Article 4(e) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)[96] took a further step by explicitly considering

[91] United Nations Charter, *supra* note 69, at Arts. 55 & 56.
[92] Draft Code of Crimes against the Peace and Security of Mankind (26 July 1996) Articles 19-22; Reprinted in Gabrielle Kirk McDonald & Olivia Swaak-Goldman., eds., Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, vol. 2, part 1 (The Hague, The Netherlands: Kluwer Law International, 2000) 335-410; Guy S. Goodwin-Gill, "Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute," in Guy S. Goodwin-Gill & Stefan Talmon, eds., The Reality of International Law: Essays in Honour of Ian Brownlie (New York, N.Y.: Oxford University Press, 1999) 210; Naomi Roht-Arriaza, "Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress," in Naomi Roht-Arriaza, ed., Impunity and Human Rights in International Law and Practice (New York, N.Y.: Oxford University Press, 1995) 25; Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, GA Res. A/RES/3074 (3 December 1973) paras. 1 & 6; Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgement of the Tribunal, GA Res. A/RES/95 (I) (11 December 1946); Stephen P. Marks, "Forgetting 'The Policies and Practices of the Past': Impunity in Cambodia," (1994) 18:2 Fletcher Forum for World Affairs 20; UN Commission on Human Rights, Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict: Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998) at para. 25.
[93] Geneva IV, *supra* note 71.
[94] Geneva Convention IV, *supra* note 71, at Art. 3.
[95] *Ibid*, at Art. 27.
[96] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (Protocol II), Opened for signature on 12 December 1977, 1125 U.N.T.S. 609 (Entered into force on 7 December 1978).

rape and other forms of sexual violence, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, committed in non-transnational armed conflicts as "outrages upon personal dignity."[97]

d. Obligations under International Human Rights Law

Libya is a signatory to a number of core international human rights treaties, which require it, as a State Party, to take effective legislative, administrative, and judicial measures to prevent, prosecute and punish crimes committed against civilians. These treaties include: the Convention on the Prevention and Punishment of the Crime of Genocide;[98] the International Covenant on Civil and Political Rights;[99] the Convention on the Elimination of All Forms of Discrimination against Women;[100] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[101] the United Nations Convention against Transitional Organized Crime;[102] the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;[103] the African [Banjul] Charter on Human and Peoples' Rights;[104] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[105]

Under the provisions of the above treaties, Libya is obligated to prosecute gender-based crimes deliberately perpetrated against the civilian population during the recent armed conflict in Libya, and to provide victims with an effective remedy, including judicial, social, and adequate

---

Ratified/acceded by Libya on 7 June 1978.

[97] *Ibid*, at Art. 4(2)(e).

[98] Genocide Convention, *supra* note 73.

[99] *International Covenant on Civil and Political Rights,* (1966), GA Rex. 2200 (XXI), 21 UN GAOR, Supp. (No.16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 302, 1976 Can. T.S. No. 47 (1966). (Entered into force on 23 March1976). Acceded by Libya on15 May 1970 [Covenant on Civil and Political Rights].

[100] *Convention on the Elimination of All Forms of Discrimination against Women,* (1979), GA Res. 34/180, 34 UN GAOR, Supp. (No.46) at 193, UN DOC. A/34/46 (1979). (Entered into force on 3 September 1981). Acceded by Libya on16 May 1989.

[101] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* GA Res. 39/46, 39 UN GAOR, Supp. (No.51) at 197, UN Doc. A/39/51 (1984), reprinted in 23 International Le Aterials 1027 (1984), *Substantive changes noted in* 24 I.L.M. 535 (1985) (Entered into force on 26 June1987). Acceded by Libya on 16 May 1989 [Convention against Torture].

[102] *United Nations Convention against Transnational Organized Crime*, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force Sept. 29, 2003.* Ratified by Libya on 18 June 2004.

[103] *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), *entered into force* Nov. 11, 1970. Acceded by Libya on 16 May 1989.

[104] *African [Banjul] Charter on Human and Peoples' Rights*, Adopted on 27 June 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, (1981); Reprinted in 21 I.L.M. 58 (1982) (Entered into force on 21 October 1986). Ratified by Libya on 19 July 1986 [African Charter *on* Human and Peoples' Rights].

[105] *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,* Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 African Human Rights Law Journal 40, *entered into force* Nov. 25, 2005 [Protocol on the Rights of Women in Africa]

reparations. As a State Party to the International Covenant on Civil and Political Rights (ICCPR), e.g., Libya has an obligation to provide an accessible, effective, and enforceable remedy to the victims of crimes. Article 2(3)(b) of the same instrument provides that such remedy should be determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the state. [106]

Moreover, rape and other forms of sexual violence, including sexual torture, violate the right of Libyans not to be subjected to torture or to cruel, inhuman or degrading treatment, and obligate the Libyan authorities to take effective legislative, administrative, judicial or other measures to prevent such acts in any territory under Libyan jurisdiction.[107] In addition, the Security Council's Resolution 1325 (2000) "calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse."[108] Likewise, Resolution 1820 (2008) emphasizes that "sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict."[109]

On the regional treaties level, Article 5 of the African [Banjul] Charter on Human and Peoples' Rights, provides that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."[110] By the same token, Article 11(3) of the above Protocol on the Rights of Women in Africa, focussing as it does on the protection of women in armed conflicts, requests that States Parties, including Libya, protect women against all kinds of violence, particularly rape and other forms of sexual exploitation. The same article stresses that such acts should be considered war crimes, genocide and/or crimes against humanity and that their perpetrators be brought to justice before a competent criminal judicial body.[111]

---

[106] Covenant on Civil and Political Rights, *supra* note 99, at Art. 2(3)(b).
[107] Convention against Torture, supra note 101, at Art. 2(1).
[108] UN Security Council's Resolution 1325 (2000), *Women and Peace and Security* (31 October 2000), UN Doc. S/RES/1325 (2000), 40 I.L.M. 500-502 (2001), at para. 10 [UN Security Council's Resolution 1325].
[109] Rosemary Grey & Laura J. Shepherd, "'Stop Rape Now?': Masculinity, Responsibility, and Conflict-related Sexual Violence," (2012) 16:1 Men and Masculinities 116; UN Security Council's Resolution 1820 (2008), *Noting that Rape and other Forms of Sexual Violence can Constitute a War Crime, a Crime against Humanity, or a Constitutive Act With Respect to Genocide* (31 March 2008) UN Doc. S/RES/1820 (2008), at para. 1 [UN Security Council's Resolution 1820].
[110] African Charter *on* Human and Peoples' Rights, *supra* note 104, at Art. 5.
[111] Protocol on the Rights of Women in Africa, *supra* note 105, at Article 11(3). See also Christine Ocran, "Recent Developments – Actualities: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa," (2007)15 African Journal of International & Comparative Law 150; Heléne Combrinck, "Rape Law Reform in Africa: 'More of the Same' or More Opportunities?," in Clare McGlynn & Vanessa E. Munro, eds., *Rethinking Rape Law: International and Comparative Perspectives*.(New York, N.Y.: Routledge, 2010) 124.

In sum, the above humanitarian and human rights law instruments, not only oblige the Libyan transitional government to prosecute conflict-related gender-based crimes and bring perpetrators to justice, but underline its duty to prevent future violations.

IV. The Dilemma of Prosecuting Gender-Based Crimes Under Libyan Transitional Justice

The fall of Qadhafi's totalitarian regime due to a popular uprising in October 2011, as is often the case with the collapse of autocratic systems, left Libya faced with serious challenges as a result of inheriting the former regime's socio-political problems. Other factors making the situation difficult were the social construct and culture of the Libyan people, the new dramatic political and security situation, and the failure of the Libyan consecutive transitional governments to restore justice and public order. An examination of the new socio-legal scene in Libya identifies four major challenges facing Libyan transitional justice in any future effort to prosecute wartime rape and other forms of sexual violence, namely legal impunity and lawlessness, weakness of the rule of law as opposed to insurgents' justice, absence of security and public order, and the lack of democratic institutions.

1. Legal Impunity and Lawlessness

Implementing an effective transitional gender justice program in post-Qadhafi Libya requires the Libyan transitional justice system to independently investigate the vast scope of sexual crimes committed by the former regime's security forces during and before the armed conflict, as well as those crimes committed by rebel forces and the transitional government's agents during and after the uprising. In other words, to ensure justice for all, Libya's transitional justice system must investigate, prosecute and hold accountable all persons who allegedly committed conflict-related gender-based crimes, whether for extracting information from detainees or as a revenge attack against communities discerned to be supporters of the former regime. Moreover, the system should also emphasize that victims' rights to effective remedies be determined by competent judicial, administrative or legislative authorities, not by insurgents' councils.[112]

Nonetheless, a closer look at the Libyan transitional laws, particularly Law No. 38, shows that these laws were promulgated in a way that makes them retributive rather than constructive. As already noted at the outset of this work, Article 4 of the above law, which provides blanket immunity for persons who carried out the task of toppling the former regime, approves the status of lawlessness and encourages the culture of impunity.[113] Early reports suggest that this amnesty law was drafted in order to address the tribal

[112] Covenant on Civil and Political Rights, *supra* note 99, at Art. 2(3)(b).
[113] The Hounding of Migrants Must Stop, *supra* note 36, at p. 70; Kevin Jon Heller, "The International Commission of Inquiry on Libya: A Critical Analysis," (2012). Electronic copy available at: <http://ssrn.com/abstract=2123782>, at p.37; Law No. (38), *supra* note 45, at Art. 4; Laws Breaching Human Rights and Undermining the Rule of Law, *supra* note 53, at p. 2.

leaders' concerns of holding members of relative rebel forces accountable for human rights violations allegedly committed during and after the uprising.[114]

In contrast to Article 12 of the Libyan Constitution,[115] which stresses that all Libyans shall be treated equally before the law, Law No. 17 regarding the establishment of rules of national reconciliation and transitional justice limits cases to be addressed by the Fact-Finding and Reconciliation Commission to crimes allegedly associated with the former regime between 1 September 1969 and 23 October 2011, while crimes committed by rebels and transitional government's agents remain unconsidered.[116] Furthermore, this law specifies the disqualification of all members of the former regime's revolutionary committees, revolutionary guards, and secret security forces from all platforms of national reconciliation—regardless of the fact that many of them were not involved in attacks against Libyan civilians—as a precondition for reconciliation and implementation of transitional justice.[117]

In light of the above discussion, one might say that the provisions of Laws 35 and 38 demonstrate the lack of thought that went into the law-making process, effectively invalidating much of what the transitional justice law is attempting to achieve.[118] Moreover, they promote a culture of impunity by allowing a significant number of people who allegedly committed gender-based and other serious crimes to walk free, based on their political affiliation. At the same time, the above laws preserve a culture of selective justice, which was in turn a direct cause of the popular revolution against the former regime.[119]

2. Rule of Law v. Militia Justice

Restoring the rule of law in post-Qadhafi Libya requires that every Libyan citizen, regardless of his political affiliation or tribal linage, be subject to the law, which must be fair, non-discriminatory, respectful of the human rights of the Libyan people, and be applied by a competent and fair legal system that complies with the international criminal law and human rights standards, embodied in the provisions of different international human rights and humanitarian law treaties ratified by Libya over the past sixty years.[120] Supremacy of the law in Libya implies improving security for all

---

[114] Kevin Jon Heller, "Surprise, the NTC Amnesties Its Own Crimes," Online: Opinio Juris (Wednesday, 9 May 2012) <http://opiniojuris.org/2012/05/09/surprise-the-ntc-amnesties-its-own-crimes/> (Accessed on: 20 February 2013); Libya Passes Controversial Amnesty Law, *supra* note 55; Libya's Transition: The Current State of Play, Atlantic Council & Rafik Hariri Center for the Middle East, November 2012, at p.2;Nasos Mihalakas, "A New Federalism for Libya and the Arab Spring," Online: Netherlands Aid (11April 2012) <http://www.nl-aid.org/continent/northern-africa/a-new-federalism-for-libya-and-the-arab-pring/> (Accessed on: 20 February 2013).

[115] The Constitution of Libya, *supra* note 74, at Art. 12.

[116] Law No. (17), *supra* note 39, at Arts.1&2.

[117] *Ibid*, at Art.7.

[118] Libya's Troubled Transition, *supra* note 22, at p.12.

[119] Amend New Special Procedures Law, *supra* note 54, at p.1.

[120] Mohamed Eljarh, "Peace, Security and the Rule of Law Reform in Libya," Online: Middle East

citizens,[121] reforming the Libyan justice system, providing an effective transitional justice through truth and reconciliation committees, granting adequate reparations to victims, and prosecuting conflict-related crimes, including wartime rape and other forms of sexual violence.[122] It must also ensure Libyan women's security and access to justice by providing gender-sensitive justice and by prosecuting gender-based crimes perpetrated by all parties to the conflict.

It goes without saying that the blanket amnesty provided to the Libyan rebel militias by several laws adopted by the NTC, particularly Article 4 of Law No. 38, on the one hand, and the failure of Libyan lawmaker to incorporate crimes listed in the Rome Statute of the ICC[123] into the Libyan Penal Code, on the other, has weakened the State's governance and resulted in a fragile judicial system that puts fair trials out of reach.[124]

Indeed, one of the serious challenges facing the current transitional government is the immediate need to gain control over hundreds of militia groups and disarm them.[125] Rebel groups are affecting most aspects of Libyans' lives—including security and justice—[126]and forming several *quasi*-states and *de facto* authorities within the Libyan state.[127] Thousands of Libyans were, and still are, vulnerable to kidnapping by rebel militias. Some of the latter are held in different detention facilities outside the jurisdiction of Libya's justice system, while others have been subjected to extrajudicial killing,[128] or assassination in mysterious circumstances.[129]

Online (10 January 2012) <www.middle-east-online.com/english/?id=49918> (Accessed on: 21 February 2013) [the Rule of Law Reform in Libya]; UN Development Programme, "Rule of Law: Building Lasting Peace through Justice and Security," (October 2012), at p. 1.

[121] "Libya: Rocky Road Ahead for Libya's Tawergha Minority," *IRIN*, Tripoli, Libya, 13 December 2011.

[122] UN High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States: Amnesties. (New York, N.Y.: United Nations Publications, 2009), at 33-35.

[123] The Rome Statute of the ICC, *supra* note 79, at Arts. 6-8.

[124] Hilary Homes, "Fair Trials Still out of Reach in Libya," Amnesty International Canada (7 September 2012) [Fair Trials Still out of Reach in Libya].

[125] Militias Threaten Hopes for New Libya, *supra* note 12, at p. 32; Sarah Leah Whitson, "In Libya, Building the Rule of Law," *The New York Times* (29 December 2011). Online: <http://www.nytimes.com/2011/12/30/opinion/in-libya-building-the-rule-of-law.html> (Accessed on: 21 February 2013) [Sarah Leah Whitson].

[126] The general prosecutor in al-Zawiya, 50 km to the west of Tripoli, told Amnesty International that the judicial system is functioning in difficult and tense circumstances as armed militias control most aspects of life in the city. He added that a group of armed militias stormed the court room and threatened one of the judges as they thought he had imposed a light sentence on an alleged Qadhafi supporter. In another similar incident, a group of armed men abducted a public prosecutor in al-Zawiya, held him for several hours and dragged him to the prosecution's office demanding that he must be punished for ordering the release of a detainee they accused of committing crimes. See Fair Trials Still out of Reach in Libya, *supra* note 124.

[127] Fair Trials Still out of Reach in Libya, *supra* note 124; Libya's Unwilling Revolutionaries, *supra* note 1.

[128] This includes the killing of Muammar Qadhafi and his son Mu'tasim on 20 October 2011. The NTC promised an investigation into these deaths but nothing has as yet emerged. Moreover, Amnesty International and Human Rights Watch documented the summary execution of 65 Libyan citizens on 23 October 2011 by rebel forces outside the Mahari Hotel in Sirte. See Militias Threaten Hopes for New Libya, *supra* not 12, at. p. 33; Sarah Leah Whitson, *supra* not 125.

[129] A case in point is the assassination of Abdul-Fattah Younes al-Obeidi, who defected to the

During and in the aftermath of the conflict, rebel fighters arrested and arbitrary detained thousands of suspected security forces of the former regime, loyalists, and alleged foreign mercenaries. They continue to hold many of these in secret detention facilities without indictment or trial and in inhuman conditions, subjecting many of them to humiliation, torture, sexual torture, rape or threat of rape, mutilation and torture leading to death. [130] To cite but one example, *Thuwwar* al-Zintan, a rebel militia group functioning in western Libya, captured Saif al-Islam Qadhafi (hereinafter Saif al-Islam) on 19 November 2011, locked him in a secret place, and refused to hand him over to the Libyan transitional government. Since then the NTC and successor transitional governments have utterly failed, for more than 15 months,[131] to provide him with a fair trial under the jurisdiction of the Libyan justice system or execute the ICC's arrest warrant and extradite him to the Court in The Hague.[132] In this respect, Ahmed al-Jehani, Libya's representative to the ICC, has said: "we as Libyans cannot begin Saif's trial. There is no central power to prosecute him."[133] This is an egregious violation of Saif's right to be tried without undue delay, and a proof of the incompetence of the Libyan judicial system. The competence of any judicial body depends on its capacity to deliver justice in a timely, efficient, and impartial way. The current Libyan judicial system has shown itself incapable, thus far, of meeting this standard.

3. Lack of Security and Public Order

Libya is currently facing a cluster of complex security challenges. The most direct challenge to Libya's transition is the lack of central authority and

---

opposition in February 2011 and became the commander-in-chief of the rebel forces. On 27 July 2011, a group of rebel fighters took him for questioning in a military camp in Gharyounes. It has been reported that he was shot dead together with his aides in late July 2011. Recently, Hassan Jum'ah al-Jazzawi, a judge investigating the death of al-Obeidi, was assassinated in Benghazi. See Christine N. Myers, "Tribalism and Democratic Transition in Libya: Lessons from Iraq," (2013) 7:5 Global Tides 1-28. Available at: <http://digitalcommons.pepperdine.edu/globaltides/vol7/iss1/5> (Accessed on: 11 October 2013) 18; Militias Threaten Hopes for New Libya, *supra* not 12, at. pp. 32-33.

[130] Amnesty International, "Libya: Militia Stranglehold Corrosive for Rule of Law," News (4 July 2012), at p. 1; *Libya: Rule of Law or Rule of Militias*?, Amnesty International, 5 JULY 2012, Index: MDE 19/012/2012, at pp. 17-18 & 24 -25 [Rule of Law or Rule of Militias?]; Militias Threaten Hopes for New Libya, *supra* not 12, at. p. 32.

[131] Jonathan O'Donohue, "Libya's Defining Moment: Justice or Revenge? Gaddafi-regime Officials must be Tried in the International Criminal Court to Ensure a Fair Trial," Online: Aljazeera (22 September 2013) <http://www.aljazeera.com/indepth/opinion/2013/09/201392210557425280.html> (Acceded: 3 October 2013); "Saif al-Islam in Libyan Court for First Time: Son of Former Libyan Leader Muammar Gaddafi Appears in Zintan Court over ICC Delegation Case," Online: Aljazeera (17 January 2013) <http://www.aljazeera.com/news/africa/2013/01/20131171676991400.html> (Accessed on: 17 January 2013) [Saif Al-Islam in Libyan Court for First Time]; Vivienne Walt, "Libya's Disaster of Justice: The Case of Saif al-Islam Gaddafi Reveals a Country in Chaos," Online TIME (28 June 2013) <http://world.time.com/2013/06/28/libyas-disaster-of-justice-the-case-of-saif-al-islam-gaddafi-reveals-a-country-in-chaos/> (Accessed on: 3 October 2013).

[132] Warrant of Arrest for Saif al-Islam Qadhafi, ICC Pre-Trial Chamber I, No. ICC-01/11 (27 June 2011) [Warrant of Arrest for Saif al-Islam Qadhafi].

[133] Libya's Unwilling Revolutionaries, *supra* note 1.

public order. Tens of thousands of armed revolutionaries, approximately 125,000, are operating within more than one hundred brigades and spread throughout Libyan territory.[134] Each of these groups claims its share of legitimacy, operates separately from other groups, and has its own procedures regarding organization, arrest, and detention.[135]

These groups have refused several calls from the NTC and transitional governments to surrender their arms and merge into the national army and security forces. This is however prevented by the state of mistrust existing between individual groups, on the one hand, and between them and the central government, on the other. This situation has complicated the state of security and would obstruct any attempt to reach reconciliation, peace-building and restoring justice.[136]

However, this status of fragmentation reflects Libya's socio-cultural landscape. Before independence in 1951, Libyan tribes functioned to a considerable extent as independent political, economic, and military bodies. This has been a feature of Libya's political and economic life over the past sixty years; in fact, more than 70% of the population, despite considerable migration in the 1960s and 1970s to Tripoli and other large cities during the oil boom, still identify themselves as members of a tribe, retaining the same tribal values and trends.[137] This socio-cultural identity is profoundly rooted

---

[134] Arturo Varvelli, "The Role of Tribal Dynamics in the Libyan Future," International Society for Performance Improvement (ISPI), Analysis No. 172, May 2013, at p.5; Chris Hughes, "Libya: Tribal Warfare Looms in Battle for Power in Post-Gaddafi Era," Online: Mirror (23 August 2011) <http://www.mirror.co.uk/news/uk-news/libya-tribal-warfare-looms-in-battle-149199> (Accessed on: 3 October 2013); Florence Gaub, "The Libyan Armed Forces between Coup-proofing and Repression," (2013) 36:2 Journal of Strategic Studies 239; Igor Cherstich, "Libya's Revolution: Tribe, Nation, Politics," Online: Open Democracy (3 October 2011) <http://www.opendemocracy.net/igor-cherstich/libyas-revolution-tribe-nation-politics> (Accessed on: 3 October 2013); "Libya: Fragile Security, Fragmented Politics," (2013) 19:2 IISS Strategic Comments xv; Yahia H Zoubir & Erzsébet N Rózsa, "The End of the Libyan Dictatorship: The Uncertain Transition," (2012) 33:7 Third World Quarterly1270; Rosan Smits, et al., *Revolution and Its Discontents: State, Factions and Violence in the New Libya* (The Hague, Conflict Research Unit, the Clingendael Institute, 2013) 42.

[135] Graeme Smith, "In Libya, the Revolution Will be Tribalized," Online: The Globe and Mail (7 March 2011) <http://www.theglobeandmail.com/news/world/in-libya-the-revolution-will-be-tribalized/article569819/> (Accessed on: 3 October 2013); *Holding Libya Together: Security Challenges After Qadhafi*, International Crisis Group, Middle East/North Africa Report N°115 (14 December 2011) at p. 3 [Security Challenges After Qadhafi]; Katarina Marcella Pedersen, *After Gaddafi, What Now? Issues of Transitional Justice* (M.A., Georgetown University, 2013) 47; Libya's Troubled Transition, *supra* note 22, at p. 7; Mathieu Galtier, "Militias are Taking over in Post-Gadhafi Libya," Online: USA TODAY (3 January 2013) <http://www.usatoday.com/story/news/world/2013/01/03/libya-militias/1802523/> (Accessed on: 3 October 2013); Youssef Sawani & Jason Pack, "Libyan Constitutionality and Sovereignty Post-Qadhafi: The Islamist, Regionalist, and Amazigh Challenges," (2013) 18:4 The Journal of North African Studies 524.

[136] Hanan Salah, "Dispatches: Law and Order in Libya, Tripoli-Style," Online: Human Rights Watch (27 August 2013) <http://www.hrw.org/news/2013/08/27/dispatches-law-and-order-libya-tripoli-style> (Accessed on: 3 October 2013); Michael Shkolnik, "Libya's Fragmentation: Tribal Conflict, Islamism, and the Quest for Power," United Nations Association in Canada, 15 May 2012; Paul Iddon, "A Clear-Cut Reminder of Libya's Tribal Divisions," Online: Digital Journal (2 May 2013) <http://digitaljournal.com/ article/349326> (Accessed on: 3 October 2013); The Rule of Law Reform in Libya, *supra* note 120.

[137] Haala Hweio, "Tribes in Libya: From Social Organization to Political Power," (2012) 2: 1 African Conflict & Peacebuilding Review 114 [Haala Hweio]; Meftah Ali Dakhil, *Migration,*

in the Libyans' political and economic life and is strongly reflected in the formation of post-Qadhafi security forces and rebel brigades.[138]

Inevitably, the lack of security has resulted in poor governance, a fragile judicial system, and difficulties in breaking with the legacy of impunity inherited from the former regime.[139] The absence of a centralized authority resulted in the failure of the transitional government to protect foreign diplomatic corps in Benghazi,[140] as well as Libyan high ranking officials,[141] and minorities. The latter case is best illustrated by the case of African workers and immigrants who became a "legitimate" target of frequent arbitrary arrests and abusement.[142] The lack of the transitional government's control over armed militias promotes a large scale of retaliation attacks,

---

Development, and Place Preferences: The Example of Libya (Ph.D., Dissertation, University of Kentucky, 1989) 33; Mohamed Farag Malhauf, *A Study of Newly Developed Communities in Libya* (Ph.D., Dissertation, University of California-Berkeley, 1979) 21.

[138] Hilmi M. Zawati, *Aftermath of Rape and Sexual Violence: The Dilemma of Libyan Women Wartime Rape Survivors*, International Speakers' Lecture Series, Faculty of Law, Queen's University, Kingston, Ontario, 29 March 2012; Seth Kaplan, "Understanding Libya: The Role of Ethnic and Tribal Groups in Any Political Settlement," Online Fragile States (1 March 2012) <http://www.fragilestates.org/2012/03/01/understanding-libya-the-role-of-ethnic-and-tribal-groups-in-any-political-settlement/> (Accessed on: 3 October 2013).

[139] *Divided We Stand: Libya's Enduring Conflicts*, International Crisis Group, Middle East/North Africa Report N° 130 (14 September 2012).

[140] The attack on the US diplomatic mission in Benghazi on 11 September 2012, and the failure of the transitional government to respond adequately to the incident, illustrates the lack of the rule of law and the constant failure of the government to impose it. See Barak Barfi, "Libya's Anti-Military Militias," Online: Project Syndicate (7 January 2013) <http://www.project-syndicate.org/commentary/replacing-militias-with-national-security-forces-in-libya-by-barak-barfi> (Accessed on: 24 February 2013).

[141] Recently, on 6 January 2013, Mohamed Magarief, head of the Libyan General National Congress, was attacked by gunmen during his visit to Sebha to meet with members of local tribes on the subject of tribal clashes between Awlad Suleiman and Qadhadhfa tribes, which left several dead on both sides. Moreover, at the time of writing this paper, Ali Zeidan, the Libyan prime minister, has been abducted and held for several hours by armed men associated with the fragmented Libyan security apparatus—the Libyan Revolutionaries Operations Room (LROR) and the Anti-Crimes Unit. This is yet another high-profile example of the state of confusion and lawlessness in Libya two years after the fall of the Qadhafi regime. See "Details Emerge of Attack on Magarief in Sebha," Online: Libya Herald (6 January 2013) <http://www.libyaherald.com/2013/01/06/reports-emerge-of-magarief-assassination-attempt-in-sebha/> (Accessed on: 24 February 2013); "Freed Libyan Prime Minister Urges Calm: Ali Zeidan was Held for Several Hours by Former Rebel Brigades," Online: Aljazeera (10 October 2013) <http://www.aljazeera. com/news/africa/2013/10/freed-libyan-prime-minister-urges-calm-201310101515129385582.html> (Accessed on: 11 October 2013); Kim Sengupta, "Is No One Safe in Libya? PM has to be Rescued from Kidnap Gang : Ali Zeidan was Freed after Half a Day, but his Abduction Highlights a Nation's Slide into Chaos," Online: The Independent (10 October 2013) <http://www.independent.co.uk/news/world/africa/is-no-one-safe-in-libya-pm-has-to-be-rescued-from-kidnap-gang-8870655.html> (Accessed on: 11 October 2013); "Libyan Prime Minister Seized by Armed Men," Online (10 October 2013) <http://www. aljazeera.com/news/africa/2013/10/libyan-pm-ali-zeidan-kidnapped-by-armed-men-201310104263047746 8.html> (Accessed on: 11 October 2013); Mahmud Turkia "Show of Power by Libya Militia in Kidnapping," New York Times (10 October 2013) <http://www.nytimes.com/2013/10/11/world/africa/libya.html?pagewanted=1&_r=0> (Accessed on: 11 October 2013).

[142] The battle for Libya, *supra* note 12, at pp. 9 & 80; Human Rights Watch, "Libya: Cease Arbitrary Arrests, Abuse of Detainees Thousands Arrested Without Review in Tripoli," (30 September 2011), at p. 2; Report of the International Commission of Inquiry on Libya, *supra* note 12, at para. 62; Rule of Law or Rule of Militias?, *supra* note 130, at p. 15.

including rape and other forms of sexual violence, against groups or communities believed to be loyalists to the former regime. Some townships and districts in Western Libya have been ethnically cleansed and turned into virtual ghost towns, particularly Tuwergha, Bani Walid, and Sirte.[143]

However, security is essential to the Libyan transitional justice process, just as it is also critical to preventing future conflicts and stopping rape retaliation attacks, bringing justice to wartime rape victims, providing fair trials to perpetrators, and helping the Libyan people to tolerate the painful legacy of the past, so as to achieve justice for all citizens.

4. Lack of Democratic Institutions

Despite the differences between the three consecutive regimes that have governed Libya since independence in 1951, they all shared a consensus in considering the Libyan tribes as an important component and central player in shaping the Libyan state and contributing to its political identity.[144] King Muhammad Idris al-Sanusi, the first and last king of Libya, who was interested in reigning more than governing, had used the Libyan tribes as social associations to strengthen his control over the country and as an alternative to democratic institutions.[145] However, although the King tried in the middle of the 1960s to transfer responsibilities under the jurisdiction of the tribes over to government institutions, the tribal structure continued to be in a strong position when Qadhafi toppled the monarchy on September 1, 1969.[146]

To reinforce his regime during the 42 years of his authoritarian rule, Qadhafi marginalized the army and distributed weapons to many informal tribal groups. Then, to further consolidate power, he dismantled the traditional state institutions and replaced them, according to his political vision, with revolutionary committees.[147] These committees formed the courts, carried out wide-ranging powers of arrest, and controlled the media and other aspects of Libyans' lives.[148] Furthermore, taking advantage of the

---

[143] Ann Elizabeth Mayer, "Building the New Libya: Lessons to Learn and to Unlearn," (2013) 34 University of Pennsylvania Journal of International Law 372; Security Challenges after Qadhafi, *supra* note 135, at p. 27.
[144] Haala Hweio, *supra* note 137, at 112.
[145] Barak Barfi, "Rebuilding the Ruins of Qaddafi," Online: Project Syndicate (22 December 2011) <http://www.project-syndicate.org/commentary/rebuilding-the-ruins-of-qaddafi> (Accessed on: 24 February 2013) [Rebuilding the Ruins of Qaddafi].
[146] Dirk Vandewalle, *Libya since Independence: Oil and State-Building* (Ithaca, NY: Cornell University Press, 1998), at p. 196 [Libya since Independence]; Haala Hweio, *supra* note 137, at p. 116.
[147] Emanuela Paoletti, Libya: Roots of a Civil Conflict," (2011) 16:2 Mediterranean Politics 317; Mohammed El-Katiri, State-Building Challenges in a Post-Revolution Libya, U.S. Army War College, October 2012, at p. 23 [State-Building Challenges in a Post-Revolution Libya]; Saskia van Genugten, "Libya after Gadhafi," (2011) 53:3 Survival: Global Politics and Strategy 70 [Libya after Gadhafi]; Thomas Hüsken, "Tribal Political Culture and the Revolution in the Cyrenaica of Libya," in Libya from Revolution to a State Building: Challenges of the Transitional Period. A Conference sponsored by the Libyan Centre for Studies and Research, Doha, Qatar, 7-8 January 2012, at p. 7.
[148] Rebuilding the Ruins of Qaddafi, *supra* note 145.

fact that tribalism is a factor of daily life in Libya,[149] Qadhafi implemented the strategy of "divide and rule" by pitting Libyan tribes one against another,[150] which led to the formation on February 17th of rebel brigades spread all over the country. This resulted in the emergence of some 140 militant groups—approximately the number of the existing Libyan tribes and clans—fighting against each other for legitimacy and rule.

By weakening the state's institutions—the cornerstone in any process of state building and democratization—and supporting the rise of the tribal politicization to further his autocratic regime, Qadhafi turned Libya, despite its great natural resources, into an underdeveloped, consumerist police state.[151] As Haala Hweio suggests, there was a direct relation between weakening Libya's institutions and the increase in the role of the tribes in political life, on the one hand, and the long-term plan of Qadhafi to remain in power, on the other.[152]

In light of the above accounts, it is fair to say that the NTC and the consecutive traditional governments have inherited a state without political institutions or an effective judicial system. This situation has resulted in a dual authority over the country, unskilled political leaders,[153] and failure by the government to reign in militias and restore the rule of law and public order. These constitute the major challenges that Libyans need to face in traversing the transitional period on their way to sustainable peace, state-building, and democracy. [154]

V. Transitional Justice v. Retributive Justice: Key Mechanisms for Gender-Sensitive Transitional Justice in Libya

There are a variety of international instruments that emphasize the right of Libyan victims of gross and systematic violations of human rights to obtain an effective remedy and various forms of reparation. These instruments can provide them with a transnational judicial and non-judicial framework that would enable them to appear before national judicial bodies

---

[149] State-Building Challenges in a Post-Revolution Libya, *supra* note 147, at p. 1.
[150] Christopher S. Chivvis, et al., "Libya's Post-Qaddafi Transition: The Nation-Building Challenge," RAND Corporation, 2012, at p. 11.
[151] Craig R. Black, "Deterring Libya: The Strategic Culture of Muammar Qadhafi," Future War fair Series No. 8, Air War College, Air University, Maxwell Air Force Base, Alabama, US, October 2000, at p. 10; Haala Hweio, *supra* note 137, at p. 118; Libya since Independence, *supra* note 146, at p. 9; State-Building Challenges in a Post-Revolution Libya, *supra* note 147, at p. 7; Ulla Holm, "Libya in Transition: The Fragile and Insecure Relation between the Local, the National and the Regional," in Louise Riis Andersen, ed., How the Local Matters Democratization in Libya, Pakistan, Yemen and Palestine (Copenhagen, Denmark: Danish Institute for International Studies, DIIS, 2013), at p. 27.
[152] Haala Hweio, *supra* note 137, at p. 120.
[153] Barak Barfi, "Libya's Transition to Transition," Online: Project Syndicate (15 March 2012) <http://www.project-syndicate.org/commentary/libya-s-transition-to-transition> (Accessed on: 27 February 2013).
[154] Libya after Gadhafi, *supra* note 147, at p. 70; Rebuilding the Ruins of Qaddafi, *supra* note 145.

exercising universal jurisdiction, regional courts of human rights, international committees, and truth and reconciliation commissions to seek redress.

As has already been noted at the beginning of this analysis, mechanisms for gender-sensitive transitional justice in Libya may comprise a wide range of options, including those offered by judicial and non-judicial bodies.[155] The latter option may involve several national justice-serving measures: truth-seeking, fact-finding, and reconciliation commissions, which aimed at the investigation of gender-based crimes perpetrated by both state and non-state actors before, during, and after the recent eight-month civil war. Similar commissions, e.g., the truth and reconciliation commissions of South Africa, Sierra Leone, Peru, etc., usually conclude their reports by providing the results of their investigation and recommendations for amnesty, legal prosecution, and reparation to victims.[156] Accountability mechanisms may include Libya's civil and criminal courts, the ICC,[157] and perhaps a special court for Libya, composed of domestic and international judges and applying both Libyan and international criminal law.

In order to overcome the challenges posed by the failure of consecutive Libyan governments over the past sixty years to reform the judicial system and to incorporate international crimes identified in different international legal instruments, particularly the Rome Statute of the ICC,[158] it is necessary that the current transitional government utilize a number of overlapping key mechanisms in order to achieve gender-sensitive transitional justice in Libya.

---

[155] Gender-Based Violence in Transition, *supra* note 39, at p. 14; Kai Ambos, "The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC," in Kai Ambos et al. (eds.), Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development (Berlin: Springer-Verlag, 2009) 19 [The Legal Framework of Transitional Justice]; The Rule of Law Reform in Libya, *supra* note 120; Sirkku K. Hellsten, "Transitional Justice and Aid," Working Paper No. 2012/06, United Nations University, January 2012, at p.16.

[156] Transitional Justice and the Arab Spring, *supra* note 6, at p. 9.

[157] Based on the prosecutor's investigation into the situation in Libya pursuant to the Security Council's Resolution 1970 (2011), arrest warrants were issued on 27 June 2011 by the ICC Pre-Trial Chamber I to Muammar Gaddafi, Saif Gaddafi, and Abdullah al-Senussi, for their individual responsibility in crimes committed by government's security forces after 15 February 2011 in different locations of the Libyan Territory. See The International Criminal Court, the Office of the Prosecutor, "First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)", (26 February 2011); The International Criminal Court, the Office of the Prosecutor, "Second Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)", (9 November 2011); The International Criminal Court, the Office of the Prosecutor, "Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)", (4 June 2012); The International Criminal Court, the Office of the Prosecutor, "Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)", (7 July 2012); Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammad Abu Minyar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi, Pre-trial Chamber I, Case No. ICC-01/11 (16 May 2011); UN Security Council's Resolution 1970 (2011), *Situation Referred to International Criminal Court* (26 February 2011), UN Doc. S/RES/1970 (2011) [UN Security Council's Resolution 1970]; Warrant of Arrest for Saif al-Islam Qadhafi, *supra* not 132.

[158] The Rome Statute of the ICC, *supra* note 79, at Arts. 6-8; Transitional Justice and the Arab Spring, *supra* note 6, at p. 4.

The following section underlines three significant mechanisms that can help in this effort, including: urgent legal justice system reform; an effective truth and reconciliation process involving the participation of Libyan feminist legal scholars and activists; and a special court for Libya with a hybrid legal system—similar to the Special Court for Sierra Leone (SCSL)[159] and the Extraordinary Chambers of the Courts of Cambodia (ECCC)[160]—to adequately prosecute and punish conflict-related gender-based crimes and provide justice for both victims and perpetrators, regardless of their political affiliation or tribal lineage and the time-frame of the offences. The employment of these mechanisms by the transitional government would partly fulfil its obligations under international law and be consistent with the Security Council's resolutions.[161] These resolutions demand that states ensure women's involvement in all aspects of post-conflict reconciliation and peace-building,[162] and emphasize accountability for crimes committed during any conflict against women, including wartime rape and other forms of sexual violence.[163]

1. Legal Justice System Reform

For many years, domestic and international criminal laws avoided recognizing wartime rape and other forms of sexual violence as punishable crimes under their provisions. After the incorporation of gender-based crimes into the laws of some national courts[164] exercising universal jurisdiction,[165] as well as into the statutes of international tribunals and courts, there has been a tendency in many recent post-conflict trials for the above judicial bodies to prosecute high-ranking officers for inciting rape and other gender crimes, leaving the actual perpetrators to remain at large. As a result, many of the atrocities committed against women and men go unpunished and victims see their claims ignored.[166]

Accordingly, reforming the inherited defective Libyan legal system is a *condicio sine qua non* for an effective gender-sensitive transitional justice that

---

[159] *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (16 January 2002), 2178 U.N.T.S. 138.
[160] *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, 27 October 2004 (NS/RKM/1004/006).
[161] Particularly, UN Security Council's Resolution 1325, *supra* note 108; UN Security Council's Resolution 1820 *supra* note 109; UN Security Council's Resolution 1888 (2009), *Women and Peace and Security* (30 September 2009) UN Doc. S/RES/1888 (2009); UN Security Council's Resolution 1889 (2009), *Women and Peace and Security* (5 October 2009) UN Doc. S/RES/1889 (2009).
[162] UN Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820* (New York, N.Y.: United Nations Publications, 2009), at pp. 13-14.
[163] Nahla Valji, *A Window of Opportunity? Making Transitional Justice Work for Women* (New York, N.Y.: United Nations Development Fund for Women, 2010) 1 [Making Transitional Justice Work for Women].
[164] Fore example, see *Canadian Crimes against Humanity and War Crimes Act*, R.S.C., 2000, c.24.
[165] *R.* v. *Désiré Munyaneza*, (22 May 2009) Montreal Superior Court, 500-73-002500-052, C.A.H.W.C.A., at 737.
[166] Gender-Based Violence in Transition, *supra* note 39, at p. 15.

guarantees Libyan women's rights and especially their participation in post-conflict policy-making and decision-taking on equal footing with Libyan men.[167] Needless to say, the Libyan transitional government has inherited a flawed legal system that lacked independence—and therefore the confidence of the Libyan people—over the past four decades, and does not specifically incorporate international crimes embodied in the Rome Statue of the ICC, including genocide, crimes against humanity, war crimes, extrajudicial killings, and gender-based crimes.[168] This *lacuna* in the law may prevent Libyan judicial bodies from prosecuting and punishing those responsible for previous and recent international crimes committed in a number of war-torn Libyan cities and towns.[169] Moreover, a gender-sensitive transitional justice requires that gendered legal norms be included in and considered as an integral part of the Libyan Penal Code. This process is necessary to develop a new legal understanding of the harms of rape and other forms of sexual violence in war settings.[170]

2. *Gender Transitional Justice as Restorative Justice: The Libyan Truth and Reconciliation Commission*

This long-term and painstaking non-judicial mechanism requires that both perpetrators and victims acknowledge, remember and learn from the past with the aim of transforming Libyan society from a state of war and lawlessness into one of sustainable peace, rule of the law, democracy, and state-building.[171] This will require truth-seeking, and fact-finding and

---

[167] Christine Bell & Catherine O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," (2007) 1 The International Journal of Transitional Justice 25 & 30; Helen Scanlon & Kelli Muddell, "Gender and transitional justice in Africa: Progress and prospects," (2009) 9:2 African Journal on Conflict Resolution 25; Rashida Manjoo & Calleigh McRaith, "Gender-Based Violence and Justice in Conflict and Post-Conflict Areas," (2011) 44 Cornell International Law Journal 17; Report of the Secretary-General, *Women's Participation in Peacebuilding*, UN Doc A/65/354–S/2010/466 (7 September 2010), paras. 4 & 18; Making Transitional Justice Work for Women, *supra* note 163, at p. 25.

[168] The battle for Libya, *supra* note 12, at p. 10; Contribution of the Arab Spring to the Role of Transitional Justice and Amnesty Laws, *supra* note 59, at p. 9; Leila Hanafi, "Libya and the ICC: Inspiring Transitional Justice Reform," Online: JURIST-Hotline (16 May 2012) <http://jurist.org/hotline/2012/05/leila-hanafi-libya-ICC.php> (Accessed on: 27 February 2013) [Inspiring Transitional Justice Reform]; Report of the International Commission of Inquiry on Libya, *supra* note 12, at para. 770.

[169] To be able to prosecute international crimes in its courts, Libya has to incorporate core crimes, particularly crimes against humanity into its domestic criminal code. For further discussion, see Leila Nadya Sadat, "A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity," in Leila Nadya Sadat, *Forging a Convention for Crimes against Humanity* (New York, N.Y.: Cambridge University Press, 2011) 474.

[170] Campbell, Kirsten, "The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia," (2007) 1 The International Journal of Transitional Justice 428.

[171] Anja Mihr, "Transitional Justice and the Quality of Democracy – From democratic institution building to reconciliation," in Anja Mihr, ed., *Transitional Justice: Between Criminal Justice, Atonement and Democracy* (Utrecht: Utrecht University, 2012) 32; Martina Fischer, "Transitional Justice and Reconciliation: Theory and Practice," Online <http://www.berghof-handbook.net/documents/publications/ fischer_tj_and_rec_handbook.pdf> (Accessed on: 28 February 2013), p. 407; Romi Sigsworth, "Gender-Based Violence in Transition," Concept Paper, in Violence and Transition Project Roundtable Sponsored by Centre for the Study of Violence

reconciliation commissions. The main object of this process, which can only complement but not substitute for criminal justice,[172] is to investigate conflict-related gender-based crimes, bring justice to Libyan women and men victims of wartime rape and other forms of sexual violence, and emphasize their rights to justice and remedy pursuant to the principle *ubi jus ibi remedium*, regardless of their political affiliation or tribal lineage, or of whether they were abused before, during or after the recent civil war.

Libyan victims' fundamental rights to an effective remedy are thus clearly established and crystallized in international humanitarian and human rights law.[173] They have been enshrined in the norms of international customary humanitarian law pre-WWI; the Treaty of Versailles; the judgements of the Permanent Court of International Justice (PCIJ); and the Harvard Draft, which provides in Article 7 that states are responsible for injuries caused by an act or omission of the state.[174]

The international human rights instruments that entered into force after the establishment of the United Nations in 1945, and that were ratified by Libya, recognize the victim's substantive rights to effective and adequate remedy, whether these rights were violated by other individuals or by government authorities, intentionally or through negligence. Article 8 of the Universal Declaration of Human Rights was the first provision to emphasize the victim's substantive right to obtain an effective remedy, implying that the remedy must be individualized and adjudicatory.[175] On the other hand, the International Covenant on Civil and Political Rights (ICCPR), which emphasizes the civil and political rights listed in the Universal Declaration of Human Rights, elucidates the victim's right to an effective remedy in Article

---

and Reconciliation Transitional Justice Programme, Johannesburg, 7 – 9 may 2008, at p. 18; Sanam Naraghi Anderlini, et. al., "Transitional Justice and Reconciliation." In Inclusive Security, Sustainable Peace: A Toolkit for Advocacy and Action. Hunt Alternatives Fund, 2007, at p.2; Transitional Justice – Does It Help or Does It Harm, *supra* note 39, at p. 4; Transitional Justice and Ongoing Conflict, *supra* note 4, at 6.

[172] The Legal Framework of Transitional Justice, *supra* note 155, at 34.

[173] Human Rights Watch, "Truth and Justice Can't Wait: Human Rights Developments in Libya amid Institutional Obstacles," (December 2009), at p. 59.

[174] In the Chorzow Factory case, 1928, the Permanent Court of International Justice ruled that "… it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." See *Chorzow Factory*, Merits, Judgement No. 13 (1928) P. C. I. J., Series A, No. 17, p. 29. See also: Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (New York, N.Y.: Cambridge University Press, 2004) 88; *Harvard Draft of the Law of Responsibility of States for Damages done in their Territory to the Persons or Property of Foreigners* (Supplement to 1929) 23 American Journal of International Law 131; Karen Parker & Jennifer F. Chew, "Compensation for Japan's World War II War-Rape Victims," (1994) 17:3 Hastings International and Comparative Law Review 524-525; *Reparation for Torture: A Survey of Law and Practice in Thirty Selected Countries, Redress*, Report, April 2003, p. 10; Sompong Sucharitkul, "State Responsibility and International Liability in Transnational Relations," in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Boston, Mass.: Kluwer Law International, 1996) 286; *Treaty of Versailles*, 28 June 1919, 2 Bevans 43; Reprinted in Leon Friedman, ed., *The Law of War: A Documentary History*, vol. 1 (New York, N.Y.: Random House, 1972) 417-434.

[175] It states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." See Universal declaration of Human Rights, *supra* note 70, Article 8.

2(3). It extends this right to violations committed by government personnel and officials by ruling out the defences of sovereign immunity or following superior orders, and by obliging governments to investigate and prosecute violations regardless of the fact that they were committed by persons in an official capacity.[176]

Similar norms are explicitly embodied in several regional and international human rights law instruments, particularly those treaties and conventions codified in the aftermath of WWII[177] and during the 1990s—the years of proliferation of United Nations human rights treaty bodies and monitoring mechanisms—which produced dozens of reports on the human rights situations in the former Yugoslavia and Rwanda.[178]

---

[176] Article 2(3) of the International Covenant on Civil and Political Rights reads:
Each State Party to the present Covenant undertakes:

> a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> b. To ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> c. To ensure that the competent authorities shall enforce such remedies when granted.

See Covenant on Civil and Political Rights, *supra* note 99, Article 2(3).

[177] Michael O'Flaherty, "Treaty Bodies Responding to States of Emergency: The Case of Bosnia and Herzegovina," in Philip Alston & James Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (New York, N.Y.: Cambridge University Press, 2000) 439 & 444; Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," (1990) 78 California Law Review 475 & 478; Rebecca J. Cook, "State Responsibility for Violations of Women's Human Rights," (1994) 7 Harvard Human Rights Journal 169; René Provost, *International Human Rights and Humanitarian Law* (Cambridge, U.K.: Cambridge University Press, 2002) 43; UN Commission on Human Rights, *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119*, UN Doc. E/CN.4/Sub.2/1997/20 (26 June 1997), p. 7.

[178] Between 1992 and 1998, Special Rapporteurs of the UN Commission on Human Rights, René Deqni-Séqui, M. Tadeuse Mazowiecki, and Elisabeth Rehn, submitted dozens of reports on the situation of human rights in Rwanda and the former Yugoslavia, some of which are listed in the following:
Reports submitted by René Deqni-Séqui on the situation of human rights in Rwanda: UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui*, UN Doc. E/CN.4/1995/7 (28 June 1994); UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui*, UN Doc. E/CN.4/1995/12 (12 August 1994); UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui*, UN Doc. E/CN.4/1995/70 (11 November 1994); UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui*, UN Doc. E/CN.4/1995/71 (17 January 1995); UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Ségui, Special Rapporteur, under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, UN Doc. E/CN.4/1996/7 (28 June 1995); UN Commission on Human Rights, *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*, UN Doc. E/CN.4/1996/68 (29 January 1996); UN Commission on Human Rights, *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*

This right, which is also incorporated in conventional and customary international humanitarian law, including the 1907 Hague Convention IV and the Protocol I additional to the Geneva Conventions of 1949, may take the form of restitution, rehabilitation, truth commissions, or monetary compensation.[179] The basic principles and guidelines of these forms were

May 1994, UN Doc. E/CN.4/1997/61 (20 January 1997).
Reports submitted by M. Tadeuse Mazowiecki on the situation of human rights in the territory of the former Yugoslavia: UN Commission on Human Rights, *Analytical Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by M. Tadeuse Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 14 of Commission Relations 1992/S-1/1 of 14 August 1992*, UN Doc. E/CN.4/1992/S-1/9 (28 August 1992); UN Commission on Human Rights, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/ 1993/50 (10 February 1993); UN Commission on Human Rights, *Fourth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1994/8, (26 September 1993); UN Commission on Human Rights, *Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1994/3 (5 May 1993); UN Commission on Human Rights, *Second Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1994/4 (19 May 1993); UN Commission on Human Rights, *Fourth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1994/8 (26 September 1993); UN Commission on Human Rights, *Fifth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1994/47 (17 November 1993); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1995/4 (10 June 1994).
Reports submitted by Elisabeth Rehn on the situation of human rights in the territory of the former Yugoslavia: UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Report Submitted by Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, Pursuant to Commission Resolution 1995/89*, UN Doc. E/CN.4/1996/63 (14 March 1996); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Periodic Report Submitted by Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 45 of Commission Resolution 1996/71*, UN Doc. E/CN.4/1997/5 (17 July 1996); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Periodic Report Submitted by Ms. Elisabeth Rehn, special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 45 of Commission Resolution 1996/71*, UN Doc. E/CN.4/1997/9 (22 October 1996); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Final Report of Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia,* UN Doc. E/CN.4/1998/63 (14 January 1998); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Report on the Human Rights Situation in Bosnia and Herzegovina Submitted by the Special Rapporteur Ms. Elisabeth Rehn, Pursuant to Commission Resolution 1997/57,* UN Doc. E/CN.4/1998/13 (15 October 1997); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Report on the Situation of Human Rights in the Republic of Croatia Submitted by Ms. Elisabeth Rehn, Special Rapporteur, Pursuant to Commission Resolution 1997/57,* UN Doc. E/CN.4/1998/14 (31 October 1997); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Report on the Situation of Human Rights in the Federal Republic of Yugoslavia Submitted by Ms. Elisabeth Rehn, Special Rapporteur, Pursuant to Commission Resolution 1997/57,* UN Doc. E/CN.4/1998/15 (31 October 1997).

[179] *Recommendation on the Issue of "Comfort Women,": Supplementary Explanation*, Japan Federation of Bar Association Report, 1995, at p. 5; Responding to Victims of Wartime Sexual Violence in Africa, *supra* note 6, at p. 36; UN Commission on Human Rights, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/ Sub.2/1993/8 (2 July 1993) [Boven Final Report]; UN Commission on Human Rights, Report of the Independent Expert on the Right to Restitution,

proposed by Theo van Boven, the United Nations special rapporteur, in his 1993 final report on reparations for gross violations of human rights and fundamental freedoms. Noting that it is usually too difficult for a victim to obtain an optimal remedy for gross violations committed on a massive scale––e.g. systematic mass rape and genocide in the former Yugoslavia and Rwanda—Boven asserted that to restore justice, the responsibility of the perpetrator must be established and the rights of the victim preserved to the fullest possible extent. In other words, remedies must be both effective and adequate[180]—a principle which the Truth and Reconciliation Commission is supposed to emphasize, notwithstanding its limited success due to the lack of enforcement powers and procedural obstructions.[181]

It should also be noted that the Libyan Fact-Finding and Reconciliation Commission, established pursuant to Law No. 17 for the year 2012, will not work properly without abolishing Law No. 38, particularly Article 4.[182] Indeed, the failure to investigate crimes committed by the rebels during and after the conflict would encourage the culture of impunity and undermine the truth and reconciliation process.[183]

3. Accountability Mechanisms: Who Has Jurisdiction over Libya's Gender-Based Egregious Crimes?

The debate over where to hold Saif al-Islam and other conflict-related

---

Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, M. Cherif Bassiouni, Submitted Pursuant to Commission on Human Rights Resolution 1998/43, UN Doc. E/CN.4/1999/65 (8 February 1999); UN Commission on Human Rights, Final Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Mr. Cherif Bassiouni, Submitted Pursuant to Commission on Human Rights Resolution 1999/33, UN Doc. E/CN.4/2000/62 (18 January 2000).

[180] However, Boven's principles and guidelines were revised by M. Cherif Bassiouni, an independent expert, who replaced the special rapporteur in 1998. A final version of Bassiouni's report was submitted in 2000 and circulated for comments by the Office of the High Commissioner in 2002. A revised version of Bassiouni's report deleted all references to international humanitarian law and changed the title to: "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Law." Finally, the Commission called for Alejandro Salinas to make another revised version by consulting Boven and Bassiouni, taking into consideration remarks made by organizations and governments. A final revised draft was submitted on 1 October 2004. See Boven Final Report, *supra* note 179, at paras. 131 & 137; Dinah Shelton, "The United Nations Principles and Guidelines on Reparations: Context and Contents," in Koen De Feyter, et al., eds., *Out of the Ashes: Reparation for the Victims of Gross and Systematic Human Rights Violations* (Antwerpen, U.K.: Intersentia, 2005) 15-18; Reparation: A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law, Redress, Report, March 2003, p. 15; *Torture Survivors' Perceptions of Reparation: Preliminary Survey*, Redress, Report, 2001, p. 13; UN Commission on Human Rights, *Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict: Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998).

[181] Hilmi M. Zawati, *supra* note 89, at 273.

[182] Law No. (17), *supra* note 39; Law No. (38), *supra* note 45, at Art. 4; Libya: Transitional Government Should Support Victims [1] Promote Justice for Sexual Violence, Human Rights Watch (19 September 2011); Libyan Women Demand Support for War Rape Victims, *Reuters*, Tripoli, Libya, 26 November 201.

[183] Contribution of the Arab Spring to the Role of Transitional Justice and Amnesty Laws, *supra* note 59, at p. 44.

criminal suspects and under whose jurisdiction they fall has led to a continuous legal tug of war between the various Libyan transitional governments and the ICC.[184] While Libya insists on its right to try suspects at home—where the alleged crimes were committed—in Libyan courts and before Libyan judges, the latter has repeatedly asked the Libyan NTC and successive transitional governments to surrender Saif al-Islam and Abdullah Senussi (hereinafter Senussi) to the Court, confirming its jurisdiction over their trial pursuant to the UN Security Council's Resolution 1970 (2011)—adopted unanimously under Chapter VII of the UN Charter and pursuant to Article 13 (b) of the Rome Statute of the ICC on 26 February 2011.[185] This Resolution refers the situation in Libya to the ICC and requests the Libyan transitional government to cooperate fully with the Court and the Prosecutor.[186]

Acting on the above resolution, the Prosecutor initiated investigations and sought arrest warrants on 16 May 2011 against Muammar Qadhafi, Saif al-Islam and Senussi for responsibility for alleged crimes against humanity committed in Libya between 15 and 28 February 2011.[187] On 27 June 2011, the Pre-Trial Chamber I accepted the Prosecutor's application,[188] and issued three warrants of arrest for the above officials in relation to murders and persecutions allegedly committed after 15 February 2011 by state security forces.[189] Accordingly, the Registry filed, on 4 July 2011, its request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Qadhafi, Saif al-Islam and Senussi.[190] Proceedings against Muammar Qadhafi were officially terminated on 22 November 2011,[191] following his capture and execution by rebels from Misrata near his

---

[184] Leila Hanafi, "Libya and the ICC: in the pursuit of justice?," Online: Middle East Monitor (9 May 2012) <http://www.middleeastmonitor.com/articles/middle-east/3737-libya-and-the-icc-in-the-pursuit-of-justice> (Accessed on: 1 March 2013) [Libya and the ICC]; Mark S. Kersten, "After the War: Negotiating Justice in Post-Gaddafi Libya," in Kirsten Fisher and Robert Stewart (eds.), 'Transitional Justice and the Arab Spring', (Routledge, Forthcoming 2013), at p. 12 [Negotiating Justice in Post-Gaddafi Libya]; Mike Corder, "Court Mulls Where Gadhafi's Son Should Be Tried," Associated Press, The Hague, Netherlands, (9 October 2012) [Court Mulls Where Gadhafi's Son Should Be Tried]; Transitional Justice and the Arab Spring, *supra* note 6, at p. 9.

[185] UN Security Council's Resolution 1970, *supra* note 157, at para. 4.

[186] *Ibid*, at para. 5. See also Anna F. Triponel & Paul R. Williams, "The Clash of the Titans: Justice and Realpolitik in Libya," (2013) 28 American University International Law Review 800.

[187] Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammad Abu Minyar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi, Pre-trial Chamber I, Case No. ICC-01/11 (16 May 2011).

[188] Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber 1, Case No. ICC-01/11 (27 June 2011).

[189] Warrants of Arrest in Respect of Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Pre-trial Chamber I, Case No. ICC-01/11-01/11-2, ICC-01/11-01/11-3, ICC-01/11-01/11-4 (27 June 2011).

[190] *Prosecutor* v. *Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Registry, Case No. 01/11-01/11-5 (4 July 2011).

[191] *Prosecutor* v. *Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi,

hometown of Sirte on 20 October 2011.[192]

Subsequent to the capture of Saif al-Islam on 19 November 2011 by rebel fighters from Zintan, one of Libya's most powerful militia factions, the prosecutor visited Libya and conducted several meetings with Libyan officials. In a joint press conference with the Libyan Minister of Justice, the latter stated that Saif al-Islam could be tried in Libya in coordination with the ICC.[193] During the conference, the Prosecutor mentioned Libya's right to try Saif al-Islam in Libya and insisted that the ICC would not intervene if the Libyan authorities proceeded along those lines.[194] On the occasion of that visit, Abdurrahim El-Keib, the Prime Minster of the NTC, expressed Libya's desire to try Saif al-Islam and Senussi in Libya, and asserted that Libya was moving forward with an investigation into crimes against humanity allegedly committed by them in February 2011.[195] On the other hand, he asserted that Libya, which was then in the process of adopting a new penal law incorporating international crimes, namely, crimes against humanity, war crimes, and the crime of genocide,[196] would provide the suspects with fair and independent trials.[197] Nonetheless, in complete contrast to what had been stated by or attributed to the Prosecutor, the ICC issued a press release the following day emphasizing that Libya was obligated to surrender the suspect and cooperate fully with the Court in accordance with Resolution 1970. If it was the wish of the Libyan authorities to prosecute Saif al-Islam, they would have to submit an application to the Pre-Trial Chamber I, challenging the admissibility of the case pursuant to Articles 17 and 19 of the Rome Statute of the ICC. The acceptance or rejection of the inadmissibility of the case would be left to the discretion of the Judges of the ICC.[198]

Pre-Trial Chamber 1, Case No. ICC-01/11-01/11-28 (22 November 2011).

[192] Death of a Dictator, supra note 16, at 32.

[193] Saif al-Islam Gaddafi could be Tried in Libya, Says ICC Prosecutor, Reuters, Tripoli, Libya, 22 November 2011.

[194] *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Request to Disqualify the Prosecutor from Participating in the Case Against Mr. Saif Al Islam Gaddafi, The Appeals Chamber, Case No.: ICC-01/11-01/11 (3 May 2012), at para. 13.

[195] *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (1 May 2012) Annex A (Public) Press Statement by H.E. Dr. Abdurrahim El-Keib, Prime Minister of the Transitional Council of Libya on the Occasion of the Visits of Mr. Luis Moreno-Ocampo, Prosecutor of the International Court.

[196] *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (1 May 2012). Annex J (Public) National Transitional Council Decree Recognising the Applicability of International Crimes within Libyan Laws; *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (1 May 2012) Annex K (Public) Letter to Dr. Ahmed Sadiq al-Jehani from Mostafa Eissa Lindi Regarding incorporating Articles 6-8 of the Rome Statute of the ICC in the Libyan Penal Code.

[197] *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (1 May 2012). Annex H (Public) Memorandum Explaining the Guarantees of the Accused in Front of the Libyan Judicial System through the Accusation and Trial Phases.

[198] Press Release, 23 November 2011, "Course of Action before the ICC Following the Arrest of the Suspect Saif Al-Islam Gaddafi in Libya," ICC-CPI-2011/11/23-PR746.

Some months later, despite the fact that the NTC had assured the Pre-Trial Chamber on 23 January 2012 that Libya had no intention at that time to challenge the admissibility of the case, nevertheless, seeking to defer Saif al-Islam's surrender under Article 94,[199] the Libyan government reversed its decision and brought on 1 May 2012 an application to the ICC under Article 19(2)(b) of the Rome Statute challenging the admissibility of the case concerning Saif al-Islam and Senussi.[200] The application indicates that Libyan authorities have already started investigating the suspects, and under the principle of complementarity set forth in Article 17 of the Rome Statute of the ICC, the Court has an obligation to rule in favour of this application.[201] The Libyan government also argued that denying Libya's right to try former regime officials would compromise the sovereignty of the country, and undermine the whole process of Libyan transitional justice. While Ahmed al-Jehani, the Libyan lawyer representing the Libyan government at the Court, has asserted that the ICC's trying of Saif al-Islam would discourage reconciliation and sustainable peace in Libya and render the principle of complementarity meaningless, Melinda Taylor, Saif al-Islam's court-appointed lawyer, emphasizes that the Court should not trust the Libyan government's pledges and its fragile judicial system. She maintains that if the ICC hands the case over to the Libyan authorities, Saif al-Islam will lose his life in a completely vindictive and arbitrary trial that would have nothing to do with justice.[202] She stresses that the Libyan authorities are motivated not by the desire for justice but for revenge.[203] However, the Pre-Trial Chamber I of the ICC rejected on 31 May 2013 the challenge to the admissibility of the case against Saif Al Islam and reminded Libya of its obligation to deliver the defendant to the Court.[204]

On the other hand, Payam Akhavan, McGill University professor of law and member of Libya's legal team to the Court, argues that the ICC need

---

[199] *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Request to Disqualify the Prosecutor from Participating in the Case Against Mr. Saif Al Islam Gaddafi, The Appeals Chamber, Case No.: ICC-01/11-01/11-44-Anx1-Red. (3 May 2012).

[200] *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (1 May 2012), at para. 1 [Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute]. See also Amin Nouri, *The Principle of Complementarity and Libya Challenge to the Admissibility before the International Criminal Court* (M. A., Lund University, 2013), at p.46.

[201] *Ibid*.

[202] Anna Bishop, "Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge," (2013) 22 Minnesota Journal of International Law 409-410; Court Mulls Where Gadhafi's Son Should Be Tried, *supra* note 184; "Taylor Breaks Silence to Raise Fair Trial Fears," Online: ABC/AFP (7 July 2012) <http://www.abc.net.au/news/2012-07-06/taylor-breaks-silence-on-libyan-detention/4115916> (Accessed on: 31 December 2012).

[203] Death awaits Gaddafi's son in Libya, AFP, The Hague, Netherlands (10 October 2012); Timothy William Waters, "Libya's Home Court Advantage: Why the ICC Should Drop Its Qaddafi Case," Foreign Affairs (2 October 2013) <http://www.foreignaffairs.com/ articles/139961/ timothy-william-waters/libyas-home-court-advantage> (Accessed on: 3 October 2013).

[204] *Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (31 May 2013), at para. 219.

only take steps to conduct a criminal prosecution when states fail to prosecute or are not able to investigate crimes. Yet in the Libyan case, the country is willing to put Saif al-Islam on trial; so the question really revolves around Libya's capacity to prosecute him.[205] In this connection, human rights groups have warned that a local fair trial for Saif al-Islam is impossible, as revenge is more likely be served than justice.[206] The lack of security and public order indicate that a guilty verdict will automatically result in the death penalty.[207]

Legally speaking, the ICC's jurisdiction over a case is restricted by the principle of complementarity, incorporated in Article 17(1)(a), which provides that the Court should take over a case only when a State is unwilling or unable to carry out the investigation or prosecution.[208] In the case of a non-State Party, the ICC cannot investigate and prosecute alleged crimes under the provisions of the Rome Statute unless the UN Security Council refers the case to the Prosecutor pursuant to Article 13(b) of the Statute and under Chapter VII of the UN Charter, as has happened with regard to Libya and Sudan.[209] Accordingly, as a non-State Party, Libya is not obligated under the provisions of the statutory laws of the ICC to cooperate with the Prosecutor or the Court, but it is so obligated by virtue of the referral.[210]

---

[205] M. Christopher Pitts, "Being Able to Prosecute Saif Al-Islam Gaddafi: Applying Article 17(3) of the Rome Statute to Libya," (2014) Emory International Law Review, 2014 Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2245790>, at p.23; Bridget Wayland, "Libyan Tug of War: International Law Professor Payam Akhavan is Playing a Key Role in One of the Most Closely Watched Cases in the aftermath of the Arab Spring," Online: Focus online/News from the Faculty of Law/McGill University (20 December 2012) <http://publications.mcgill.ca/reporter/2013/01/libyan-tug-of-war/> (Accessed on: 1 March 2013).

[206] Frédéric Mégret & Marika Giles Samson, "Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials," (2013) 11:3 Journal of International Criminal Justice 572.

[207] Michael Petrou, "Tripoli vs. The Hague: Two Courts Vie to Try Gadhafi's Son-Libya and the International Criminal Court are at war—over who gets to stage a trial for Saif al-Islam Gadhafi," Online: Maclean's (23 May 2012) <http://www2.macleans.ca/2012/05/23/tripoli-vs-the-hague-two-courts-vie-to-try-gadhafis-son/> (Accessed on: 1 March 2013); Owen Bowcott "Saif Gaddafi Should Go on Trial in Libya, War Crimes Tribunal Told: Tripoli Urges ICC to Abandon Legal Claim to Try Dictator's Son, and Relative Abdullah al-Senussi, and Let Them Face Justice at Home," Online: The Guardian (1May 2012) <http://www.guardian.co.uk/world/2012/may/01/saif-gadaffi-trial-libya-icc> (Accessed on: 1 March 2013).

[208] Darryl Robinson, "The Mysterious Mysteriousness of Complementarity," (2010) 21 Criminal Law Forum 72; Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," (2006) 17 Criminal Law Forum 263; Kirkland Green, "The Libya Cases at the ICC and the Libyan Government's Admissibility Challenge" Online: American Non-Governmental Organizations Coalition for the International Criminal Court: AMICC (14 December 2012), <http://www.amicc.org/docs/Libya_Challenge. pdf> (Accessed on: 28 February 2013); Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen, Belgium: Intersentia, 2002) 55; The Rome Statute of the ICC, *supra* note 79, at Article 17 (1) (a).

[209] *Ibid*, Article 13 (b); Jennifer Nimry Eseed, *supra* note 16, at 580.

[210] Paragraph 5 of the UN SC Resolution 1970 reads: "… Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation

In this connection, one may argue that since Libya is in the process of reforming its judicial system by incorporating international crimes into its penal code, by investigating and showing willingness to try suspect members of the former regime and provide them with independent and fair trials, and by being in no way obligated under any provision of the Rome Statute to cooperate with the ICC, including article 86, the Court has a binding duty to declare the cases against Saif al-Islam and Senussi inadmissible. This fine-sounding argument could be challenged on different bases, including the fact that the primacy of domestic courts related to the principle of complementarity, spelled out in Article 17 of the Rome Statute, is based on both willingness and ability.[211] It is true that Libya is willing to prosecute Saif al-Islam and other former regime officials for alleged crimes committed in Libya against Libyans during the recent conflict, but it has no capacity to do so under its current laws and given its fragile judicial system inherited from the former regime, as well as the retributive justice prevailing under the current transitional regime. Accordingly, Libya is in fact obligated under the UN SC Resolution 1970 to comply with the ICC requests to surrender Saif al-Islam and other wanted suspects to the Court, while the Pre-Trial Chamber I is the only judicial body empowered to decide on the Libyan authorities' application of inadmissibility.[212] However, while the application for the admissibility of Saif al-Islam's case is still pending at the time of writing this work, [213] the Pre-Trial Chamber I of the ICC ruled on 11

---

under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor." See Carsten Stahn, "Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'," (2012) 10: 2 Journal of International Criminal Justice 330; UN Security Council's Resolution 1970, *supra* note 157, at para. 5.

[211] *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Prosecution's Response to "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi," Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (12 February 2013), paras. 21-22.

[212] Dapo Akande, "Is Libya Under an Obligation to Surrender Saif Gaddafi to the ICC? What Does the Rome Statute Say?," Online: EJIL Talk (26 November 2011) <http://www.ejiltalk.org/is-libya-under-an-obligation-to-surrender-saif-gaddafi-to-the-icc-part-i-what-does-the-rome-statute-say/> (Accessed on: 28 February 2013); Dapo Akande, "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC," (2012) 10:2 Journal of International Criminal Justice 301-303; Konstantinos D. Magliveras, "Challenges for the International Criminal Justice and the ICC following the Arrest of Saif Al-Islam Gaddafi," Online: American Society of International Law, Accountability Series (Spring 2012) <http://www.asil.org/accountability/spring_2012_4.cfm> (Accessed on: 1 March 2013); *The prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, PCD Request for the Pre-Trial Chamber to Make a Finding of Non-Compliance, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (27 March 2012).

[213] Generally, see *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application for leave to reply to the "Response of the Libyan Government to the 'Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC'" of 1 February 2013, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (5 February 2013); *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Defence Response on behalf of Mr. Abdullah Al-Senussi to Government of Libya's Application for Leave to Appeal the "Decision on the Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC", Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (14 February 2013); *The*

October 2013, after a protracted legal dispute between the latter and the Libyan government, that "the case against Senussi is currently subject to domestic proceedings conducted by the Libyan competent authorities and that Libya is willing and able genuinely to carry out such investigation." Therefore, the Judges concluded that the case is inadmissible before the Court, in accordance with the principle of complementarity enshrined in Article 17(1)(a) of the Rome Statute, founding treaty of the ICC".[214] Of course, the prosecutor may still appeal this decision pursuant to Article 19(10) of the same statute, especially as the Libyan justice system's capability to deliver a fair judgement to the defendant is still in question due to the incompetent legal system, absence of security, lack of public order, and poor governance. In fact, Ali Zeidan, the Libyan prime minister, was kidnapped on 10 October 2013 for a few hours by armed militiamen in Tripoli.[215]

Nevertheless, this analysis triggers three accountability measures to bring members of the former regime who allegedly committed or instigated conflict-related crimes, including gender-based crimes, to justice:

First, local justice, where Libyan authorities request that Saif al-Islam should stands trial in Libya under the jurisdiction of the local judicial system. This is valid to the extent that justice ought to be served where crimes have been committed, reinforcing the integral role of national criminal law in setting grounds for punishments and their socio-pedagogical influences. It also sends a direct message to both victims and perpetrators that when a crime occurs, justice not only be done, but must be seen to be done [216] However, this mechanism must be excluded at the present time for many of the reasons mentioned at the outset of this work. The capacity of the Libyan

---

Prosecutor v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi,* Public Redacted Version of the "Response to the "Libyan Government's further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi," Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (18 February 2013); *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi,* Request for Leave to Reply to the "Libyan Government's Response to Urgent Defence Request of 21 January 2013," Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (22 February 2013); *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi,* Response to the "Libyan Government 's Request for leave to reply to Responses by OTP, OPCV and OPCD to Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (22 February 2013).

[214] *Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi,* Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (11 October 2013), para. 311. See also *ICC Pre-Trial Chamber I Decides that the Al-Senussi Case is to Proceed in Libya and is Inadmissible before the ICC*, Press Release, ICC-CPI-20131011-PR953 (31 May 2013). Available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr953.aspx> (Accessed on: 11 October 2013); Owen Bowcott, "Gaddafi Spy Chief's Trial Should be Held in Libya, ICC Rules: Abdullah al-Senussi Faces Death Penalty for Allegedly Ordering Massacres during 2011 Revolution that Overthrew Regime," Online: The Guardian (11 October 2013) <http://www.theguardian.com/world/ 2013/oct/11/gaddafi-spy-chief-trial-libya-icc-rules> (26 October 2013).

[215] *Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Declaration of Judge Christine Van den Wyngaert on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (11 October 2013), para. 2.

[216] A. Simester & G. Sullivan, *Criminal Law: Theory and Doctrine* (Portland, Or.: Hart, 2007) 32; B. Mitchell, "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling," 64:3 Modern Law Review 398; Hilmi M. Zawati, *supra* note 8, at p. 6.

judicial system to deliver a fair trial must be seriously questioned after 42 years of lawlessness, absence of accountability and rule of law during and after an eight-month bloody civil war, and in the light of a transitional justice that has actively legislated impunity. [217] Indeed, the current Libyan judicial system is not functioning effectively, suffers from the defects of the past, lacks impartiality, and continues to be a tool of repression. Two years since the fall of the former regime, the NTC and transitional governments are completely unable to provide accountability, sustainable peace, state-building, civil society, and the rule of law. Accordingly, it would be impossible to secure a fair trial for the suspects. The lack of public order and the inability to provide justice and redress to both victims and suspects have motivated the international community to apply the principle of R2P and encourage Libya to immediately launch serious criminal justice reform, and to deliver Saif al-Islam and other former regime officials to the ICC.[218]

Moreover, holding Saif al-Islam *incommunicado* in the rebels' custody at Zintan for more than two years in poor conditions,[219] without access to a lawyer or an official indictment,[220] is in conflict with Article 55 of the Rome

---

[217] Alexander Knoops, "Prosecuting the Gaddafis: Swift or Political Justice?," (2012) 4:1 Amsterdam Law Forum 90; Law No. (38), *supra* note 45, at Art. 4.

[218] Inspiring Transitional Justice Reform, *supra* note 168; Libya and the ICC, *supra* note 184.

[219] Generally, see *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Public Redacted Version of "OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam" (ICC-Ol/ll-Ol/ll-51-Conf, 2 February 2012), Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (3 February 2012); *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Public Redacted Version Urgent Report Concerning the Visit to Libya, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (2 March 2012); *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Public Redacted Response to the "Notification and Request by the Government of Libya in response to "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi," Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (30 March 2012); *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Public Redacted Version of the Corrigendum to the "Defence Response to the Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute," Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (31 July 2012).

[220] When the mission of the Office of Public Counsel for the Defence (OPCD) visited Libya, they were told by a Libyan law officer that Saif al-Islam was not interrogated for war crimes, but "in connection with allegations concerning the fact that he allegedly did not have a licence for two camels, and issues concerning the cleaning of his fish farms." However, Libya's legal team to the Court has denied this story and considers it an inappropriate and unsubstantiated allegation by the OPCD against Libya. See Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, *supra* note 200, at para. 94; Kamal Abdallah, "Gaddafi's Men Face Charges," Online: Al-Ahram Weekly (24 September 2013) <http://weekly.ahram.org.eg/News/4188/19/Gaddafi%E2%80%99s-men-face-charges. aspx> (Accessed on: 3 October 2013); *The Prosecutor* v. *Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Public Redacted Addendum to the Urgent Report Concerning the Visit to Libya," Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (5 March 2012), para. 38; Chris Stephen, "Melinda Taylor Lashes out at Libya and ICC," Online: Libya Herald (16 December 2012) <http://www.libyaherald.com/2012/12/16/icc-lawyer-melinda-taylor-lashes-out-at-libya-again/> (Accessed on: 31 December 2012).
It is also worthy of note that Saif al-Islam appeared before a secret hearing on 17 January 2013 in Zintan after 14 months after his capture on 19 November 2011. He was facing charges related to a visit by the Court mission. He was charged with involvement with the ICC delegation members who were carrying papers related to the national security of Libya. Melinda Taylor, Saif al-Islam's defence lawyer, who was a member of the delegation, has argued that he will not receive a trial that would meet international standards credibility. She adds that his appearance before a Libyan court violates the UN SC Resolution 1970, and calls on the Security Council to impose Sanctions on Libya. See Jamie Dettmer, "Justice for Gaddafi Heir? ICC Fears Saif al-

Statute, which provides for the rights of persons during an investigation.[221] It also infringes the principles of the right to fair warning or maximum certainty,[222] and the right to be tried without undue delay.[223]

Nevertheless, leaving aside the ICC request to transfer the defendant to stand trial in The Hague, a pre-trial proceedings session has convened behind closed doors in Tripoli on 24 October 2013 against 38 leading Qadhafi regime figures, including Saif al-Islam; Senussi; Al-Baghdadi Al-Mahmoudi (the former Prime Minister), Abu Zaid Omar Dorda (Qaddafi's External Security Agency head), and Abdulati El-Obaidi (the former Foreign Minister).[224] The defendants were charged with murder, kidnapping, complicity in incitement to rape, plunder, sabotage, embezzling public funds and committing acts harmful to national unity.[225] For security reasons, only a few of the indictees have appeared in court, pleading not guilty to all charges levelled against them by the prosecution. Saif al-Islam, who is facing trial in Zintan on a separate charge of trading information threatening Libya's national security, didn't appear at the pre-trial hearing as militiamen refused to deliver him to the court in Tripoli. However, the lack of security and the wide scale lawlessness dominating the Libyan criminal justice system pose a serious challenge to its ability to ensure fair and impartial trials for all concerned.[226]

Islam Trial Won't Be Fair," Online: Daily Beast Company (January 18, 2013) <http://www.thedailybeast.com/articles/2013/01/18/justice-for-gaddafi-heir-icc-fears-saif-al-islam-trial-won-t-be-fair.print.html> (28 February 2013); Saif Al-Islam in Libyan Court for First Time, *supra* note 131.

[221] The Rome Statute of the ICC, *supra* note 79, at Art. 55.

[222] Andrew Ashworth, *Principles of Criminal Law*, 6th ed., (New York, N.Y.: Oxford University Press, 2009), at pp. 63-64; *Kolender* v. *Lawson* (1983) 103 S. Ct. 1855; 461 U.S. 352; 75 L. Ed. 2d 903; 1983 U.S. LEXIS 159; 51 U.S.L.W. 4532, at p. 15.

[223] The Rome Statute of the ICC, *supra* note 79, at Art. 67(1)(c); *Statute of the International Criminal Tribunal for the Former Yugoslavia,* United Nations SCOR, 48th Sess., 3175. Annex, at 40, UN Doc. S/25704, 3 May 1993. (As Amended on 19 May 2003 by Security Council's Resolution 1481), at Article 21(4)(c); *Statute of the International Criminal Tribunal for Rwanda*, UN Security Council's Resolution S/RES/955 (1994) Annex, Adopted in the Security Council's 3454th meeting on 8 November 1994, at Article 20 (4)(c); *Statute of the Special Court for Sierra Leone*, UN Doc. S/2002/246, appendix II, 2178 U.N.T.S. 138. (06/03/2002), at Article 21(4)(c). See also *Prosecutor* v. *Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa*, (2004) Decision on Prosecuting Request for Leave to Amend the Indictment, 20 May 2004, SCSL-03-14-PT., Valerie Oosterveld, "Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 3.

[224] "Libya Court Indicts Gaddafi Aides over 2011 Uprising," Online: Agence France-Presse (24 October 2013) <http://www.rappler.com/world/regions/middle-east/42163-libya-gaddafi-aides-indictment> (Accessed on: 28 October 2013); "Libya Court Indicts Former Gaddafi Aides over Crimes during 2011 Uprising," Online: Tripoli Post (25 October 2013) <http://www.tripolipost.com/articledetail.asp?c=1&i= 10752> (26 October 2013).

[225] Chris Stephen, "Gaddafi's Son, Intelligence Chief and PM Among Defendants in Crucial Trial: Most Important Trial in Libya's Post-Gaddafi Era Switched to Maximum Security Prison in Tripoli over Fears of Violence," Online: The Guardian (19 September 2013) <http://www.theguardian.com/world/2013/sep/19/ gaddafi-son-pm-trial> (Accessed on: 3 October 2013); Hassiba Hadj Sahraoui, "Libya Must Surrender Saif al-Islam al-Gaddafi to International Criminal Court," Online: Amnesty International (18 September 2013) <http://www.amnesty.org/en/news/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court-2013-09-18> (Accessed on: 30 October 2013).

[226] Chris Stephen, "Libya Prepares for Its Trial of the Decade: Government Refused to Hand

The second accountability measure is the ICC, whether it should conduct the trials in The Hague or in Tripoli. Due to the willingness and yet inability of the Libyan authorities to prosecute Saif-al-Islam in Libya, and its reluctance to transfer him to the Court, on the one hand, and to prevent vindictive/victor's justice in Libya, contribute to the reform of the Libyan judicial system, and help in restoring the rule of law and sustainable peace, on the other, the ICC can hold the trial in Tripoli[227] pursuant to Article 3(3) of the Rome Statute, which provides the "[t]he Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute."[228] Holding trials for the former regime officials by the ICC in Tripoli would maintain the standards of international criminal justice and encourage Libya to demonstrate its commitment to international law. This would also address Libya's concerns and desire to try war crimes suspects on the Libyan soil, and encourage wartime rape victims to come forward and testify in a climate of greater security and judicial effectiveness.[229]

Finally, as the above mechanism was evidently refused by the Libyan transitional government, a third option could be a hybrid judicial system for legal accountability akin to those systems established in different war-torn countries.[230] This is a relatively new judicial mechanism in international criminal justice whereby international and local judges and prosecutors apply domestic and international law. A hybrid judicial system, which involves international and national components, could be more acceptable to Libyan authorities for several reasons, including the unique opportunity it would present for actors in the Libyan criminal justice system to share proceedings with experienced international judges, prosecutors, and lawyers; maintain Libya's sovereignty; contribute to the restoration and

---

Muammar Gaddafi's Son and Spymaster over to International Criminal Court for War Crimes," Online: The Guardian (17 September 2013) <http://www.theguardian.com/world/2013/sep/17/libya-trial-gaddafi-senussi> (Accessed on: 3 October 2013); "Libya: A Rebuff to the ICC Authorities Fail to Surrender Gaddafi's Son to ICC, Despite Ruling," Online: Human Rights Watch (September 19, 2013) <http://www.hrw.org/news/2013/09/19/libya-rebuff-icc> (Accessed on: 30 October 2013); "Libya Court Indicts Gaddafi Aids and Son," Online: News 24 (24 October 2013) <http://www.news24.com/Africa/News/Libya-court-indicts-Gaddafi-aides-son-20131024-2> (26 October 2013); Neil Durkin, "Saif Gaddafi's Trial in Libya is Victor's Justice," Online: Huffington Post (21 September 2013) <http://www.huffingtonpost.co.uk/neil-durkin/saif-gaddafi-trial_b_3956043.html> (Accessed on: 3 October 2013).

[227] This is what Mark Kersten calls an *in situ* trial. See Mark Kersten, "ICC Confirms: Trial in Libya by the Court is a Possibility!," Online: Justice in Conflict (21 November 2011) <http://justiceinconflict.org/2011/11/21/icc-confirms-trial-in-libya-by-the-court-is-a-possibility/> (Accessed on: 6 March 2013); Mark Kersten, "Trying Saif, Senussi in Libya: Why is Moreno-Ocampo so Lenient?," Online: Justice in Conflict (12 January 2012) <http://justiceinconflict.org/2012/01/12/trying-saif-senussi-in-libya-why-is-the-moreno-ocampo-so-lenient> (Accessed on: 7 March 2013); Rebecca Lowe, "Gaddafi Trial: International or Libyan Law?," Online: International Bar Association (12 December 2011) <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=21dd8269-4920-4bab-aaa6-5de4f7c2fdb4> (Accessed on: 7 March 2013).

[228] The Rome Statute of the ICC, *supra* note 79, at Art. 3(3).

[229] Negotiating Justice in Post-Gaddafi Libya, *supra* note 184, at p. 20.

[230] For example, the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers of the Courts of Cambodia (ECCC), the War Crimes Chamber of the Court of Bosnia-Herzegovina (WCCCBH), and the Special Tribunal for Lebanon (STL).

reform of post-conflict judicial system; and strengthen Libya's position on the international stage as a transformed country, newly emerged from statelessness to accountability and the rule of law.[231]

VI. Conclusion

This analysis argues that the incompetence of the current Libyan transitional justice system, manifested in its failure to respond adequately to conflict-related gender-based crimes, impedes access to justice for victims, encourages the culture of impunity, and leaves Libya's peace-building process open to danger. In pursuing this inquiry, this research study examines Libya's gender-based crimes under transitional justice and affirmed its obligations under the norms of international law to protect victims and prosecute alleged gender-based crimes. It also underlines the dilemma of prosecuting gender-based crimes under Libyan transitional justice by exploring four major obstacles to adequately addressing gender-based crimes under the Libyan transitional justice system, including legal impunity and lawlessness, lack of the rule of law v. militia justice, lack of security and public order, and lack of democratic institutions. Finally, this work scrutinizes three key mechanisms for gender-sensitive transitional justice in Libya, involving urgent justice system reform, establishment of an independent truth-seeking and reconciliation commission to investigate gender-based crimes committed by all parties to the recent civil war, and finally, the setting up of a Special Court for Libya as a hybrid judicial system for bringing perpetrators to justice and bring justice to victims.

However, in spite of the willingness of the Libyan government to prosecute and try Saif al-Islam and other former regime official in Libya and by Libyan courts, and despite guarantees made by the Libyan authorities to provide suspects with high quality trials that meet all international standards, the chance for a fair trial remains very small. Libya's pledge to the ICC and to the international community to amend its laws by incorporating international crimes embodied in articles 6-8 of the Rome Statute of the ICC and its commitment to provide for an independent judiciary have proved the opposite—it is not the case in practice, especially, in terms of security, the rule of law, and a competent and independent judicial system, all of which can be described as inadequate. This results in a lack of trust on the part of victims seeking redress and on the part of suspects confined in the militias' and transitional government's jails awaiting fair trials. .

At this critical juncture, the international community should help Libya to domesticate international criminal and human rights law and avoid the

[231] Brendan Leanos, "And Justice for All: Understanding the Future of the International Criminal Court through the Situation in Libya," (2012) Fordham Law Review 108; Elizabeth B. Ludwin King, "New Beginnings: A Hybrid Approach to Accountability in Libya," (2011) 2 Wake Forest Law Review Online 1; Vanessa A. Arslanian, "Beyond Revolution: Ending Impunity and Lawlessness during Revolutionary Periods" (2013) 36:1 Boston College International and Comparative Law Review 31. Available at SSRN: <http://ssrn.com/abstract=2174477>.

trap of retributive and victor's justice. If Libya fails to include international crimes in its penal law, it will have no jurisdiction over conflict-related crimes, including allegedly crimes committed by Saif al-Islam, Senussi, and other former regime officials, as it violates the principle of *nullum crimen sine lege*, embodied in Article 22(1) of the Rome Statute of the ICC.[232]

Given the fact that the ICC's jurisdiction over Libya's conflict related crimes has emerged from under the coat-tails of the UN Security Council, pursuant to the UN SC Resolution 1970 (2011), and is accordingly limited to investigating and prosecuting crimes committed by members of the former regime between 15-28 February 2011, the Court has completely failed to investigate and prosecute crimes committed by both sides of the conflict after that date, including the alleged sexual abuse of Muammar Qadhafi, and his arbitrary execution along with his son Mu'tasim on 20 October 2011. Moreover, the ICC prosecutor has also failed to investigate gender-based crimes committed by rebel militias during and after the civil war, particularly those committed in rebels' detention facilities with a view to extracting information or taking revenge. Killing of captured combatants in war settings is a crime of war under Article 8(2)(b)(vi) of the Rome Statute of the ICC.[233] Furthermore, the failure of Libyan authorities and the ICC to prosecute these crimes will promote the culture of impunity, increase barriers to justice, and encourage extrajudicial retaliation in Libya's tribal society.

[232] The Rome Statute of the ICC, *supra* note 79, at Art. 22(1).
[233] *Ibid*, at Article 8(2)(b)(vi).

Using Social Science to Frame International Crimes

JAMIE ROWEN & JOHN HAGAN

I. Introduction

In 2008, the United Nations Security Council passed Resolution 1820 asking the Secretary General to submit a report that provides "information on situations of armed conflict in which sexual violence has been widely or systematically employed against civilians," and "information on his plans for facilitating the collection of timely, objective, accurate and reliable information on the use of sexual violence in situations of armed conflict."[1] In 2009, in his one-year report on Resolution 1820, United Nations Secretary General Ban Ki-Moon noted the importance of analyzing sexual violence in armed conflict, saying that, "to ascertain prevalence, population-based surveys would need to be conducted"[2] but noting that "these are difficult to undertake in conflict settings."[3]

Building from these calls by the UN, we hope to add to this discussion on Libya and Syria by providing insights into how survey research might be used to frame sexualized violence[4] as an international crime. The growing interest in social science to aid prosecutions underscores a desire to protect

[1] SC Res 1820, UN Doc S/1820/2008 (June 19, 2008).
[2] Report of the Secretary General Pursuant to Security Council Resolution 1820, UN Doc. S/2009/362 (Aug. 20, 2009), para 4.
[3] *Ibid*.
[4] Under international law, sexual violence and rape are distinct; we use the word sexualized violence rather than rape, sexual violence, or gender-based violence in order to encompass different types of violence of a sexual nature, and to clarify that men are also violated. *See* K Alexa Koenig, Ryan S Lincoln & Lauren E Groth, "Contextualizing Sexual Violence Committed During the War on Terror: a Historical Overview of International Accountability", 45 USF L Rev 911 (2010).

Vol 10, pages 107-128. ISSN: 1712-2988.

witnesses from recounting painful experiences,[5] to avoid misrepresentations and misunderstandings during testimonies,[6] and to bolster claims that the violence meets the threshold of international crimes.[7] The hope is that better data and analysis from survey research may help end impunity for sexualized violence.[8]

In the context of armed conflict, rape and other forms of sexualized violence are now seen as crimes in and of themselves, as well as elements of genocide, crimes against humanity and torture.[9] Although the jurisprudence has made it easier to convict individuals accused of international crimes, investigators need as much information as possible in order to determine whether a person or an entity (e.g., a state) can be held accountable under international law.[10]

---

[5] Peggy Kuo, "Prosecuting Crimes of Sexual Violence in an International Tribunal", 34 Case W Res J Int'l L 305, 316 (2002) (describing the challenge of encouraging survivors of sexual violence to participate in the ICTY).

[6] Scholars continue to offer worrisome critiques about incentives to misrepresent facts in court, the misunderstandings between judges and lawyers who are trained in western law and survivors with different approaches to narrating their experiences. *See* Nancy A Combs, Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions (2010).

[7] The International Criminal Court (ICC) refers to this threshold as the "gravity" of the crime, and has the authority to determine whether the violence meets this threshold. Specifically Article 17 of the Rome Statute, which governs the ICC, provides that the Court may exercise jurisdiction only if (1) national jurisdictions are 'unwilling or unable' to; (2) the crime is of sufficient gravity; and (3) the person has not already been tried for the conduct on which the complaint is based (*ne bis in idem*). Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 UNTS 90, 37 ILM 1002 (entered into force July 1, 2002), art 17 [Rome Statute].

[8] Xabier Agirre Aranburu, "Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases", 23 Leiden J Int'l L 609, 611 (2010) (explaining how lawyers must use evidence to develop fact patterns).

[9] Rome Statutes, arts 7,8. The specific intention to destroy an identified group either "in whole or in part" distinguishes the crime of genocide from a crime against humanity. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, UNTS 277, art 2; Rome Statute, art 6. Crimes against humanity include murder, extermination, rape, persecution and all other inhumane acts of a similar character, such as willfully causing great suffering, or serious injury to body or to mental or physical health, committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute, art 7.

Violence that constitutes crimes against humanity tend to be at a larger scale than "war crimes," which refers to serious breaches of international humanitarian law committed against civilians or enemy combatants during an international or domestic armed conflict, for which the perpetrators may be held criminally liable on an individual basis. Rome Statute, art. 8.

[10] Under the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the defendant must either intend to plan or intend to commit the crime or be "aware of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct." The Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 ILM 1192 (1993). art 6(1). The Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 ILM 1598 (1994), art 7(1). The ICTY also expanded theories of liability so that individuals who did not directly perpetrate crimes could be held liable. They did this mainly through the legal doctrine of Joint Criminal Enterprise, which enables an individual to be held responsible for all crimes committed pursuant to the existence of a common plan or design which involves the commission of a crime provided for in the Statute if the defendant participates with others in the common design. This theory has been heavily critiqued for expanding the scope of liability too far, enabling guilt by association. For a summary of these critiques, *see* Allison Marston Danner & Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility,

Here, we ask what kind of information a survey of survivors can provide, and how might the information gleaned from a survey be used to further successful prosecutions in international criminal courts? We suggest that survey research and subsequent statistical analyses may be particularly useful to address concerns about the prevalence of the violence.[11] Obviously, it will be more difficult to use this information to show who or what might be liable.[12] Moreover, given the different ways that judges, advocates and social scientists utilize personal accounts, it will be even more difficult to convince judges that such information is useful to them.

This conference paper is geared towards advocates and policy makers who may be interested in using social science and, thus, does not delve deeply into legal doctrine or methods. Other scholars have provided useful insights into ways to think about methods, legal definitions and everyday challenges in international courts when trying to end impunity for sexualized violence.[13] Rather, we provide various examples of how survey research on victims[14] as well as statistical analysis have been used to describe as well as frame mass violence as international crimes. We focus on different types of scholarship, including public health, criminology and demography in order to highlight different approaches to data collection and analysis.[15]

---

and the Development of International Criminal Law", 93 Cal L Rev 75 (2005); Jens David Ohlin, "Three conceptual problems with the doctrine of Joint Criminal Enterprise", 5 J Int'l Crim Just 69 (2007); Steven Powles, "Joint Criminal Enterprise-Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity", 2 J Int'l Crim Just 606 (2004).

[11] The Rome Statute suggests that violence is part of a plan or policy or committed on a "large-scale basis," "widespread or systematic." Rome Statute, arts. 7, 8. *See also* Leila Sadat, "Unpacking the Complexities of International Criminal Tribunal Jurisdiction", Wash U St Louis Legal Stud Res Paper Ser No 10-03-13, 14 (2010) (arguing that the ICC looks for "scale – that is, the magnitude or widespread nature of the crimes").

[12] At the ICC, perpetrators can be held liable if there was a) deliberate inducement, or the leaders deliberately create the opportunity for violence, b) implicit causation, or the violence was a natural and foreseeable result from actions triggered by the leaders and c) command responsibility if the leaders knowingly failed to prevent or repress crimes committed by their subordinates. Rome Statute, art. 28.

[13] *See especially* Aranburu, *supra* note 8. Jana Asher, David Banks & Fritz Scheuren, Statistical Methods for Human Rights (2008); Patrick Ball, "Making the Case: The Role of Statistics in Human Rights Reporting", 18 Statistical J UN 163 (2001); Robert Justin Goldstein, "The Limitations of Using Quantitative Data in Studying Human Rights Abuses", 8 Hum Rts Q 607 (1986).

[14] The growing research on perpetrators is very important as it provides clues into how they understand the use of sexualized violence, and why it may be present in some conflicts but not others. *See especially*, Dara Kay Cohen, "Explaining Sexual Violence During Civil War: Evidence from the Sierra Leone War (1991-2002)", Ann Conv Am Pol Sci Ass'n, Chicago, IL (August 2007), *available at* http://www.poli562c.moonfruit.com/download/i/mark_dl/u/4008218952/4537427941/Reading%203.4.pdf (last visited Feb 15, 2013). For an early and influential account on rape during war, *see* Susan Brownmiller, Against Our Will: Men, Women, and Rape 30–113 (1993).

[15] In addition to studies of sexualized violence, we discuss mortality as courts have recognized that the numbers of killed or missing are important in establishing whether or not a genocide occurred. *Prosecutor v Krstić*, Judgment, ICTY Appeals Chamber, at para. 12, Case No. IT-98-33, (2004). Genocidal intent can be proven by evidence of deliberate or systematic targeting of individuals based on membership to a specific group. *See* Herbert F. Spirer & William Seltzer, "Obtaining Evidence for the International Criminal Court Using Data and Statistical Analysis," in Statistical Methods for Human Rights 195-225, 219 (Jana Asher, David Banks, Fritz Sheuren, eds 2008).

Our hope is that these examples might inform ongoing efforts to gather more information about sexualized violence in Syria and Libya, especially for those with an eye towards future prosecutions.

The paper begins with an overview of what we know about sexualized violence in Syria and Libya. This section reveals the limitations of existing information, and how difficult it will be to overcome these limitations. In particular, we address the challenges that advocacy organizations face in gathering and analyzing it. Next, we examine three ways to think about how survey research might be used, drawing on examples of survey studies used to evaluate the causes and consequences sexualized violence as well as mortality. We focus specifically on public health scholarship as this field continues to offer important insights into how surveys might assess the causes of violence. Following, we present several examples of how social scientists might analyze the data with statistical methods in order to frame the violence as an international crime. Finally, we discuss the potential challenge of using statistical analysis in international prosecutions. The discussion reveals an ongoing need to increase dialogue between advocates, scholars and jurists about what kinds of information can and should be used to ensure accountability for sexualized violence in Libya and Syria.

II. The Limited Information: Sexualized Violence in Syria and Libya

Existing information reveals that all sides in Syria and Libya are using sexualized violence, and victims are both men and women. In 2013, the International Rescue Committee conducted a survey of female refugees from Syria, reporting that many claimed to have left their villages due to the sexualized violence.[16] Their report notes "many women and girls relayed accounts of being attacked in public or in their homes."[17] While conducting research on the conflict in early 2014, gay refugees in Syria reported being entrapped and tortured by Islamist groups that are taking over various parts of the country.[18] The New York-based Women Under Siege collected 81 stories of sexual assault reported in 2012 and 2013, mostly in home raids and residential sweeps. In a report of their findings, the organization indicated that 90% of women victims experienced rape and 42% experienced gang rape, and described these attacks as a widespread and systematic tool of war.[19]

This information is particularly limited by the nature of the organization's reporting method. They do not systematically gather information and do not verify the accounts. Rather, they are self-reported acts of violence.

The information reported early on in Libya is even more problematic.

---

[16] Alexandra Brosnan and Megan Finckly, Syria: A Regional Crisis: The IRC Commission on Syria Refugees 4 (2013).
[17] *Ibid*, at 6.
[18] Personal Communication, Beirut, Lebanon, December 30, 2013.
[19] Lauren Wolfe, "The Ultimate Assault: Charting Syria's Use of Rape to Terrorize its People", July 11, 2012, http://www.womenundersiegeproject.org/blog/entry/the-ultimate-assault-charting-syrias-use-of-rape-to-terrorize-its-people.

Seham Sergewa, a Libyan psychologist claimed to have sent out 70,000 questionnaires, receiving 60,000 responses, despite the lack of a functional postal system, with 259 reports of rape.[20] A more credible report came from Physicians for Social Responsibility. The organization conducted an investigation into sexualized violence in Libya by administering fifty-four interviews over a one-week period. They describe interviews with six civilians, including two medical professionals who report the use of rape as a military tactic and honor killings in response.[21] This information was corroborated by the United Nations investigation, which also found that men leave villages in order to protect family members from rape.[22]

While useful, this information is limited for a variety of reasons. In her study on the presence or absence of sexualized violence during armed conflict, political scientist Elizabeth Wood summarizes part of this dilemma, saying:

> The frequency and type of incidents reported are shaped by oft-noted factors such as the willingness of victims to talk, the resources available, whether forensic authorities record signs of sexual violence, and the regional and partisan bias of the organization. In addition, the description of sexual violence as 'widespread" and "systematic' may reflect an organization's attempt to draw resources to document sexual violence (whatever its actual level) rather than the frequency of incidents, or may reflect legal rather than social science concepts. And in settings where political violence is ongoing, organizations may feel it prudent to state that all sides engage in sexual violence, whatever their beliefs and data about asymmetric patterns.[23]

Other scholars have similarly pointed out that data on sexualized violence is particularly difficult to gather given the sensitivity of the topic, the difficulty in determining which acts should be categorized as sexualized violence, and how to integrate gender issues, such as whether to only count female victims. In particular, Hoover-Green and Cohen argue that advocacy organizations that gather data on sexualized violence struggle from "dueling incentives" over short-term needs for funding and long-term needs for credibility.[24] As a result, advocacy organizations may make claims that are not credible, particularly claims that overstate the violence. Those claims may dominate popular discourse about the nature and prevalence of the violence. Xabier Aranburu, a senior analyst with the International Criminal Court, has expressed concern over this dilemma and points out that advocacy organizations may try to claim that rape is "weapon of war" or of

---

[20]Karim Faheem, "Claims of Rape Unsettle and Divide Libyans", New York Times, June 19, 2011, http://www.nytimes.com/2011/06/20/world/africa/20rape.html. The article reports that the Sergewa claimed to have used family and NGO networks to distribute the surveys.

[21] Physicians for Human Rights, Witness to War Crimes: Evidence from Misrata, Libya (2011), https://s3.amazonaws.com/PHR_Reports/Libya-WitnesstoWarCrimes-Aug2011.pdf

[22] U.N. Human Rights Council, Report of the International Commission of Inquiry to Investigate All Alleged violations of international human rights law in the Libyan Arab Jamahiriya, para 216, U.N. Doc. A/HRC/17/44 (1 Jun. 2011), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf.

[23] Elisabeth Jean Wood, "Armed Groups and Sexual Violence: When Is Wartime Rape Rare?", 37 Pol & Soc'y 131, 133–34 (2009).

[24] Dara Kay Cohen & Amelia Hoover Green, "Dueling Incentives: Sexual Violence in Liberia and the Politics of Human Rights Advocacy", 49 J Peace Research 445 (2012).

some strategic design when, in reality, it may be more opportunistic.[25]

Given these dilemmas, any study conducted with an eye towards judicial accountability must understand these different professional communities, and how their different approaches to gathering and analyzing information affects their ability to frame sexualized violence as an international crime.

III. Public Health: Assessing The Nature and Prevalence of Violence

Public health scholars have been at the forefront of efforts to improve data collection and analysis on sexualized violence. Here, we discuss several public health studies, selected to highlight the different methodological approaches that scholars have taken, as a way to highlight the kind of information that surveys of sexualized violence survivors can help provide.

A variety of survey studies address sexualized violence in armed conflict as part of broader inquiries into women's health. Many involve interviews with women well after the violence has ceased, when it is easier to access survivors. For example, in 2007 the Centers for Disease Control conducted a survey study on women's reproductive health in Liberia, asking questions about the conflict and post conflict period.[26] This report used a sophisticated sampling methodology, drawing on available data about urban/rural living in order to generalize the findings of the study to the overall population. The researchers ended up interviewing 907 households, with 58.9% reporting at least one sexual violation during the conflict.[27] They asked questions related to the nature of sexualized violence, such as if the women were subjected to improper sexual comments or forced to have sex in exchange for goods or services. The researchers found that women were ten times more likely to have reported a sexual violation during the recent conflict period (1999-2003), than the post conflict period of the previous year. They suggest that sexualized violence was much more likely during the armed conflict than in times of peace.

Other public health studies relied on surveys with questions related to what survivors wanted as a response to the violence, in addition to what they experienced. In 2001, just after the brutal war ended, researchers in Sierra Leone conducted a population-based survey of internally displaced women within three refugee camps and one town. They interviewed 991 women who were heads of families and who provided information on 9,166 household members. In this study, 9% of respondents reported sexual abuse, and reported that 8% of female household members and 0.1 % of men had experienced war-related sexual violence.[28] The researchers also asked

---

[25] Aranburu, *supra note* 8, at 613-15 (2010) (pointing out an ongoing debate as to whether sexualized violence is strategic or opportunistic).

[26] Basia Tomczyk et al, Women's Reproductive Health in Liberia: The Lofa Country Reproductive Survey January-February 2007 (2007), http://www.africare.org/our-work/where-we-work/liberia/Resources/5Liberia_ResourceDoc.pdf.

[27] *Ibid*, at xv.

[28] Lynn Amowitz, Chen Reis, Kristina Hare Lyons, et al., "Prevalence of War-Related Sexualized Violence and Other Human Rights Abuses Among Internally Displaced Persons in Sierra Leone", 287 J Am Med Ass'n 513 (2002). Rape was reported by nearly 90% of the respondents

questions about the consequences of the sexual assault and what women thought helped and would help them. Interestingly, they found that few thought punishment would be beneficial.[29]

Another survey conducted in East Timor broadened the inquiry to address the nature of the violence, including questions related to statements by perpetrators. Their questions focused on the prevalence of sexualized violence, but they also wanted to learn more about the context, asking whether the violence was accompanied by "improper sexual comment."[30] Of the 288 women, ages 18-49, who participated in this study, 24% reported a violent episode from someone outside the family during the 1999 conflict; of these 24%, 92% reported being threatened with a weapon, and 96% included improper sexual comments.[31]

While it is useful to know how many women reported improper sexual comments, knowing more about these comments may provide insights into the motivations for sexualized violence during armed conflict, which may be important to determine whether the violence rises to the level of international crime, and which one. A report authored by Physicians for Human Rights and the Harvard Human Rights Initiative investigated sexualized violence in Chad and Darfur and offers a particularly instructive model for a survey designed to address sexualized violence in Syria or Libya.[32] In order to ensure that survivors would not be concerned about the stigma associated with sexualized violence, the researchers claimed that they were careful to avoid asking questions directly related to sexual violence and, instead, focused on questions about why they left Darfur and what struggles they face now.[33] At a refugee camp in Chad, researchers interviewed 88 women willing to talk to them (therefore the data can not be generalized to all of the women in the camp) and conducted physical and psychological evaluations of women who reported sexual or physical assault.[34]

Notably, this report provides insights into the prevalence of rape in the refugee camps, not only in Darfur. The report also provides detailed qualitative information that could be very useful for those interested in framing sexualized violence as different international crimes. For example, it notes that at least one Darfuri women claimed that she was called 'slave' by

---

who claimed war-related sexualized violence, and 30% reported gang rape (the average number of perpetrators was 3.2). *Id*. at 516.

[29] *Ibid*, at 517.

[30] Michelle Hynes, Jeanne Ward, Kathryn Robertson, and Mary Crouse, A Determination of the Prevalence of Gender-based Violence Among Conflict-affected Populations in East Timor 59 (2003), http://www.rhrc.org/resources/East%20Timor_gbv_en.pdf.

[31] *See also* Michelle Hynes, Jeanne Ward, Kathryn Robertson, and Mary Crouse, "A Determination of the Prevalence of Gender-Based Violence Among Conflict-Affected Populations in East Timor", 28 Disasters 294 (2004), http://www.rhrc.org/resources/East%20Timor_gbv_en.pdf.

[32] Physicians for Human Rights, Nowhere to Turn: Failure to Protect, Support and Assure Justice for Darfuri Women (2009), https://s3.amazonaws.com/PHR_Reports/nowhere-to-turn.pdf.

[33] *Ibid*, at 2; Public Presentation at *Symposium: Missing Peace, United States Institute for Peace, Washington D.C.* (Feb.14, 2013).

[34] Physicians for Human Rights, *supra* note 31, at 2.

her assailants.[35] This is an important finding that reveals how learning about the specific statements made during an act of sexualized violence might provide important insights into whether or to what extent sexualized violence is motivated or exacerbated by discrimination on the basis of nationality, sex, or other group features.[36]

These examples offer initial insights into how to think about using a survey to frame sexualized violence in Libya and Syria as international crimes. Several of these surveys, particularly those that took place after the conflict ended, attempted to sample women in a way that would enable estimates of sexualized violence throughout the country. However, due to the difficulty of conducting research where violence is ongoing, most of these studies are limited to who was available and willing to speak. It is much easier to generate a representative sample after the violence has ceased. Moreover, except for the report on Darfur and Chad, most of the published information from these surveys focuses on the who, what, when and where of the violence. This makes it difficult to gain insights into other contextual factors, such as what the perpetrators said or the survivors' feelings of fear or duress. These feelings will be important in order to bolster claims that they could not meaningfully consent to sexual acts, and how perpetrators used sexualized violence in their campaigns.[37]

In addition, these studies focus on sexualized violence against women.[38]

---

[35] *Ibid*, at 18.

[36] While comments about nationality or ethnicity may give rise to claims of genocide, comments about gender may give rise to claims of torture. In its holding on the violence committed at the Čelebići camp, the Trial Chamber at the International Criminal Tribunal for the Former Yugoslavia found that "the violence suffered by Ms. Ćećez in the form of rape, was inflicted upon her by Delić because she is a woman…this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture." *Prosecutor v Mucić et al*, Judgment, ICTY Trial Chamber, at para 941, Case No IT- 96-21 (November 16, 1998).

[37] Consent has remained an important question in the international jurisprudence on sexualized violence. In the ICTY case of *Kunarać*, the issue of consent became central to the trial due to the fact that the defendants were being tried for running "rape camps" in which women were routinely violated. The ICTY Trial Chamber wanted an explicit and affirmative inquiry into the consent of the victim and defined consent in the following way: "Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the contents of the surrounding circumstances." *Prosecutor v Dragoljub Kunarać, Radomir Kovač and Zoran Vukovič*, Judgment, ICTY Tral Chamber, at para 460, Case No IT-96-23/1- T (Feb. 22, 2001). In *Gacumbitsi*, the ICTR Appeals Chamber reexamined the issue of consent and where the burden of proof lies. The Appeals Chamber affirmed that both the victim's non-consent and the accused's knowledge of lack-of-consent are elements that must be proved by the prosecution. The Appeals Chamber did, however, elaborate that non-consent may be proven if circumstances can be demonstrated "under which meaningful consent is not possible." According to this standard, the prosecution does not need to produce evidence of the victim's conduct or evidence indicating use or threat of force; non-consent may be inferred from examining relevant and admissible evidence of the background circumstances, such as detention or violence in the context of an ongoing campaign of genocide. *Prosecutor v Gacumbitsi*, Judgment, ICTR Trial Chamber, at paras 147, 153, Case No 2001-64-T (June 17, 2004).

[38] There is some interesting survey research on sexualized violence against men as part of the International Men and Gender Equality Studies project. The South African-based Sonke Gender Justice Network and the Brazilian non-governmental organisation Promundo conducted the survey in and near Goma in Congo's North Kivu province. Sonke Gender Justice Network, Promundo, Gender Relations, Sexual Violence and the Effects of Conflict on the Men and Women of East Kivu: Preliminary Results from the International Men and Gender Equality Survey (2012). A total of 708 men and 754 women aged between 18 and 59 took part in

Given ongoing reports of violence against men, it is important to study violence perpetrated against both genders and the similarities and differences in these acts.[39] For those looking to frame sexualized violence against men or women as an international crime, this data might support the argument that the violence was discriminatory in nature, bolstering claims of genocide or torture. Moreover, they may shed light on how sexualized violence against men in armed conflict differs from or is similar to sexualized violence against women.

In sum, while most of these studies were conducted with an eye towards public health outcomes, researchers collecting information for legal ends can draw some important lessons from them. Many survivors have fled Syria and interviewing individuals in refugee camps may prove fruitful. At the same time, it may be difficult to interview a sample that can be generalizable to the population. In Libya, where women continue to face repercussions for discussing violence perpetrated against them, it will be very difficult to encourage them to participate in a study on sexualized violence. Presenting the research as one about the conflict more generally, as was done in Darfur and Chad, may help. A survey designed with an eye towards prosecutions might encourage narratives in which survivors share more about the context of the violence. They might ask different questions related to issues of consent, focusing on feelings of fear or duress, and statements made by perpetrators in order to gain more insights into the motivation for sexualized violence.

IV. Beyond Prevalence: Examining Intent

While survey research on sexual violence in Libya and Syria might help assess what survivors have experienced, it will be much more difficult to use this kind of information to show that a person or group can or should be held liable under international criminal law. To elaborate on this point, we present a distinct example of how scholars tried to use survey research to frame mass violence as genocide. The survey is the Atrocities Documentation Survey (ADS), which was sponsored by the United States State Department in 2004. In addition to using the data to describe the violence, social scientists trained in criminology and sociology tried to explain, at least partially, *why* it occurred. Their analysis offers a useful example of how to think more broadly about how information from a survey, if it could be gathered, might be used to frame sexual violence in Libya and Syria as international crimes.

In the ADS survey, researchers tried to sample survivors in order to

---

individual interviews and focus group discussions in June 2012. The study has striking findings that 9% of men and 22% of women report direct sexualized abuse during the conflict, with 16% of men and 26% of women reporting having been forced to watch a rape. *Id*. at 8. This survey is fascinating and disturbing from the perspective of combating sexualized violence. For example, nearly two-thirds of male respondents agreed with the statement that a woman who does not dress decently is asking to be raped. *Id.* at 9.

[39] *See* Sarah Solangon & Preeti Patel, "Sexual Violence Against Men in Countries Affected by Armed Conflict", 12 Conflict, Sec & Dev 417, 425 (2012) (arguing that the narrow focus on women in studies of sexualized violence in armed conflict reifies the stereotype that men are perpetrators and women are victims). *See also* R. Charli Carpenter, "Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations", 37 Sec Dialogue 83 (2006).

generalize to the entire population of individuals who fled their homes. They interviewed 1,136 refugees in nineteen camps throughout Chad from July 12 though August 18, 2004.[40] Interviewers randomly selected a sector within a refugee camp and then, from a fixed point within the sector, chose every 10th dwelling unit for interviewing.[41] Interviews took place in private, with only the refugee, a translator, and the interviewer present.[42] The teams used a semi-structured interviewing approach to encourage the refugees to provide narratives about their experience as a whole; the report only drew on descriptions of eyewitness accounts of violence, not hearsay.[43] The questions from the survey focus on the context in which the violence took place, and provide information of ongoing killings, sexualized violence and displacement.[44]

What was novel about this survey was not only the sampling method, designed to enable the scientists to generalize to the broader population of survivors, and the detailed information it provided, but how social scientists later analyzed it. Two sociologists at Northwestern University, including one of this article's authors, decided to use the information to explain *why* the violence occurred. In particular, they wanted to address the Sudanese government's claims that the violence was occurring due to efforts to gain natural resources and/or fight rebel groups in the communities. The social scientists examined different causes of the violence by constructing statistical models to account for the killings and displacement. In particular, they tried to statistically examine the government's role in the violence. They found that the presence of government officials and rebel forces greatly increased the amount of violence that individuals experienced, as well as the chance that individuals would hear racial epithets.[45]

With an eye towards accountability for genocide, they argue that this finding supports the claim that the government has helped foment racially-motivated violence. In order to bolster this claim, they measured the relationship between individual reports of violence, what they call victimization severity, and variables such as age, gender, ethnic group of victim, social group of attackers, news about rebels in the area, and other

---

[40] United States State Department, *Documenting Atrocities in Darfur*, State Publication 11182. Released by the Bureau of Democracy, Human Rights, and Labor and the Bureau of Intelligence and Research, September 2004. A summary can be found at http://2001-2009.state.gov/g/drl/rls/36028.htm. An internal evaluation by the State Department asserted that the survey captured the entire scope of Darfuri refugees in Chad. Jonathan Howard, "Survey Methodology and the Darfur Genocide," in Genocide in Darfur: Investigating the Atrocities in the Sudan 59-74, 73 (Samuel Totten & Erik Markusen, eds, 2013).

[41] All adults were listed within the dwelling unit, and one adult was randomly selected. Howard, in Genocide in
Darfur: Investigating the Atrocities in the Sudan, *supra* note 39, at 65.

[42] *Ibid,* at 66

[43] *Ibid,* at 69.

[44] *Ibid*.

[45] John Hagan & Wenona Rymond-Richmond, "Collective Dynamics of Genocidal Victimization in Darfur", 73 Am Soc. Rev 875 (2008). To underscore that the violence is not caused by competition for scarce resources, they included the interaction effects of settlement density and joint attacks. They found that settlement density is not a good predictor of hearing racial epithets, which might be expected if competition for scarce resources was the mediating factor that encouraged racialized violence. *Ibid,* at 888.

potential explanations of the violence.[46] They found that factoring in racial motivation takes away the significance of population density, undermining the government's claim that the violence is occurring over scarce resources in densely populated areas.[47] They also found that the levels of victimization increase when there is both bombing and racial intent. The survey data also included accounts of how perpetrators used racial epithets when engaging in acts of sexualized violence. The analysis revealed that sexualized violence was reported less often when government or Janjaweed forces conducted the attacks separately and when attackers used no racial epithets during attacks. [48] The social scientists argue that, given these findings, sexualized violence is part of the genocide.[49]

In their analysis, the sociologists blended social science and advocacy, arguing that their findings support the claim that genocide is occurring in Darfur.[50] The social scientists published a book and numerous articles from their research, but struggled to gain attention from policy makers and prosecutors.[51] Their approach offers an instructive example of how survey research, and statistical analysis of the information gathered, can be used to frame mass violence as different international crimes. In particular, by applying techniques from criminology and sociology, their efforts reveal how one might think of designing questions that could later be turned into quantifiable variables that can help explain why the violence occurred.

V. Proving Intent: The Challenge of Using Statistics in Court

Even if advocates or social scientists were able to conduct a survey, and

---

[46] *Ibid,* at 875-881. The Sudanese government has proposed a variety of explanations for the violence, mainly that they are fighting rebel groups being hidden by the Darfuris who have been victimized. The models show a variety of factors that are statistically significant in relation to the overall victimization, such as gender (women are more likely to be attacked) and the presence of both the Janjaweed and the government army during attacks. *Id.* at 890.

[47] *Ibid.*

[48] John Hagan, Wenona Rymond-Richmond and & Alberto Palloni, "Racial Targeting of Sexual Violence in Darfur", 99 Am J Pub Health 1386, 1390 (2009).

[49] Hagan & Rymond-Richmond, s*upra* note 44, at 891.

[50] *Ibid.*

[51] John Hagan & Wenona Rymond-Richmond, Darfur and the Crime of Genocide (2008). Meanwhile, in 2009, the ICC indicted Sudanese president Al-Bashir for war crimes and crimes against humanity and, in 2010, for genocide. Situation in Darfur, Sudan, in the Case of *The Prosecutor v Omar Hassan Ahmad Al Bashir*: Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 (4 Mar. 2009), *available at* http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf; Situation in Darfur, Sudan, in the Case of Prosecutor v Omar Hassan Ahmad Al Bashir, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 (12 July 2010), *available at* http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf. Although there is increasingly a consensus among western scholars, policy makers and advocates that the violence in Darfur amounts to genocide, some scholars suggest that indicting Al-Bashir has divided the African Union and undermined the legitimacy of the ICC. *See* Kurt Mills, *"Bashir is Dividing Us": Africa and the International Criminal Court*, 34 HUM. RTS. Q. 404, 423-26 (2012). In particular, the indictment for genocide was strongly condemned. African Union, Communiqué: The Chairperson of the Commission Expresses Deep Concern About the New Decision of the ICC Pre-Trial Chamber 1 on Sudan and Its Impact on the Ongoing Peace Processes in Sudan, 16 July 2010, *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/2E3A31D7D68FA9154925776C000322ED-Full_Report.pdf.

later analyze it to help illuminate why the violence occurred, they may still struggle to use their findings in court. There are the various dilemmas using statistical analysis because of different ideas of causality, the legal definition of widespread and systematic, and a variety of other differences between advocacy, social science, and the law.[52] It remains difficult to assess the nature of sexualized violence in armed conflict given that much of what we know suggests that there is great variation across national contexts.[53]

Most criminal trials, whether domestic or international, draw on testimonial, documentary and physical evidence to help prove a case. Survey research may be useful to complement testimonial evidence, as it is difficult, if not impossible to use all survivors of mass violence to be witnesses. At the same time, it may be difficult for courts to accept the findings of a statistical analysis. Moreover, it's not clear that they should. Critics of the use of statistics in international criminal law note that statistics may help provide insights into the causes of violence more generally, but they cannot provide insights into the direct causes of a specific act.[54] As a demographer who worked for the ICTY noted, "a demographer is usually not able, based on demographic data, to say anything about who the perpetrators were and why they committed the atrocities. He/she can only attempt at making reliable estimates of the number and distribution of the victims."[55]

This observation is crucial in thinking about how courts may interpret statistical analyses of survey data. While the ADS analysis was never challenged in court of law, other analyses have been. At the ICTY, judges looked favorably upon demographic estimates on the mass killings during the 1991-1995 war.[56] However, when social scientists tried to aid the prosecution with a statistical analysis of what may have accounted for violence in Kosovo in 1999, problems arose. In the case of *Milutinović et. al.* six Serb defendants were put on trial for genocide against Kosovo Albanians during the conflict, and the judgment specifically addressed the shortcomings of the prosecution's use of statistical analysis.[57] A demographer presented an analysis of killings and refugee flows in Kosovo during 1999, when NATO intervened as the Serb and Kosovo Liberation Army (KLA) clashed. A research organization published a report based on analysis of the numbers of killed or missing from lists collected by the ICTY

---

[52] For example, in international criminal law, "widespread" refers to the large-scale nature of the attack and the number of targeted persons, while the phrase "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence." *Prosecutor v Blaškić,* Judgment, ICTY Appeals Chamber, para 101, Case No. IT-95-14-A (2004) para 101, *reprinted in* Spirer and Seltzer, in Statistical Methods for Human Rights, *supra* note 15, at 200.

[53] Wood, *supra* note 22.

[54] Samuel R. Lucas, "The Road to Hell...:The Statistics Proposal as the Final Solution to the Sovereign's Human Rights Question", 30 Wis Int'l LJ 259, 283 (2012).

[55] Helbe Brunborg, "Needs for Demographic and Statistical Expertise at the International Criminal Court", Expert consultation process on general issues relevant for the Office of the Prosecutor, at 5, *available at* www.icccpi.int/iccdocs/asp_docs/library/organs/otp/brunborg.pdf (last visited 16 December 2009).

[56] *Ibid.* There were several cases on this violence, most notably the first conviction in the ICTY. *Prosecutor v Krstić.* Judgment, ICTY Trial Chamber, *supra* note 15.

[57] *Prosecutor v Milutinović et al*. Judgment, ICTY Trial Chamber, at para. 21-29, Case No IT- 05-87-T (July 2009). The analysis was also used in the case against Milosević but, due to his death, this case was never concluded.

and three organizations.[58] After estimating the total number of killed and displaced, they noted two peaks in the otherwise linear increase in number over time. The report concluded that, "when viewed in isolation local refugee movement and killings may look like a local response to a local cause, seen in the aggregate, statistical analysis reveals a pattern implying a common cause."[59]

With this foundation, the team looked for a common cause that would be "consistent with or contradicted by the statistical evidence."[60] The research team created a statistical model to analyze whether there was any relationship between the patterns of killings and migration and three hypothetical causes: the conditions created by reported NATO bombings, KLA attacks, or Yugoslav army attacks.[61] In their analysis, they found a statistically significant relationship between refugee flows and Yugoslav army attacks.[62] They concluded that their analysis was consistent with the prosecution's claim that there was a planned, systematic attack on the Kosovar Albanians.[63]

Although the defendants were convicted of the crime of genocide, the judgment states that the analysis was "of little value" because it did not provide adequate alternative explanations as to why the violence occurred:

> The Ojdanić Defence submits four additional explanations: movement may have resulted from KLA-issued orders for Kosovo Albanian civilians to leave their villages; refugees may have fled the areas of combat between the KLA and the Yugoslav forces; people may have moved in anticipation of NATO bombing; and the patterns may have resulted from NATO and KLA working together in Kosovo. The Chamber notes that the exclusion of the first two hypotheses by Ball—even if based upon correct data and methodology—is of little value because it still leaves a number of potentially plausible options unexplored.[64]

In the end, the Trial Chamber "potentially" commends Ball for his "alternative, innovative" approach, and suggests that its theoretical and

---

[58] The organizations are the American Bar Association Central and East European Law Initiative and its partners,
Human Rights Watch and the Organization for Security and Cooperation in Europe.

[59] Patrick Ball, Wendy Betts, Fritz Scheuren, Jana Dudukovich & Jana Asher, Killings and Refugee Flow In Kosovo March-June 1999 8 (Report to the International Criminal Tribunal for the Former Yugoslavia (Jan. 3, 2002), app. 1.

[60] *Ibid.*

[61]This hypothesis was that "[a]ir attacks by the North Atlantic Treaty Organization (NATO) created local conditions that led to Kosovars being killed and leaving their homes. The NATO influence could either have been direct, because people were killed in airstrikes and others fled, or indirect, because local Yugoslav authorities responded to the airstrikes by killing Kosovars and forcing them from their homes." The other hypothesis was that "[a]ction by the Kosovo Liberation Army (KLA) motivated Kosovars to leave their homes, either directly because the KLA ordered people to leave, or indirectly because Kosovars fled fighting between KLA and Yugoslav forces. *Id.*at 7.

[62] *Ibid,* at 10.

[63] This hypothesis was that "[a] systematic campaign by Yugoslav forces drove Kosovar Albanians from their homes. Killings were used either to motivate the departures, or the killings were a result of the campaign. *Id.*at 7.

[64] *Prosecutor v Milutinović et. al.*, Judgment, ICTY Trial Chamber, *supra* note 56, at para 28.

scientific value lies within the academic community.[65]

This assessment of the statistical analysis provided important lessons on how statistical analysis might be viewed in international criminal tribunals.[66] Each step of a statistical analysis requires assumptions that can be readily challenged by an attorney or judge. Statistics are used to show probability, and it is impossible to statistically examine all the alternative hypotheses for why mass violence occurred. Moreover, when it comes to survey research, statistical analysis will face additional challenges based on the quality of the underlying data, which, as explained in earlier, requires careful attention to the sampling and the questions. Any survey designed with an eye toward future prosecution must be planned, analyzed and presented with awareness that statistical analyses may not be well received in court.

VI. Conclusions: Improving the Information, and Facing the Inherent Limitations

International criminal law is increasingly addressing sexualized violence as a collective crime rather than "collateral damage."[67] Survey research can aid this endeavor by providing information about whether the violence may constitute international crimes, who may be liable and, ultimately, held accountable for it. At the same time, the challenge that social scientists faced at the ICTY is indicative of an ongoing dilemma related to the use of statistical analysis in international criminal law.[68] The conclusions in *Milutinović* have as much to do with the inherent limitations of the data and its analysis as they do with the inherent limitations of international criminal courts to address issues as devastating and complex as sexualized violence in armed conflict. It would be impossible to statistically examine all possible explanations for violence, just as it would be impossible to cross-examine every survivor. Even if survey research helps confirm that sexualized violence is widespread, it will still be difficult to show *why* it is occurring. It may be harder yet to convince international judges that a statistical analysis can or should complement, let alone substitute, testimonies, documents or physical evidence that may be difficult to gather.

Given these dilemmas, various scholars have suggested that survey research and statistical analysis might be most useful at the stage of investigation, where courts may be looking at whether or not to indict a

---

[65] *Prosecutor v Milutinović et. al*., Judgment, ICTY Trial Chamber, *supra* note 56, at para 29.

[66] *See* Amelia Hoover-Green, (Learning the Hard Way at the ICTY: Statistical Evidence of Human Rights Violations in an Adversarial Information Environment*," in* Collective Violence And International Criminal Justice: An Interdisciplinary Approach 325-350 (Alette Smeulers, ed. 2010).

[67] Janie L Leatherman, Sexualized Violence and Armed Conflict 138 (2012) (discussing new developments in international law that address sexualized violence as part of genocide, crimes against humanity and also a way for soldiers to assert their masculinity in situations in which they feel helpless).

[68] Spirer and Seltzer, in discussing how statistical analysis might be used by the ICC, note that such information may be useful in 1) assisting in the investigative process, 2) producing statistical or demographic estimates to be offered into evidence, either in the form of descriptive statistics, causal analysis, or other types of analysis. Spirer & Seltzer in Statistical Methods for Human Rights, *supra* note 15, at 198.

perpetrator of violence.[69] The International Criminal Court has made it clear that, at the investigation stage, one does not need to "exclude all hypotheses inconsistent with the requisite statutory elements of the alleged crime."[70] Statistical analysis that draws on survey research may be most useful in establishing that there are "reasonable grounds"[71] to charge perpetrators rather than prove beyond a reasonable doubt that their explanation for the violence is accurate. At the same time, investigators may be even less knowledgeable about statistical methods and have their own concerns and biases that shape the facts they incorporate into their reports.

Finally, it is important to emphasize that criminal liability modeled on individual actions in a domestic context may be inherently problematic due to the nature of mass violence, particularly sexualized violence, in armed conflict.[72] Survey research and statistical analysis may be used to further accountability efforts in international criminal courts, but may also help inform policy makers about other mechanisms that may be better equipped to address the collective nature of the violence. While gathering more information on sexualized violence may provide greater understanding of how survivors experience the violence, it will not be able to uncover the many structural factors that contribute to it, such as masculinity, the nature of war, and historical, cultural, and economic inequities, among others.[73] Studying survivors may do little to shed light on these larger issues, which, in the end, must be addressed in order to stop, prevent, or redress sexualized violence.

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

---

[69] *See* John Hagan, Richard Brooks & Todd Haugh, "Reasonable Grounds Evidence Involving Sexual Violence in
Darfur", 35 Law & Soc Inquiry 881 (2010).

[70] *Prosecutor v Al Bashir*, Case No. ICC 02/05-01/09, Judgment on Prosecutor's Appeal (February 3, 2010), rev'd *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Decision on Prosecutor's Application for a Warrant of Arrest, para 12 (March 4, 2009).

[71] *Id*., at para 30, 42 (establishing that an indictment can go forward where there are "reasonable grounds to conclude" that the crime took place).

[72] Mark Drumbl, "Collective Responsibility and Post-Conflict Justice," *in* Accountability for Collective Wrongdoing, 23-60 (Tracy Isaacs, Richard Vernon, eds, 2011).

[73] As Leatherman suggests, sexualized violence is better understood as a function of global and local economies far more than collateral damage of military strategies. Leatherman, *supra* note 66, at 138.

Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity:

Addressing a Gendered Harm in International Criminal Tribunals

VALERIE OOSTERVELD*

I. Introduction

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

* Associate Professor, University of Western Ontario Faculty of Law. I wish to thank Alexandra MacKenzie for her superb research assistance, Prof. Margaret Martin for her helpful comments, and the Social Sciences and Humanities Research Council of Canada for funding my research. Any errors are my own.

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

Vol 10, pages 107-128. ISSN: 1712-2988.

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

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

---

[3] *Ibid,* at paras 106, 108, Annex IX paras 5, 10, 15, Annex X para 13.
[4] *Ibid,* at para 107 and Annex IX paras 5, 10-13.
[5] *Ibid,* at para 107 and Annex IX paras 5, 11.
[6] UN Human Rights Council, *Report of the International Commission of Inquiry on Libya*, UNHRCOR, 19th Sess, UN Doc A/HRC/19/68, (2012) at paras 65-70 [Libya Commission of Inquiry Report].
[7] *Ibid,* at para 67.
[8] *Ibid.*
[9] This focus should not occur at the expense of attention to female-targeted sexual violence. Rather, it should occur in addition to an examination of sexual violence against women and girls, especially given the interrelationship between male- and female-targeted sexual violence: see Parts 2 and 4, below.
[10] While this article focuses on international criminal courts and tribunals, it is important to recognize that the same concerns and recommendations may also arise in domestic prosecutions of international crimes.

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

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

---

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

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

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

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

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

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

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

---

[14] For a discussion on the ICTY's statistics on the prosecution of male sexual violence, see Kirsten Campbell, "The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia" (2007) 1 Int'l J Transitional Justice 411 at 422-427.
[15] *Prosecutor v Blagoje Simić*, IT-95-9-T, Judgment (17 October 2003) at para 728 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) [*Simić* Trial Judgment].
[16] *Ibid*; *Prosecutor v Momčilo Krajisnik*, IT-00-39-T, Trial Judgment (27 September 2006) at para 304 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I) [*Krajisnik* Trial Judgment].
[17] *Simić* Trial Judgment, *supra* note 15 at para 728.
[18] *Ibid,* at paras 695, 697, 698, 771; *Prosecutor v Radoslav Brđanin*, IT-99-36-T, Trial Judgment (1 September 2004) para 498 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III) [*Brđanin* Trial Judgment].
[19] *Prosecutor v. Zdravko Mucić et al*, IT-96-21-T, Trial Judgment (16 November 1998) paras 1035-1040 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Mucić et al* Trial Judgment].
[20] Sivakumaran describes how the cases of the international criminal courts and tribunals tend to fall into three categories: (a) where sexual violence against men and boys is mentioned but not characterized as sexual violence; (b) where the sexual violence is mentioned and properly categorized as such but without any consequences attached to the violence; and (c) where the sexual violence is recognized as such and consequences (i.e. convictions) are attached to this violence: Sandesh Sivakumaran, "Lost in Translation: UN responses to sexual violence against men and boys in situations of armed conflict" (2010) 92:877 International Review of the Red Cross 259 at 272 [Sivakumaran, "Lost in Translation"].

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

---

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

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

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

[24] *Ibid, at* para 172.

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

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

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

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

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

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

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

---

[30] *Simić* Trial Judgment, *supra* note 15 at paras 728, 772.
[31] *Krajisnik* Trial Judgment, *supra* note 16 at paras 304, 800.
[32] *Ibid, at* paras 745, 1126.
[33] Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (Boston: Martinus Nijhoff Publishers, 2011) at 58.
[34] *Brđanin* Trial Judgment, *supra* note 18 at para 516.
[35] *Prosecutor v Issa Hassan Sesay et al*, SCSL-04-15-T, Judgment (2 March 2009) at paras 1205, 1207-8 (Special Court for Sierra Leone, Trial Chamber I) [RUF Trial Judgment].
[36] *Prosecutor v Alex Tamba Brima et al*, SCSL-04-16-PT, Further Amended Consolidated Indictment (18 February 2005) at paras 51-57 (Special Court for Sierra Leone); *Prosecutor v Issa Hassan Sesay et al*, SCSL-04-15-PT, Corrected Amended Consolidated Indictment (2 August 2006) at paras 54-60 (Special Court for Sierra Leone); *Prosecutor v Charles Taylor*, SCSL-03-01-PT, Prosecution's Second Amended Indictment (29 May 2007) at paras 14-17 (Special Court for Sierra Leone).
[37] AFRC Trial Judgment, *supra* note 22 at paras 968-969; *Prosecutor v Charles Taylor*, SCSL-03-01-T, Judgment (18 May 2012) at paras 124-134 (Special Court for Sierra Leone, Trial Chamber II) [*Taylor* Trial Judgment]. Similarly, in *Bagosora*, the court heard evidence that amputated genitals of men were seen at roadblocks, but this was only considered as background information as the indictment contained no charges related to this: *Prosecutor v. Théoneste Bagosora*, ICTR-98-41-T, Judgment and Sentence (18 December 2008) at para 1908 (International Criminal Tribunal for Rwanda, Trial Chamber I). See also Sivakumaran, "Lost in Translation", *supra* note 20 at 274.

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

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

---

[38] RUF Trial Judgment, *supra* note 35 at paras 1304, 1308, 1194, 1207, 1208, 1210, 1307, 1067, 1347.
[39] *Prosecutor v Mikaeli Muhimana*, ICTR-95-1B-T, Judgment and Sentence (28 April 2005) paras 442-444, 448 (International Criminal Tribunal for Rwanda, Trial Chamber III); Sivakumaran, "Lost in Translation", *supra* note 20 at 274.
[40] Social assumptions will be examined in Part 3, below.
[41] Special Court for Sierra Leone Statute, *supra* note 21 at art 2(g). The Rome Statute also includes mention of enforced sterilization: Rome Statute, *supra* note 21 at arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).
[42] Sandesh Sivakumaran, "Sexual Violence Against Men in Armed Conflict" (2007) 18:2 European Journal of International Law 253 at 256 [Sivakumaran, "Sexual Violence"].
[43] *Simić* Trial Judgment, *supra* note 15 at para 697.
[44] *Ibid, at* para 698.
[45] *Ibid, at* 198.
[46] *Ibid, at* para 771.
[47] *Mucić et al* Trial Judgment, *supra* note 19 at para 1037.
[48] *Ibid, at* 1039.
[49] *Ibid, at* paras. 1035, 1037, 1038, 1039.

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

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

---

[50] *Prosecutor v Mićo Stanišić and Stojan Župljanin*, IT-08-91-T (Vol I) (27 March 2013) at paras 1221, 1235, 1599, 1663 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) [*Stanišić and Župljanin* Trial Judgment].
[51] *Ibid, at* para 1560.
[52] *Ibid, at* paras 1221, 1235, 1246, 1248-1250, 1560, 1685, 1687-1690.
[53] *Prosecutor v Eliezer Niyitegeka*, ICTR-96-14-T, Judgment and Sentence (16 May 2003) paras 462-467, 303, 312, 462 (International Criminal Tribunal for Rwanda, Trial Chamber I) [*Niyitegeka* Trial Judgment].
[54] *Prosecutor v Milomir Stakić*, IT-97-24-T, Judgment (31 July 2003) paras. 228, 236, 241, 617 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II). See also Sivakumaran, "Lost in Translation", *supra* note 20 at 275.
[55] *Todorovic* Sentencing Judgment, *supra* note 27 at para 38.
[56] For a discussion of this, see R Charli Carpenter, "Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations" (2006) 37:1 Security Dialogue, 83 at 96-97.
[57] *Prosecutor v Anto Furundžija*, IT-95-17/1-T, Judgment (10 December 1998) para 127 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber). See also para 267 for a description of the effect of forced viewing of sexual violence.
[58] *Ibid, at* 129, 267.
[59] *Stanišić and Župljanin* Trial Judgment, *supra* note 50 at para 1214.
[60] RUF Trial Judgment, *supra* note 35 at para 1347.

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

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

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

---

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

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

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

[64] Campbell, *supra* note 14 at 425.

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

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

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

---

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

[67] Sivakumaran, "Sexual Violence", *supra* note 42 at 259.

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

[69] Sivakumaran, "Lost in Translation", *supra* note 20 at 263.

[70] Cohen et al, *supra* note 63 at 7.

[71] *Ibid*.

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

[73] Sivakumaran, "Sexual Violence", *supra* note 42 at 260; Sivakumaran, "Lost in Translation", *supra* note 20 at 276.

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

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

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

---

[76] Sivakumaran, "Prosecuting", *supra* note 1 at 81.
[77] RUF Trial Judgment, *supra* note 35 at paras 1125, 1347-1351; *Taylor* Trial Judgment, *supra* note 37 at paras 2035-2038, 2053.
[78] See e.g. Syria Commission of Inquiry Report, *supra* note 2 at para 107 and Annex IX paras 5, 11.
[79] Sivakumaran, "Prosecuting", *supra* note 1 at 81; Sivakumaran, "Sexual Violence", *supra* note 42 at 267-275.
[80] On hegemonic masculinity, gender and conflict, see Carol Cohn, "Women and Wars: Toward a Conceptual Framework" in Carol Cohn, *Women & Wars* (Cambridge, UK: Polity Press, 2013) 1, 10-11.
[81] Sivakumaran, "Prosecuting", *supra* note 1 at 81; Sivakumaran, "Sexual Violence", *supra* note 42 at 270-273.
[82] Sivakumaran, "Sexual Violence", *supra* note 42 at 263-264. He also mentions "rape plus", which is rape done specifically to transmit HIV/AIDS or which has a consequence of doing so: 264.
[83] *Ibid, at* 265. See also description of the ICC's *Kenyatta* case in Part 4, below.
[84] Sivakumaran, "Sexual Violence", *supra* note 42 at 266. See also Syria Commission of Inquiry Report, *supra* note 2 at para 107 and Annex IX paras 5, 10-13.
[85] Sivakumaran, "Sexual Violence", *supra* note 42 at 266.
[86] *Ibid, at* 266-267.
[87] Sivakumaran, "Prosecuting", *supra* note 1 at 80.
[88] *Ibid, at* 94.
[89] Sivakumaran, "Lost in Translation", *supra* note 20 at 271. Investigators and prosecutors need

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

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

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

---

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

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

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

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

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

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

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

[96] Sivakumaran, "Sexual Violence", *supra* note 42 at 260.

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

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

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

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

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

---

[97] Sandesh Sivakumaran, "Male/Male Rape and the "Taint" of Homosexuality" (2005) 27 Human Rights Quarterly 1274 at 1288; Sivakumaran, "Sexual Violence", *supra* note 42 at 255.
[98] Solangon and Patel, *supra* note 66 at 424.
[99] Ní Aoláin et al, *supra* note 63 at 49-55.
[100] Sivakumaran, "Sexual Violence", *supra* note 42 at 255.
[101] *Ibid*.
[102] *Ibid, at* 255-256. Indeed, we have seen this with female sexual violence, where many cultures use euphemisms to describe rape: e.g. *Akayesu* Trial Judgment, *supra* note 22 at paras 152-154.
[103] This may be because the domestic law does not recognize male sexual abuse, especially rape, as such: see examples in Sivakumaran, "Prosecuting", *supra* note 1 at 82-83.
[104] Sivakumaran, "Sexual Violence", *supra* note 42 at 256.

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

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

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

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

---

[105] Sivakumaran, "Sexual Violence", *supra* note 42 at 256.
[106] *Ibid.*
[107] *Ibid.* See also the *Kenyatta* case on forced circumcision, described in Part 4, below.
[108] See notes 36-38 and accompanying text, *supra*.
[109] Jarvis and Salgado, *supra* note 61 at 102.
[110] *Ibid, at* 122.
[111] Sivakumaran, "Prosecuting", *supra* note 1 at 92.
[112] *Ibid, at* 90.
[113] *Ibid, at* 87, 91.

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

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

> any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.[120]

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

---

[114] *Kunarac et al* Trial Judgment, *supra* note 22 at para 460.
[115] See *supra* note 22.
[116] The Rome Statute of the ICC contains the most comprehensive listing of sexual violence crimes, and it includes as crimes against humanity and war crimes: "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence" comparable in nature: Rome Statute, *supra* note 21 at arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).
[117] See notes 36-38 and accompanying text, *supra*.
[118] Sivakumaran, "Prosecuting", *supra* note 1 at 92-95; Sivakumaran, "Lost in Translation", *supra* note 20 at 273.
[119] This happened in the ICC's *Kenyatta* case, which is explored in detail in Part 4, below.
[120] *Akayesu* Trial Judgment, *supra* note 22 at para 688; upheld in *Prosecutor v Miroslav Kvočka et al*, IT-98-30/1-T, Judgment (2 November 2001) at para 180 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Kvočka et al* Trial Judgment].
[121] ICC "Elements of Crimes", *supra* note 11 at art 7(1)(g)-6.

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

Perhaps the most detailed definition of sexual violence in the international criminal legal sphere – and therefore the definition closest to indicating the meaning(s) of 'sexual' – is that of the UN Special Rapporteur on systematic rape, sexual slavery and slavery-like practices: "any violence, physical or psychological, carried out through sexual means or by targeting sexuality".[125] This includes "both physical and psychological attacks directed against a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts" and "situations in which two victims are forced to perform sexual acts on one another or to harm each other in a sexual manner".[126] While the Special Rapporteur's definition does not directly define 'sexual', it is helpful in capturing the meaning(s) of 'sexual'.[127] She identifies three ways in which physical or psychological violence may be deemed to be sexual: first, by targeting a victim's sexual characteristics such as body parts[128] (like breasts, vaginas, testicles or penises); second, when the perpetrator uses sexual means to carry out the violence[129] (such as humiliating an individual by placing the perpetrator's penis in the victim's mouth, or forcing two victims to perform sexual acts); or third, by targeting sexuality[130] (a victim's virginity, or virility, for example). This nuanced explanation of sexual violence indicates that what is 'sexual' must also be similarly nuanced. In other words, sexual violence is not about sex *per se*, but it is about body parts and socially-constructed norms of what is 'sexual' (for example, social norms that link the virginity of unmarried girls and women with a family's honour).[131] It would be helpful for international courts and tribunals to consider more comprehensively what makes certain kinds of violence sexual, in order to capture the relevant physical, sociological and psychological aspects.

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

---

[122] *Akayesu* Trial Judgment, *supra* note 22 at para 697; *Kvočka et al* Trial Judgment, *supra* note 120 at para 180.
[123] *Niyitegeka* Trial Judgment, *supra* note 53 at paras 456-467; *Kvočka et al* Trial Judgment, *supra* note 120 at para 180 and note 343. See also, for an example of sexual mutilation not overtly identified as such: *Prosecutor v Duško Tadić*, IT-94-1-T, Opinion and Judgment (7 May 1997) at paras 729-730 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).
[124] *Kvočka et al* Trial Judgment, *supra* note 120 at para 180 and note 343.
[125] UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic rape, sexual slavery and slavery-like practices pursued during armed conflict: Final report submitted by Gay J. McDougall, Special Rapporteur*, 22 June 1998, UN Doc E/CN.4/Sub.2/1998/13 (1998) at para 21 [*Report of the Special Rapporteur on Systematic Rape*].
[126] *Ibid, at* paras 21-22.
[127] There is more than one meaning to the word. E.g., Oxford Dictionaries defines the term as "relating to the instincts, physiological processes, and activities connected with physical attraction or intimate physical contact between individuals" or "relating to the two sexes or to gender": Oxford University Press, *Oxford Dictionaries*, online: Oxford Dictionaries <http://oxforddictionaries.com/definition/english/sexual?q=sexual>.
[128] *Report of the Special Rapporteur on Systematic Rape*, *supra* note 125 at para 21.
[129] *Ibid, at* paras 21-22.
[130] *Ibid, at* para 21.
[131] On sexual stereotypes, see Cook and Cusack, *supra* note 13 at 27-28.

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

The Prosecutor disagreed with this recategorization and, at the next stage confirming the charges, tried to explain why 'other forms of sexual violence' was a more appropriate category than 'other inhumane acts'. First, the prosecution tried to broaden the Pre-Trial Chamber's understanding of how men and boys[136] were targeted for various forms of sexual violence, pointing out that they not only suffered forced circumcision and penile amputation, they also suffered rape,[137] forced nudity and/or sexual mutilation.[138] In other words, the overarching context of the forced circumcision and penile amputation was one where other forms of sexual violence also occurred. The Prosecutor also explained that other forms of violence, such as murder, accompanied these forms of sexual violence.[139] Unfortunately, this wider understanding of the context of male sexual violence may have been lost, as the Pre-Trial Chamber seemed to focus its

---

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

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

[134] *Ibid.*

[135] *Ibid.*

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

[137] *Ibid, at* 87, lines 5-12.

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

[139] *Ibid, at* 90, lines 7-9.

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

The response of the Pre-Trial Chamber indicated that it understood the Prosecutor's argument to be that an act of violence is 'sexual' if it targets a 'sexual' body part and it rejected this approach: "not every act of violence which targets parts of the body associated with sexuality should be considered an act of sexual violence."[144] The Pre-Trial Chamber ascribed a different meaning to the attacks than that proposed by the Prosecutor – "it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other"[145] – but without considering whether multiple motivations, including a motivation relating to humiliation of sexual status, can be considered. Both the explanations of the Prosecutor and the Pre-Trial Chamber are likely correct[146] because both describe the purpose of the acts. However, the Pre-Trial Chamber's approach overlooked the specific role norms around circumcision (as a trigger for sexual and cultural manhood) played within

---

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

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

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

[143] *Ibid, at* 88, lines 12-15.

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

[145] *Ibid, at* para 266.

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

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

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

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

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

---

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

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

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

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

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

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

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

VI. Conclusion

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

---

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

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

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

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

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

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

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

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

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

---

[156] *Ibid*.

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

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

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

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

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

This article ends where it began, on the theme of the volume: sexual violence against men and boys, especially in detention, was recorded in recent conflicts in Libya and Syria. The ICC has the opportunity to prosecute this sexual violence (due to the referral of the situation in Libya to the ICC by the Security Council),[161] thereby setting international precedent in drawing attention to this form of violence. In addition, it is important that evidence of male sexual violence continue to be gathered in the Syria situation, so that future prosecutions –whether by the ICC[162] or domestic courts – are possible. Sexual violence against men and boys must no longer be "overlooked, downplayed, or re-characterized" within international criminal law.[163]

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

---

[159] On limitations posed by domestic law, see Sivakumaran, "Prosecuting", *supra* note 1 at 82-83.
[160] This is especially so because the Rome Statute is based on the principle of complementarity, under which, states have the primary responsibility to investigate and prosecute the crimes listed in the Rome Statute: Rome Statute, *supra* note 21 at art 17.
[161] United Nations Security Council, 'Peace and Security in Africa', UNSC Res 1970, UNSCOR 6491st mtg, UN Doc S/Res/1970 (2011) at para 4.
[162] At the time of writing, the Security Council had not referred the situation in Syria to the ICC. Led by Switzerland, more than 50 countries wrote a letter to the Member States of the Security Council to call on the Council to refer the Syrian situation to the ICC. See letter of 14 January 2013, available on the website of the Permanent Mission of Switzerland to the United Nations in New York, online: <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/un/missny/other.Par.0142.File.tmp/ICC-Brief%20def.pdf>.
[163] Sivakumaran, "Prosecuting", *supra* note 1 at 79.