<table>
<thead>
<tr>
<th><strong>EDITORIAL BOARD</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EDITORS IN CHIEF</strong></td>
</tr>
<tr>
<td>Lin Cong</td>
</tr>
<tr>
<td>Caroline Senini</td>
</tr>
<tr>
<td>Sean Tyler</td>
</tr>
<tr>
<td><strong>EXECUTIVE EDITORS</strong></td>
</tr>
<tr>
<td>Nerin Ali</td>
</tr>
<tr>
<td>Glenn Gibson</td>
</tr>
<tr>
<td>Jim Robson</td>
</tr>
<tr>
<td><strong>BUSINESS MANAGER</strong></td>
</tr>
<tr>
<td>Pedram Moussavi</td>
</tr>
<tr>
<td><strong>MANAGING EDITORS</strong></td>
</tr>
<tr>
<td>Harrison Cruickshank</td>
</tr>
<tr>
<td>Pavle Levkovic</td>
</tr>
<tr>
<td>Chelsea Wadley</td>
</tr>
<tr>
<td><strong>SENIOR EDITORIAL BOARD</strong></td>
</tr>
<tr>
<td>Jennifer Bernardo</td>
</tr>
<tr>
<td>Stephen Crawford</td>
</tr>
<tr>
<td>Claire Huang</td>
</tr>
<tr>
<td>Aria Laskin</td>
</tr>
<tr>
<td>Sarah Mistak</td>
</tr>
<tr>
<td>Faustin Ntoubandi</td>
</tr>
<tr>
<td>Kristen Pue</td>
</tr>
<tr>
<td>Catherine Smith</td>
</tr>
<tr>
<td>Amy Tang</td>
</tr>
<tr>
<td>Christian Vandergeest</td>
</tr>
<tr>
<td><strong>STAFF EDITORS</strong></td>
</tr>
<tr>
<td>Drew Beesley</td>
</tr>
<tr>
<td>Cassandra Cao</td>
</tr>
<tr>
<td>Sulyin Chow</td>
</tr>
<tr>
<td>Jeffrey Couse</td>
</tr>
<tr>
<td>Robert Hersch</td>
</tr>
<tr>
<td>Sophia Lu</td>
</tr>
<tr>
<td>Joel Parsan</td>
</tr>
<tr>
<td>Schreiber Pereira</td>
</tr>
<tr>
<td>Rebeca Ramirez</td>
</tr>
<tr>
<td>Christophe Shamas</td>
</tr>
<tr>
<td><strong>SENIOR COMMISSIONING EDITOR</strong></td>
</tr>
<tr>
<td>Aaron McKeil</td>
</tr>
<tr>
<td><strong>DESIGN MANAGER</strong></td>
</tr>
<tr>
<td>Todd Brayer</td>
</tr>
<tr>
<td><strong>PRODUCTION EDITOR</strong></td>
</tr>
<tr>
<td>Allison McHugh</td>
</tr>
<tr>
<td><strong>COPY EDITORS</strong></td>
</tr>
<tr>
<td>Joel Parsan</td>
</tr>
<tr>
<td>Allison McHugh</td>
</tr>
<tr>
<td><strong>ASSOCIATE EDITORS</strong></td>
</tr>
<tr>
<td>Samia Abbas</td>
</tr>
<tr>
<td>Marie Andic</td>
</tr>
<tr>
<td>Simeran Bachra</td>
</tr>
<tr>
<td>Jason Brisebois</td>
</tr>
<tr>
<td>Alex Buckley</td>
</tr>
<tr>
<td>Spencer Burger</td>
</tr>
<tr>
<td>Andrei Burloiu</td>
</tr>
<tr>
<td>Pat Chapman</td>
</tr>
<tr>
<td>Yoon Yalk Alec Choi</td>
</tr>
<tr>
<td>Malek Chouikhi</td>
</tr>
<tr>
<td>Vivian Chung</td>
</tr>
<tr>
<td>Allie Fonarev</td>
</tr>
<tr>
<td>Hilary Gric</td>
</tr>
<tr>
<td>Taylor Grott</td>
</tr>
<tr>
<td>Ishita Guptan</td>
</tr>
<tr>
<td>Kayan Hui</td>
</tr>
<tr>
<td>Jackson Huang</td>
</tr>
<tr>
<td>Fariha Husain</td>
</tr>
<tr>
<td>Lan Jiangzhou</td>
</tr>
<tr>
<td>Kailee Jordan</td>
</tr>
<tr>
<td>Emma Julian</td>
</tr>
<tr>
<td>Ariana Keyman</td>
</tr>
<tr>
<td>Ben Lerer</td>
</tr>
<tr>
<td>Fraser Malcolm</td>
</tr>
<tr>
<td>Matthew Malott</td>
</tr>
<tr>
<td>Jonathan McDaniel</td>
</tr>
<tr>
<td>Ryerson Neal</td>
</tr>
<tr>
<td>Andrew Ngo</td>
</tr>
<tr>
<td>Alex Ognibene</td>
</tr>
<tr>
<td>Thiago Palo</td>
</tr>
<tr>
<td>Michelle Park</td>
</tr>
<tr>
<td>Dan Paton</td>
</tr>
<tr>
<td>Laura Petryshen</td>
</tr>
<tr>
<td>Chad Podolsky</td>
</tr>
<tr>
<td>Caitlin Porter</td>
</tr>
<tr>
<td>Evan Rankin</td>
</tr>
<tr>
<td>Katelyn Reszitnyk</td>
</tr>
<tr>
<td>Reena Rosenwald</td>
</tr>
<tr>
<td>Samantha Rudick</td>
</tr>
<tr>
<td>Genevieve Ryan</td>
</tr>
<tr>
<td>Emma Stanton</td>
</tr>
<tr>
<td>Sarah Stothart</td>
</tr>
<tr>
<td>Sahil Syed</td>
</tr>
<tr>
<td>Alberta Tam</td>
</tr>
<tr>
<td>Brad Valley</td>
</tr>
<tr>
<td>Gigi Van Leeuwen</td>
</tr>
<tr>
<td>Eleanor Vaughan</td>
</tr>
<tr>
<td>Matthew Vaughan</td>
</tr>
<tr>
<td>Celine Wadhara</td>
</tr>
<tr>
<td>Bradon Willms</td>
</tr>
<tr>
<td>David Windrim</td>
</tr>
<tr>
<td>Sam Wollenberg</td>
</tr>
<tr>
<td>Alexandra Wong</td>
</tr>
<tr>
<td>Cindy Zhou</td>
</tr>
</tbody>
</table>
FACULTY ADVISORS
Professor Audrey Macklin
Professor Ron Levi

ADVISORY BOARD
Kenneth Abbott
Jose Alvarez
Upendra Baxi
Laurence Boisson de Chazournes
Jutta Brunnée
Michael Byers
Martha Finnemore
Robert Keohane
Benedict Kingsbury
Karen Knop
Martti Koskenniemi
Stephen Krasner
Friedrich Kratochwil
Oona Hathaway
René Provost
Philippe Sands
Shirley Scott
Gerry Simpson
Janice Stein
Stephen Toope
Rob Walker

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

Editors’ Acknowledgment
Lin Cong, Caroline Senini and Sean Tyler i

Book Review: Resolving Claims to Self-Determination: Is There a Role for the International Court of Justice?
Jennifer A. Orange 1

Towards Postnational Membership
Kiran Banerjee 4

Special Collection — Sexual Violence in the Recent Conflicts in Libya & Syria

Book Review: Rethinking Rape Law
Hilmi M. Zawati 30

The Challenge of Prosecuting Conflict-Related Gender-Based Crimes under Libyan Transitional Justice
Hilmi M. Zawati 48

Using Social Science to Frame International Crimes
John Hagan & Jamie Rowen 92

Sexual Violence Against Men and Boys in Armed Conflict or Mass Atrocity
Valerie Oosterveld 107
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
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

1 JSD candidate, Faculty of Law, University of Toronto.
4 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].
5 Coleman, supra note 3 at 18.

© 2014 Journal of International Law and International Relations
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 Secesssion of Quebec and the ICJ’s Kosovo Opinion, Coleman finds that freedom from oppression and alien subjugation is the “golden thread” that determines the legitimacy of claims for self-determination.

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.

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, and then take an average of 14 subsequent years of serious conflict before the group’s goals are met. The cost in human life, violations of human rights and economic growth is staggering. Coleman refers to a “structural deficency” in the UN’s ability to resolve disputes regarding self-determination that leaves claimants with no option other than violence.

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

---

7. Coleman, supra note 3 at 82-83.
8. Ibid, at 141.
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.\textsuperscript{12} Furthermore, state parties must consent to the contentious jurisdiction of the court before any state-to-state complaint may be heard.\textsuperscript{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 18\textsuperscript{th} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\begin{itemize}
\item \textsuperscript{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 1945, online: <http://www.refworld.org/docid/3deb4b9c0.html> [accessed 23 March 2014].
\item \textsuperscript{13} Ibid, at 17, citing Article 36 of the ICJ Statute.
\item \textsuperscript{14} Kendall, supra, note 2.
\item \textsuperscript{15} Coleman, supra note 3 at 315.
\item \textsuperscript{16} Coleman, supra note 3 at 316.
\item \textsuperscript{17} Ibid, at 291.
\end{itemize}
Toward Post-National Membership?

Tensions and Transformation in German and EU Citizenship

KIRAN BANERJEE*

I. INTRODUCTION .................................................................................................................................................. 4

II. GERMAN MEMBERSHIP REGIMES: A CRUCIAL CASE .................................................................................. 7

III. THEORIZING POST-NATIONALISM: CONCEPTS AND CLAIMS ..................................................................... 9

IV. THE DIS-AGGREGATION OF CITIZENSHIP: 
    GERMANY’S MIGRANT POPULATIONS .................................................................................................................... 11

V. GERMANY’S PERSISTING AMBIGUITIES OF BELONGING AND MEMBERSHIP ........................................... 28

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.


© 2014 Journal of International Law and International Relations
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. 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.” 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.

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. 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


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.

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.” Following recent scholarship, I suggest that the central aspects of the post-national position can be distinguished as two sets of separate claims. 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-

---

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.


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. 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.” 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 

\textit{jus sanguinis} in German nationality law. 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

\begin{enumerate}
  \item \textit{jus sanguinis} and \textit{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 \textit{jus sanguinis} as embodying a less progressive form of citizenship grounded in exclusionary conceptions of ethnonationalism and \textit{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, \textit{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.
\end{enumerate}
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. 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. 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.” 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

---

16 Hansen, “The Poverty of Postnationalism,” supra note 5 at 4-5.
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.” 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. 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. 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.” 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. 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. 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.” 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.
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.”

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.”

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. 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.”

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.

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

---

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.
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.”

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. 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.” 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.

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. 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.” 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

---

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.
Member states. 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. 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.”

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.” 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.”

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. 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. 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.”

---

38 Ibid.
39 Wind, supra note 31 at 242.
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

---

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.
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.  

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. 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. 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

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 Journal 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.\textsuperscript{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 movement 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 residence may be less \textit{practically}, as well as \textit{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.\textsuperscript{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.”\textsuperscript{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 \textit{Land} and national elections within Germany. Moreover, such trends have continued even in the wake of important shifts in Germany’s policies toward the

\textsuperscript{51}Conant, “Contested Boundaries”, \textit{supra} note 42.

\textsuperscript{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, \textit{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, \textit{supra} note 46.

\textsuperscript{53}Hansen, “The Poverty of Postnationalism,” \textit{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

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

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

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 not 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.

security climate, the right to diplomatic protection “can be of decisive importance for the individual migrant’s life chances.” 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. 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. 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. 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. 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. 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

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)
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 305-308.
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. 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. 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 persistently offered neither. 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. 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

---

79 Joppke, “Citizenship”, supra note 5 at 87.
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. 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. 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. 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

---

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.” 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. 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 reconfigured 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.

---

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.

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. 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.” 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

---


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.”

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. 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


I. INTRODUCTION ..................................................................................................................31

II. THEORETICAL ENGAGEMENTS AND CONCEPTS OF THE CRIME OF RAPE ..........33

III. INTERNATIONAL AND REGIONAL PERSPECTIVES ..................................................34

IV. NATIONAL PERSPECTIVES ..............................................................................................35

V. NEW AGENDAS AND DIRECTIONS ...................................................................................38

VI. DISCUSSION ....................................................................................................................40

VII. CONCLUSION ..................................................................................................................43

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

¹ 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.

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
hundreds of scholarly and journalistic works on rape and other forms of sexual violence committed either in peacetime or in conflict situations. 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. 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. This milestone judgement constituted a triumph for feminist legal scholars and activists. It was also a turning point for the international justice system, in general, and for the jurisprudence of the international criminal tribunals, in particular.

---

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].


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-I, 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. 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.

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 and the International Criminal Tribunal for the Former Yugoslavia (ICTY), 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, exploring its impact on subsequent judgements of the above tribunals.

8 Rethinking Rape Law, supra note 4, at 2.
9 Ibid, at 3.
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 and alienating her experiences from the legal process. 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.

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. By contrast,
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. 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. 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.

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. 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 1991 and
1995 in Bosnia-Herzegovina and Croatia, as a policy of ethnic cleansing, under the slogan Rodit
ces Cetnika (you will give birth to a Cetnik). 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
protection from rape, the authors argue that the “central element of rape should become non-consent, rather than force or threat of force.” 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. Focusing 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.

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.

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. 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. 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 valuable.

---

25 Rethinking Rape Law, supra note 4, at 169.
26 Ibid, at 196.
27 Ibid, at 194.
created with some categories of women being excluded. 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. Taking a similar approach, Rush underlines the plurality of Australian penal jurisdictions with their different relations to the common-law tradition. 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. He emphasizes that rape law reform would be pointless without first reconstructing the legal definition of the crime of rape.

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.

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.

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, 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. 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.

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.

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

---

37 Rethinking Rape Law, supra note 4, at paragraph 8.
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? 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.

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). 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. 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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{50}

\textsuperscript{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 Čečnik. Furthermore, Pauline Nyrirasuhuko 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 Freetown, a female rebel, 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.


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

\textsuperscript{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 WW1, 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, Laurence 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.

The Challenge of Prosecuting Conflict-Related Gender-Based Crimes under Libyan Transitional Justice
Hilmi M. Zawati

I. INTRODUCTION .................................................................45

II. GENDER-BASED CRIMES AND TRANSITIONAL JUSTICE IN LIBYA .............48
   1. GENDER-BASED CRIMES AS A WEAPON OF WAR .................................48
      a. RAPE ACCOUNTS ...............................................................48
      b. CHALLENGES FACING THE VICTIMS ...........................................50
   2. LIBYA’S PROJECT FOR TRANSITIONAL JUSTICE AND PEACE-BUILDING .....53

III. WARTIME RAPE UNDER LIBYAN LAWS ........................................57
   1. LAWS OF THE TRANSITIONAL PERIOD ...........................................58
   2. THE LIBYAN PENAL CODE .........................................................60
   3. LIBYA’S OBLIGATIONS UNDER DOMESTIC AND INTERNATIONAL LAW TO
      PROSECUTE ALLEGED CONFLICT-RELATED GENDER-BASED
      CRIMES ........................................................................60
      a. OBLIGATIONS UNDER DOMESTIC LAW ........................................60
      b. OBLIGATIONS UNDER GENERAL CONCEPTS AND PRINCIPLES OF
         INTERNATIONAL CRIMINAL LAW ..............................................62
      c. OBLIGATIONS UNDER INTERNATIONAL HUMANITARIAN LAW ..63
      d. OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW ..64

IV. THE DILEMMA OF PROSECUTING GENDER-BASED CRIMES UNDER LIBYAN
    TRANSITIONAL JUSTICE ..........................................................66
   1. LEGAL IMPUNITY AND LAWLESSNESS ..........................................66

†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.

© 2014 Journal of International Law and International Relations
Vol 10, pages 44-91. ISSN: 1712-2988.
2. **RULE OF LAW v MILITIA JUSTICE** .........................................................67
3. **LACK OF SECURITY AND PUBLIC ORDER** ...........................................69
4. **LACK OF DEMOCRATIC INSTITUTIONS** ................................................72

V. **TRANSITIONAL JUSTICE v RETRIBUTIVE JUSTICE: KEY MECHANISMS FOR**
   **GENDER-SENSITIVE TRANSITIONAL JUSTICE IN LIBYA** ..................73
   1. **LEGAL JUSTICE SYSTEM REFORM** ....................................................75
   2. **GENDER TRANSITIONAL JUSTICE AS RESTORATIVE JUSTICE:**
      **LIBYAN TRUTH AND RECONCILIATION COMMISSION** ......................76
   3. **ACCOUNTABILITY MECHANISMS: WHO HAS JURISDICTION OVER**
      **LIBYA’S GENDER-BASED EGREGIOUS CRIMES?** ..............................80

VI. **CONCLUSION** ............................................................................................90

“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

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


\(^8\) 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.” 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.

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.

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, whether at the victims’ homes or in detention centres for the purpose of extracting information. These crimes included systematic mass rape, gang rape, sexual torture, sexual enslavement, sexual terrorism, gender-based persecution, male rape, and forced nudity. Investigations revealed that

---

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 Qaddafi 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. 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, as well as condoms and Viagra in the vehicles and uniform pockets of Qadhafi loyalists who were captured on the battlefield. Accordingly, these attacks constituted crimes against humanity, as they were widespread and reportedly inflicted upon the civilian populations of the whole host of Qadhafi’s war crimes.


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 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.


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).


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

24 Elizabeth Marcus, supra note 20, at p. 3.
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 Gaddafi 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.
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.  

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. It prescribes for illicit intercourse punishment by flogging, or by flogging and imprisonment, 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, 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

---

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).
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


Libyan citizens. 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.


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). 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. 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.

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].
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.
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.\footnote{Law No. (35), \textit{supra} note 44, Art. 7(4).} By the same token, Law No. 26 prohibits a large segment of the Libyan population listed in Article 8(B) “General Regulations”\footnote{Law No. (26), \textit{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.”}—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.\footnote{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 boards of directors of public bodies, companies, and institutions; 9. Executive directors of public companies, bodies, and institutions; 10. Financial monitors; 11. University presidents, deans of faculties, heads of departments, and managers of institutes, schools, and all educational and research institutions; 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.”} 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
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

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].
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; 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.

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.

III. Wartime Rape under Libyan Laws

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

---


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 (‘ird in Arabic) as being one of the many other incidents that will be examined and investigated by the Commission. Attacks on ‘ird 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-muwāqqa 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).
66 Libyan Penal Code, 28 November 1953 [Libyan Penal Code].
two amendments, the most worthy of note being two substantive amendments in 1956 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.


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

---

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.
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’état 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 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.

Courts, in accordance with the provisions of the law.” Similarly, Articles 6 & 7 of the Constitutional Declaration of 3 August 2011 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.

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.

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.”

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.

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.”

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.”

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

---

81 The Constitutional Declaration, supra note 58.
82 Ibid, at Art. 6.
83 Ibid, at Art. 7.
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.”

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

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

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. 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. 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.”

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) took a further step by explicitly considering

93 Geneva IV, supra note 71.
94 Geneva Convention IV, supra note 71, at Art. 3.
95 Ibid, at Art. 27.
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.


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 oblige 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).
110 African Charter on Human and Peoples’ Rights, supra note 104, at Art. 5.
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).
leaders’ concerns of holding members of relative rebel forces accountable for human rights violations allegedly committed during and after the uprising.\textsuperscript{114}

In contrast to Article 12 of the Libyan Constitution,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 lineage, 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.\textsuperscript{120} Supremacy of the law in Libya implies improving security for all


\textsuperscript{115} The Constitution of Libya, supra note 74, at Art. 12.

\textsuperscript{116} Law No. (17), supra note 39, at Arts.1&2.

\textsuperscript{117} Ibid, at Ar7.7.

\textsuperscript{118} Libya’s Troubled Transition, supra note 22, at p.12.

\textsuperscript{119} Amend New Special Procedures Law, supra note 54, at p.1.

\textsuperscript{120} Mohamed Eljarh, “Peace, Security and the Rule of Law Reform in Libya,” Online: Middle East
citizens, 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. 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 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. 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. Rebel groups are affecting most aspects of Libyans’ lives—including security and justice—and forming several quasi-states and de facto authorities within the Libyan state. 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, or assassination in mysterious circumstances.


121 “Libya: Rocky Road Ahead for Libya’s Tawergha Minority,” IRIN, Tripoli, Libya, 13 December 2011.
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].
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. To cite but one example, Thuwurw ar-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, 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. 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.” 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 Gharayunes. 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.


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, peacebuilding 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
in the Libyans’ political and economic life and is strongly reflected in the formation of post-Qadhafi security forces and rebel brigades.  

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.  

The absence of a centralized authority resulted in the failure of the transitional government to protect foreign diplomatic corps in Benghazi, as well as Libyan high ranking officials, 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.  

The lack of the transitional government’s control over armed militias promotes a large scale of retaliation attacks,

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


140 Divided We Stand: Libya’s Enduring Conflicts, International Crisis Group, Middle East/North Africa Report N° 130 (14 September 2012).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{147} These committees formed the courts, carried out wide-ranging powers of arrest, and controlled the media and other aspects of Libyans’ lives.\textsuperscript{148} Furthermore, taking advantage of the


\textsuperscript{144} Haala Hweio, supra note 137, at 112.


\textsuperscript{148} Rebuilding the Ruins of Qaddafi, supra note 145.
fact that tribalism is a factor of daily life in Libya, Qadhafi implemented the strategy of “divide and rule” by pitting Libyan tribes one against another, 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. 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.

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, 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.

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

---

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 (Copen-hagen, Denmark: Danish Institute for International Studies, DIIS, 2013), at p. 27.
152 Haala Hweio, supra note 137, at p. 120.
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. 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. Accountability mechanisms may include Libya’s civil and criminal courts, the ICC, 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, 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.


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


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)\textsuperscript{159} and the Extraordinary Chambers of the Courts of Cambodia (ECCC)\textsuperscript{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.\textsuperscript{161} These resolutions demand that states ensure women’s involvement in all aspects of post-conflict reconciliation and peace-building,\textsuperscript{162} and emphasize accountability for crimes committed during any conflict against women, including wartime rape and other forms of sexual violence.\textsuperscript{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\textsuperscript{164} exercising universal jurisdiction,\textsuperscript{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.\textsuperscript{166}

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


\textsuperscript{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).


\textsuperscript{164} For example, see Canadian Crimes against Humanity and War Crimes Act, R.S.C., 2000, c.24.


\textsuperscript{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.\textsuperscript{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.\textsuperscript{168} This \textit{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.\textsuperscript{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.\textsuperscript{170}

2. \textit{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.\textsuperscript{171} This will require truth-seeking, and fact-finding and


\textsuperscript{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, \textit{Forging a Convention for Crimes against Humanity} (New York, N.Y.: Cambridge University Press, 2011) 474.


reconciliation commissions. The main object of this process, which can only complement but not substitute for criminal justice, 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 \textit{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. 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.

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. 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

---

172 The Legal Framework of Transitional Justice, supra note 155, at 34.
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 WWII177 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 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:
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


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—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.

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. 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.

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


Hilmi M. Zawati, supra note 89, at 273.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{187} On 27 June 2011, the Pre-Trial Chamber I accepted the Prosecutor’s application,\textsuperscript{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.\textsuperscript{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.\textsuperscript{190} Proceedings against Muammar Qadhafi were officially terminated on 22 November 2011,\textsuperscript{191} following his capture and execution by rebels from Misrata near his


\textsuperscript{185} UN Security Council’s Resolution 1970, supra note 157, at para. 4.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{188} Decision on the 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 (27 June 2011).


\textsuperscript{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).

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{194} On the occasion of that visit, Abdurrahim El-Keib, the Prime Minister 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.\textsuperscript{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,\textsuperscript{196} would provide the suspects with fair and independent trials.\textsuperscript{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.\textsuperscript{198}

---

\textsuperscript{192} Pre-Trial Chamber I, Case No. ICC-01/11-01-11-28 (22 November 2011).

\textsuperscript{193} Death of a Dictator, supra note 16, at 32.

\textsuperscript{194} Saif al-Islam Gaddafi could be Tried in Libya, Says ICC Prosecutor, Reuters, Tripoli, Libya, 22 November 2011.

\textsuperscript{195} 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.


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, 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. 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. 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. She stresses that the Libyan authorities are motivated not by the desire for justice but for revenge. 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.

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).
201 Ibid.
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. 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. The lack of security and public order indicate that a guilty verdict will automatically result in the death penalty.

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. 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. 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.


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


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. 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.

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 stand 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. 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, Declaration of Judge Christine van 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.

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

218 Inspiring Transitional Justice Reform, supra note 168; Libya and the ICC, supra note 184.
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.libya herald.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 Qadafi regime figures, including Saif al-Islam; Senussi; Al-Baghdadi Al-Mahmoudi (the former Prime Minister), Abu Zaid Omar Dorda (Qadafi’s External Security Agency head), and Abdulati El-Obaïdi (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. \(^{226}\)

---


\(^{224}\) 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 Tripoli227 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

---


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 (SCL), the Extraordinary Chambers of the Courts of Cambodia (ECCC), the War Crimes Chamber of the Court of Bosnia-Herzegovina (WCCBH), 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.\textsuperscript{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

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).
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).
\(^3\) 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).

© 2014 Journal of International Law and International Relations
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.\(^10\)

---


\(^6\) 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].


\(^9\) 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. Obviously, it will be more difficult to use this information to show who or what might be liable. 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. Rather, we provide various examples of how survey research on victims 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.

---


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.


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_df/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 Scheuren, 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. Their report notes “many women and girls relayed accounts of being attacked in public or in their homes.” 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. 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.

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.

\[17\] Ibid, at 6.
\[18\] Personal Communication, Beirut, Lebanon, December 30, 2013.
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. 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. This information was corroborated by the United Nations investigation, which also found that men leave villages in order to protect family members from rape.

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.

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. 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

---

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

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.


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. 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. 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. 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).
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 woman 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.


her assailants. 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.

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.

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

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. Ćelčez 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 Kunarač, Radomir Kovace and Zoran Vukovic, Judgment, ICTY Trial 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. 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.

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. 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. Interviews took place in private, with only the refugee, a translator, and the interviewer present. 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. 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.

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.

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

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. 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. 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. The social scientists argue that, given these findings, sexualized violence is part of the genocide.

In their analysis, the sociologists blended social science and advocacy, arguing that their findings support the claim that genocide is occurring in Darfur. The social scientists published a book and numerous articles from their research, but struggled to gain attention from policy makers and prosecutors. 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.
49 Hagan & Rymond-Richmond, supra note 44, at 891.
50 Ibid.
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. 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.

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. 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.”

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. 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. 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 Spierer and Seltzer, in Statistical Methods for Human Rights, supra note 15, at 200.

53 Wood, supra note 22.


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 Milošević 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.
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.
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 Mladić 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.
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.\textsuperscript{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.”\textsuperscript{70} Statistical analysis that draws on survey research may be most useful in establishing that there are “reasonable grounds”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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.
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


© 2014 Journal of International Law and International Relations
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

---

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, 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, it is important to clarify the contours of this type of sexual violence so that it can be clearly labeled as a crime. 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


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.\(^\text{14}\) The ICTY recorded in evidence various types of male sexual violence such as anal rape with objects,\(^\text{15}\) forced fellatio between detainees (including in front of other detainees),\(^\text{16}\) forced fellatio of a detainee on an accused,\(^\text{17}\) beatings on genitals,\(^\text{18}\) and placing a lit fuse around the genitals of a detainee.\(^\text{19}\) 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.\(^\text{20}\) 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


\(^{15}\) 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 Mančilo Krajišnik, IT-00-39-T, Trial Judgment (27 September 2006) at para 304 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I) [Krajišnik Trial Judgment].

\(^{17}\) Simić Trial Judgment, supra note 15 at para 728.

\(^{18}\) Ibid, at paras 695, 697, 698, 771; Prosecutor v Radoslav Brdanin, IT-99-36-T, Trial Judgment (1 September 2004) para 498 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III) [Brdanin 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. 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. His two daughters were also raped in his presence. These incidents were charged as rape. Rape of men was also prosecuted as such at the ICTY. In Češić, the accused was convicted of rape for forcing two Muslim brothers to perform fellatio in front of the other prisoners. 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. The Trial Chamber responded that this “act could constitute rape for which liability could have been found if pleaded in the appropriate manner”. 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”

---


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.


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.


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 Eriksson convincingly notes, it is important to understand rape as a sexual manifestation of aggression because this leads to greater acknowledgement of the modes used to subjugate an enemy group in armed conflict or other forms of atrocity.\(^{33}\)

Prosecutors within international criminal courts and tribunals sometimes fail to charge male sexual violence (other than rape) at all. For example, in Brdanin, 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.


\(^{34}\) Brdanin 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-PT, 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.\textsuperscript{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 \textit{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.\textsuperscript{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,\textsuperscript{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,\textsuperscript{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.\textsuperscript{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 \textit{Simić} case, a victim was beaten in the crotch and told “Muslims should not propagate”.\textsuperscript{43} Another was kicked in the genital area.\textsuperscript{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.\textsuperscript{45} Rather, it was categorized as cruel and inhumane treatment as an underlying act of persecution.\textsuperscript{46} In \textit{Mucić}, the ICTY Trial Chamber characterized the placing of a lit fuse around the genitals of a male detainee as “physical mistreatment”\textsuperscript{47} and as causing “serious pain and injury”\textsuperscript{48} qualifying as cruel treatment and wilfully causing great suffering and injury, but not as sexual violence.\textsuperscript{49} In a recent example, the ICTY Trial Chamber, in \textit{Stanišić and Ćupljanin}, considered sexual violence directed against Muslim men, including sexual humiliation; the stomping of genitals; forced nudity;
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).\textsuperscript{50} Some of these acts were referred to directly as “sexual violence”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{54} Similarly, in Todorović, 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.\textsuperscript{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?\textsuperscript{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”.\textsuperscript{57} The Tribunal concluded that both witnesses were “subjected to severe physical and mental suffering”, and therefore torture.\textsuperscript{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.\textsuperscript{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.\textsuperscript{60} To arrive at a consistent international criminal legal approach, deeper consideration of this form of victimization is needed.

\textsuperscript{50} Prosecutor v Mičo 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].

\textsuperscript{51} Ibid, at para 1560.

\textsuperscript{52} Ibid, at paras 1221, 1235, 1246, 1248-1250, 1560, 1685, 1687-1690.

\textsuperscript{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].


\textsuperscript{55} Todorović Sentencing Judgment, supra note 27 at para 38.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{58} Ibid, at 129, 267.

\textsuperscript{59} Stanišić and Župljanin Trial Judgment, supra note 50 at para 1214.

\textsuperscript{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. It also perpetuates the inaccurate stereotype that sexual violence is a crime that only affects women and girls and overlooks male sexual violence. 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. 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”. 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. 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. 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.  
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”.

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. For example, Sivakumaran outlines only two prevalence studies, from Bosnia-Herzegovina and Liberia, 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. 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.”

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. Thus, more study is certainly needed, 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.” That said, underreporting 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.

---

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.
Sivakumaran, “Lost in Translation”, supra note 20 at 263.
Cohen et al, supra note 63 at 7.
Ibid.
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.
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: to assert domination, to terrorize, to coerce, to humiliate and degrade, to prevent procreation by the victims (of their ethnicity or culture), and to disempower. Indeed, sexual violence directed against men and boys is similarly rooted in the hegemonic masculinity of war. In addition, male sexual violence may be committed for different reasons than female sexual violence; specifically, “to cast aspersions of homosexuality” and to emasculate.

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; enforced sterilization and sexual mutilation, such as castration or penile amputation; genital violence, such as beatings or electrocution; forced nudity, either as a prelude to rape or other forms of sexual violence or to sexually humiliate; forced masturbation; and sexual slavery. 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.”

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).
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.\textsuperscript{90}

The second lesson that emerges from available reports is that male and female sexual violence are clearly interlinked.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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”\textsuperscript{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: \textit{ibid}, at 424.


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

\textsuperscript{93}Bemba Confirmation of Charges, supra note 23 above, paras 171-172.

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

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

\textsuperscript{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

---

98 Solangon and Patel, supra note 66 at 424.
99 Ni 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.”

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. 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), have classified the acts as something other than sexual violence, or where they have recognized the violence as sexual, their attempts at classification as sexual violence have been rebuffed.

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.

However, the term ‘sexual’ was not defined, and this is also the case in the ICC’s Elements of Crimes document. 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, sexual mutilation, and forced abortion.

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”. 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”. While the Special Rapporteur’s definition does not directly define ‘sexual’, it is helpful in capturing the meaning(s) of ‘sexual’. 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 (like breasts, vaginas, testicles or penises); second, when the perpetrator uses sexual means to carry out the violence (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 (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). 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 Niyitageka 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.
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>.
129 Ibid, at paras 21-22.
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’ in relation to the forced circumcision of Luo men. 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’. 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.” 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 were targeted for various forms of sexual violence, pointing out that they not only suffered forced circumcision and penile amputation, they also suffered rape, forced nudity and/or sexual mutilation. 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. Unfortunately, this wider understanding of the context of male sexual violence may have been lost, as the Pre-Trial Chamber seemed to focus its

132 The Rome Statute contains this list of prohibited acts within the crimes against humanity provision: “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”: Rome Statute, supra note 21 at art 7(1)(g).
133 Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11, Decision on Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (8 March 2011) at para 27 (International Criminal Court, Pre-Trial Chamber II) [Kenyatta Summons to Appear].
134 Ibid.
135 Ibid.
136 There was direct evidence on the targeting of boys: On 21 January 2008, eight Luo men had their genitals chopped off and even young boys, some of them as young as 11 and 5 years old had their genitalia cut with blunt objects such as broken glass. Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-T-5-Red-ENG CT WT 22-09-2011 1/108 NB PT, Transcript (22 September 2011) at 89, lines 21-23 (International Criminal Court, Pre-Trial Chamber II) [September 2011 Transcript].
137 Ibid, at 87, lines 5-12.
138 Ibid, at 88, lines 9-12; 89, line 3; 91, lines 15-20.
139 Ibid, at 90, lines 7-9.
Confirmation of Charges analysis of rape on female victims,140 and its analysis of male victims on forced circumcision and penile amputation (but not sexual mutilation or forced nudity).141 Second, the prosecution tried to explain why these acts should be viewed as a form of sexual violence, rather than obscured under the heading of inhumane acts.142 The prosecution explained how the sexuality of the Luo men was targeted by attempting to target their virility: “these weren’t just attacks on men’s sexual organs as such but were intended as attacks on men’s identities as men within their society and were designed to destroy their masculinity”.143 In other words, the prosecution attempted to engage the third prong of the Special Rapporteur’s definition. That said, the prosecution’s explanation was not as fulsome as it could have been, jumping from sexual organs to gender without stopping in the middle to make the link to sexual norms. The acts were sexual in nature not only because a sexual organ was targeted, but also because of the sexualized cultural norms attached to circumcision or non-circumcision of the organ. Luo men and boys were targeted for forced circumcision and other acts for complex reasons, including to humiliate their sexual status within their own society.

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

---

140 This is not altogether clear, but the two detailed descriptions provided in the Confirmation of Charges decision relate to women: Prosecutor v Francis Kirimi Mathaura, 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.”


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. 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.

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’).

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.

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. Therefore, the Pre-Trial Chamber missed the opportunity to

---


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.\textsuperscript{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.\textsuperscript{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.

\section{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,\textsuperscript{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.\textsuperscript{155} Once it is prepared, she intends to circulate

\begin{footnotesize}
\begin{itemize}
\item 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).
\item 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/drdfiles/fed13daf-3916-4e94-9028-1234d9b0c9/0/ StatementgenderSydney140212.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.
\end{itemize}
\end{footnotesize}
the draft paper to the international community for comment. 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.

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. 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’

---


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. Thus, the ICC Prosecutor’s policy paper could help inform domestic investigators and prosecutors on best practices in this respect.

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), 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 or domestic courts—are possible. Sexual violence against men and boys must no longer be “overlooked, downplayed, or re-characterized” within international criminal law.

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.
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.